THE LAW REFORM COMMISSION

RECOGNITION OF FOREIGN DIVORCES AND LEGAL SEPARATIONS

CHAPTER 1 INTRODUCTION

In this Working Paper the Law Reform Commission examines the subject of the recognition of foreign divorces and legal separations, and makes proposals for reform. The subject is a complex one, raising difficult issues of social and legal policy. Because there has been little or no public discussion on the matter up to now, it was decided to deal with it in the first place in the form of a Working Paper rather than a final Report.

The Commission has sought to establish rules of recognition of foreign divorces which would give effect as far as possible to divorces obtained abroad, while at the same time having regard to the internal law of the State which precludes the grant of a dissolution of marriage. Accordingly, the Commission recommends that special rules of recognition should apply to divorces obtained by persons who are habitually resident in Ireland.

The Commission also makes proposals concerning the recognition of foreign legal separations, where different, and somewhat less difficult, policy considerations arise. Finally the Commission recommends the introduction of a broad discretionary judicial power designed to protect the maintenance and other property rights of spouses habitually resident in Ireland following foreign divorces or legal separations.

CHAPTER 2 THE PRESENT LAW

(a) Recognition of Foreign Divorces

In order to understand the present law relating to the recognition of foreign divorces, it is necessary at the outset to have regard to the relevant constitutional provisions. Article 41 of the Constitution provides as follows:

> "1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
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> 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
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> 2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
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> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
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> 3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded and to protect it against attack.
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> 2° No law shall be enacted providing for the grant of a dissolution of marriage.
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> 3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

Initially there was a degree of judicial uncertainty as to the precise meaning of some of these provisions, especially Article

41.3.3°. It was not clear whether the previous rules of private international law, which permitted recognition of a foreign divorce obtained in the country of the common domicile of the spouses, continued to apply with full force.

In Mayo-Perrott v Mayo-Perrott,[1] in 1957, the former Supreme Court held that an order for costs arising from proceedings for divorce in England between English domiciliaries could not be severed from the substantive order for divorce and could not be enforced in Ireland. While "narrowly the decision .... deals only with the recovery of costs",[2] the disagreement between members of the Court regarding the general question of recognition of foreign divorces has provoked considerable comment.[3]

In the view of Maguire, C.J.:

> "[f]ar from recognizing the validity of a divorce obtained outside the country, [Article 41.3.3°] seems to me expressly to deny to such a divorce any recognition for it prohibits the contracting of a valid marriage by a party who has obtained a divorce elsewhere. The sub-section says as plainly as it could be said that a valid marriage which is dissolved under the law of another State remains in the eyes of our law a subsisting valid marriage."[4]

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[1] [1958] I.R. 336.

[2] Jones, The Non-Recognition of Foreign Divorces in Ireland, 3 Ir. Jur. (n.s.) 299, at 310 (1968). See also Duncan, Desertion and Cruelty in Irish Matrimonial Law, 7 Ir. Jur. (n.s.) 213, at 233: "The Mayo-Perrott case was decided on the narrow issue of whether an English order for costs made pursuant to a decree of divorce would be enforced by the courts in this country."

[3] See generally North, 376-378, Shatter, 152-154, Kelly, 617-621, Jones, supra, fn. 2 especially at 308 et seq., Duncan, The Future for Divorce Recognition in Ireland, 2 D.U.L.Rev. 2, at 4 et seq. (1970), Webb, Case Comment, 8 Int. & Comp. L.Q. 744 (1959), Davitt, Some Aspects of the Constitution and the Law in Relation to Marriage, 57 Stud. 6, at 15-16 (1968), O'Reilly, Recognition of Foreign Divorce Decrees, 6 Ir. Jur. (n.s.) 293, (1971), Kerr, The Need for a Recognition of Divorces Act, (1976) 1 D.U.L.J. 11.

[4] [1958] I.R. 336, at 344.

However, Kingsmill Moore, J. was of the opposite view:

> "The general policy of the Article seems to me clear. The Constitution does not favour dissolution of marriage. No laws can be enacted to provide for a grant of dissolution of marriage in this country. No persons whose divorced status is not recognized by the law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law[5] that dissolutions of marriage by foreign Courts, where the parties are domiciled within the jurisdiction of those Courts, will be recognized as effective here. Nor does it in any way invalidate the remarriage of such persons."[6]

Ó Dálaigh, J. (with whom Lavery, J. concurred) said:

> "Article 41.3.3° appears to put in the power of the Oireachtas to define from time to time what marriages dissolved by foreign civil tribunals are to be regarded as valid subsisting marriages under our Law, id est, what foreign civil divorces shall not be recognised as valid."[7]

He considered that enforcement by the Irish courts of the costs of a decree of divorce would clearly offend against a moral principle which the Constitution asserted, in respect of the State's pledge to guard with special care the institution of marriage and to protect it against attack.

Maguire, J. stressed the fact that the order for the payment of costs could not be severed from the major part of the judgment. He considered that there were no facts in the case which called for the application of Article 41.3.3° and that it was not relevant. The argument founded on it was of no assistance in solving the problem raised by the case.

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[5] I.e., the private international law rules relating to divorce recognition which existed in Ireland before the promulgation of the Constitution and which, in the view of Kingsmill Moore, J., were unaffected by its promulgation.

[6] [1958] I.R. 336, at 350.

[7] Id.

The view of Kingsmill Moore, J. was generally preferred by commentators and was followed in an English decision.[8]

In 1971, in the High Court decision Bank of Ireland v Caffin,[9] Kenny, J. was faced squarely with the issue when called upon to decide, in a succession case, whether a divorce obtained in England by an English domiciliary should be recognised in Ireland, thus entitling the second wife rather than the first to the statutory benefits[10] in the deceased domiciliary's estate.

After a close analysis of Mayo-Perrott, Kenny, J. concluded that the view of Kingsmill Moore, J. was preferable to that of Maguire, C.J. and held that the second wife was entitled to the benefits. Kenny, J. considered, in the light of the historical background, that the purpose of Article 41.3.2°

> "was to deprive the National Parliament of its power to pass legislation dissolving a marriage or to give jurisdiction to the courts to grant a divorce. The recognition of orders of divorce made by the courts of another country where the husband and wife had their domicile has no logical connection with the power of the Oireachtas to dissolve a marriage; and the restrictions imposed on it by the Constitution do not involve a general principle that the Courts should not, or cannot, recognise orders for the dissolution of a marriage made by the courts of another country when the parties to the marriage were domiciled in that country at the time of the court proceedings. This gets support from the words 'under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution' for they give the National Parliament jurisdiction to decide by legislation that some decrees of dissolution made by the courts of other States are to be recognised by our courts ....

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[8] Breen v Breen, [1961] 3 All E.R. 225 (High Ct., Karminski, J.), critically analysed by Unger, 24 M.L.R. 784 (1961).

[9] [1971] I.R. 123.

[10] Under section 111(1) of the Succession Act, 1965 (No. 28 of 1965).

> The National Parliament has not legislated on the matter and so the law for the time being in force under Article 78 of the Constitution of 1922 and Article 50 of the Constitution of 1937 is that the courts recognise a dissolution of marriage granted by the courts of the country where the parties were domiciled."

Kenny, J. did not accept the view of Maguire, C.J. in Mayo-Perrott that Article 41.3.3° was designed to "double-bar the door closed in sub-s 2". Kenny, J. said:

> "The two sub-sections are dealing with different branches of the law and I do not agree with him that 'the sub-section says as plainly as it could be said that a valid marriage which is dissolved under the law of another State remains in the eyes of our law a subsisting valid marriage' - because the sub-section does not say this. If this was the meaning which it was intended to express, the sub-section would have read:- 'No person whose marriage has been dissolved under the civil law of any other State shall be capable of contracting a valid marriage within the jurisdiction of the Government and Parliament established by this Constitution during the lifetime of the other party to the marriage so dissolved.' What Maguire C.J. said ignores altogether the significance of the words 'under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution'."

Kenny, J. concluded by noting that his judgment was not a decision on "the difficult questions" (a) whether a divorce granted by the courts in Northern Ireland to a person domiciled there will be recognised by our law and (b) whether a divorce granted to a person who was resident, but not domiciled, in another State has any effect in this country.

In C. v C.[11] in 1973, the question arose as to recognition of a divorce obtained in England by a wife resident there, her husband being then domiciled in Ireland. Kenny, J. held that

> "The domicile of a wife is that of her husband until their marriage is validly terminated by a divorce a vinculo and

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[11] Unreported, High Ct., Kenny, J., 27 July 1973 (1973-144 Sp.).

> as the husband was at all times domiciled in the Republic of Ireland, the Courts in this country do not recognise the divorce in England as having the effect of dissolving the marriage. While a divorce given by the Courts of the country in which the husband and wife are domiciled will be recognised,[12] a divorce granted to a wife who was resident in England against a husband who is domiciled in the Republic of Ireland does not have the effect, so far as the Courts in Ireland are concerned, of dissolving the marriage. I know that the Courts in England now have jurisdiction under legislation to grant divorces to wives who have been resident for three years in England but this jurisdiction did not exist in 1921 and the doctrine of the comity of Courts does not require that the Courts in the Republic of Ireland should recognise this divorce. No legislation has been passed by the National Parliament giving recognition to divorces granted to a wife resident in England who is domiciled in the Republic of Ireland and, in my opinion, the husband and wife are, under our law, married."

In Gaffney v Gaffney,[13] in 1975, the Supreme Court was faced with the problem of a divorce obtained on a false allegation of jurisdiction. The Court unanimously held that a wife who, under duress imposed by her husband, had successfully petitioned for divorce against him in England (during which proceedings false averments were made that the husband had an English domicile) was not subsequently estopped from challenging the validity of the decree, on the basis that the English Court had no jurisdiction to hear the proceedings, since the husband's domicile was Irish rather than English. Accordingly she, rather than the man's second wife, was recognised as the man's "wife" for the purpose of the Succession Act, 1965.

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[12] Citing Re Caffin Deceased: Bank of Ireland v Caffin, [1971] I.R. 123.

[13] [1975] I.R. 133, analysed by Shatter, 155-159, Duncan, Foreign Divorces Obtained on the Basis of Residence, and the Doctrine of Estoppel, 9 Ir. Jur. (n.s.) 59 (1975), Webb, Shotgun Divorces, [1976] N.Z.L.J. 411, Clare Canton, Note, 94 L.Q.Rev. 15 (1978).

Walsh, J. referred to the circumstances in which a foreign decree would be recognized as valid by an Irish Court, when he stated:

> "In the course of his judgment in Mayo-Perrott v Mayo-Perrott[14] Kingsmill Moore, J. stated the Irish law to have been that the recognition of foreign divorces in Irish Courts depended upon establishing that the domicile of the parties was within the jurisdiction of the court pronouncing the decree. Recognition and application of this principle of private international law was part of the common law in Ireland and, like Mr Justice Kenny in this case, I am satisfied that it is still part of our law. It follows, therefore, that the Courts here do not recognise decrees of dissolution of marriage pronounced by foreign courts unless the parties were domiciled within the jurisdiction of the foreign court in question. In so far as the Courts in this country are concerned, the marriage remains as valid and as subsisting in this country as it would have been but for the intervention of the purported decree of dissolution."

An important aspect of the decision is the observation (obiter) by Walsh, J. that

> "[t]he law has been that during the subsistence of a marriage the wife's domicile remains the same as, and changes with, that of her husband. For the purpose of this case it is proper to adopt this view, although it is possible that some day it may be challenged on constitutional grounds in a case where the wife had never physically left her domicile of origin while her deserting husband may have established a domicile in another jurisdiction."

Henchy, J. was silent on the private international law aspects of divorce recognition and Griffin, J. stated that

> "[f]or the purposes of the present case, it is not necessary to decide whether and to what extent, if at all, the recognition of the decree of divorce a vinculo made by a foreign court is inconsistent with or repugnant to any of the Articles of the Constitution and I express no view on this question."[15]

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[14] [1958] I.R. 336.

[15] O'Higgins, C.J. concurred with Walsh, J.'s judgment. Parke, J. concurred "with the judgments that have been delivered".

In the more recent Supreme Court decision of T. v T.,[16] the question arose as to recognition of a divorce obtained in England by an Englishman who had lived for over two years in Ireland with his family but who had returned to England before the divorce. The case as presented raised only one issue - the domicile of the husband. Henchy, J. said:

> "The net point is .... At the time of the divorce was the husband's domicile Irish or British? If it was British, the divorce qualifies for recognition in our Courts; if it was Irish, the divorce was given without jurisdiction and cannot be acted on here: see the decision of this Court in Gaffney v Gaffney."[17]

In the High Court case of L.B. v L.B.,[18] a divorced woman took proceedings against her former husband for maintenance and other relief. In determining whether she was entitled to relief Barrington, J. had to consider whether recognition should be afforded to a divorce obtained in France on the petition of the husband and cross-petition of the wife, both parties then being domiciled in France. Ordinarily, such a divorce would be recognised, but the facts of the case were unusual in that the evidence indicated that the divorce had been arranged by the parties by having their lawyers manufacture evidence which would justify the granting of a decree. Barrington, J. was satisfied that there had been such a measure of collusion between the parties in the proceedings before the French Court as to amount to a fraud upon the Court; had the French Court known of the collusion, Barrington, J. considered, it would have rejected the petition and the cross-petition. However, it appeared that, under French law, once

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[16] [1983] I.R. 29, analysed by Buckley & O'Mahony, Recognition of Foreign Divorces - A Further Gloss, 76 Inc. L. Soc. Gazette 211 (1982).

[17] [1983] I.R. 29, at 33.

[18] Unreported, 31 July 1980 (1979-449Sp.), analysed by Shatter, 160-161, Duncan, Collusive Foreign Divorces - How to Have Your Cake and Eat It, [1981] Dublin U.L.J. 29 (1983).

the decree of divorce had been made final and absolute, it could not be upset even though it had been obtained by collusion.

Barrington, J. noted that the case was not one of fraud as to jurisdiction, where parties pretended to be domiciled within the jurisdiction of a particular foreign Court:

> "Clearly a decree made by a foreign Tribunal under such circumstances is not entitled to recognition because one cannot confer jurisdiction on a Tribunal by falsely pretending that it has jurisdiction."[19]

Barrington, J. noted that in the case before him there could be no doubt as to the jurisdiction of the French Court to deal with the matter. The situation was that the Irish Court had become aware of certain matters of which the French Court was ignorant, in circumstances where, as a result of fraud, the French Court had been led unwittingly to a conclusion which the parties and their lawyers had prearranged.

After a review of several English decisions, Barrington, J. concluded:[20]

> "The collusion .... between the parties was such that the entire proceedings became a charade and the French Court was unwittingly led to a conclusion which had been pre-determined by the parties. There was a substantial defeat of justice for which the parties, and not the Court, bear the responsibility .... This Court is fixed with knowledge of matters of which the French Court had no knowledge. It is accordingly no disrespect to the French Court if it refuses to recognise a divorce obtained in such circumstances. Indeed, once this Court has been fixed with knowledge of what happened in the French divorce proceedings it is hard to see how it could recognise the validity of the divorce and at the same time observe the

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[19] P. 25 of the judgment, citing Dicey's Conflict of Laws, 306 (7th ed., 1958).

[20] At p. 34 of his judgment.

> constitutional duty of the State to uphold the institution of marriage."

The plea of estoppel had not been raised in the Irish proceedings by the husband, but Barrington, J. had raised the issue in the course of the hearing. Counsel for the wife had submitted, on the basis of Gaffney v Gaffney,[21] that such a plea would not lie. Barrington, J. considered[22] that

> "[t]he situation which has arisen in this case is not the same as that in Gaffney v Gaffney but, nevertheless, the case raises issues of public policy and the status of individuals so that it would appear that a plea of estoppel would not lie."

Even if such a plea did lie, Barrington, J. did not think that it could be successful "in view of the conclusion which I have reached as to the dominant role which the husband played in what happened".

One commentator has observed that

> "a considerable degree of uncertainty has been introduced into this area of the law by the denial of recognition to the French divorce decree on the ground that recognition of the divorce would have constituted 'a substantial defeat of justice', a concept that was at no stage fully defined in the judgment delivered by the court."[23]

Ancillary Orders

Another aspect of the subject which must be considered is the law relating to recognition and enforcement of foreign orders ancillary to divorce, notably orders for alimony or maintenance

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[21] [1975] I.R. 133.

[22] P. 35 of his judgment.

[23] Shatter, 161.

pending or consequent on the granting of a divorce decree.

In Mayo-Perrott v Mayo-Perrott,[24] as has been mentioned, the Supreme Court held that an order for costs was not severable from the substantive order for divorce and could not be enforced here. In the High Court case of N.M. v E.F.M.,[25], Hamilton, J. had to consider whether an English maintenance order consequent on divorce,[26] otherwise enforceable here under the provisions of the Maintenance Orders Act 1974, should not be enforced by reason of section 9 which provides that a maintenance order made in a reciprocating jurisdiction should not be recognised or enforceable if (inter alia) recognition or enforcement would be contrary to public policy.

Hamilton, J. disposed of the question as follows:

> "What is sought to be enforced here is a maintenance order admittedly made in divorce proceedings and consequent to a grant of dissolution of marriage and the question for determination by me is whether the enforcement of such a maintenance order would be contrary to public policy.
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> I accept unreservedly that if the recognition or enforcement of a maintenance order would have the effect of giving active assistance to facilitate in any way the effecting of a dissolution of marriage or to give assistance to the process of divorce that such recognition or enforcement would be contrary to public policy.
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> In the case of Mayo-Perrott v Mayo-Perrott, the Supreme Court decided that the terms of the judgment which was sought to be enforced were not severable.
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> In this particular case the maintenance order sought to be enforced was made on the 23rd day of July, 1973 and though made in and consequent to proceedings for a decree of dissolution of marriage, such decree had been granted and made absolute on the 7th day of August, 1967.
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> In enforcing and recognising this maintenance order made

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[24] [1958] I.R. 336.

[25] Unreported, July 1978 (1977 No. 87EMO).

[26] Made six years after the divorce decree had become absolute.

> on the 23rd day of July, 1973 it can not be said that such enforcement or recognition is giving active or any assistance to facilitate in any way the effecting of dissolution of marriage or is giving assistance to the process of divorce. It is merely providing for the maintenance of spouses and as such can not be regarded as contrary to public policy."

Accordingly Hamilton, J. held that the maintenance order was enforceable here.

Reference should be made at this point to the doctrine of divisible divorce whereby a spouse's right to maintenance is not affected by the fact that the other spouse has obtained by default a decree of divorce or legal separation in a State in which the defaulting spouse did not have his or her habitual residence.[27]

(b) Recognition of Foreign Legal Separations

Under Irish law, proceedings for legal separation (known as divorce a mensa et thoro) may be taken by one spouse against the other in certain specified cases where the other spouse has behaved in such a manner as to entitle the petitioning spouse to an order from the Court relieving him or her from the obligation of living with the other spouse. On making the decree the Court may award alimony to the petitioning spouse.

The three grounds for divorce a mensa et thoro are adultery, cruelty and "unnatural practices". Four absolute defences may be raised: recrimination, condonation, connivance and collusion. It also appears that conduct conducing to adultery constitutes a discretionary bar.

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[27] See the Commission's Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983), para. 29.

Proceedings for divorce a mensa et thoro have become practically redundant in recent years. This is probably because legislation has established wide-ranging judicial proceedings for maintenance and for the custody of children, for protection of the family home and for barring orders. The Law Reform Commission has recently made recommendations for reform of the law on the subject.[28]

So far as foreign decrees for legal separation are concerned, the general trend of the law internationally has been to regard such decrees as an adjunct to divorce or even to abolish proceedings for legal separation entirely. Nevertheless most countries still retain proceedings for legal separation and private international law aspects of the subject cannot be disregarded.

In England, before the position was regulated by statute[29] in 1971, there was a surprising lack of authorities. In the only reported decision, Tursi v Tursi,[30] it was held that a decree for judicial separation[31] granted in Italy, the country of the spouses' domicile, should be recognised in England. Sachs, J. noted that

> "[a]s regards principle, the main argument pressed against recognition of decrees of judicial separation outside the country of domicile in which they were granted went thus. So far the courts of the country have only accorded recognition to a foreign domiciliary decree when it affected the status of the parties: decrees of judicial separation do not affect the status: accordingly, no such decrees should be here recognised. Whilst appreciating, of course, the practical distinction between those decrees

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28 Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983).

29 Recognition of Divorces and Legal Separations Act 1971, as amended by the Domicile and Matrimonial Proceedings Act 1973, s. 2.

30 [1958] P. 54.

31 A "separationi legale", on account of the husband's desertion and cruelty.

> that cut the bond of marriage and those that leave it subsisting, the above proposition, as stated in the way that appears to attract those who put it forward, savours to my mind somewhat of a blend of dogma and absence of precedent. It is the fact that hitherto the courts here have not accorded recognition to domiciliary decrees for judicial separation: but until now they have not been asked to do so - and, indeed, it is not surprising that before the Act of 1949[32] the occasion for such a request did not arise. So the argument against recognition, as thus stated, seems rather to beg the question of principle."[33]

Sachs, J. continued:

> "The argument on principle for extra-territorial recognition springs from the fact that by the almost universal view of all civilized countries a special quality attaches to the decrees of domiciliary High Courts touching any contract of marriage between persons domiciled in the country of those courts, when that contract has validly resulted in married status: and then it runs thus. It is that special quality which is 'recognized' in the sense that the domiciliary decrees are treated as operative in other countries. The most drastic way in which a decree of a domiciliary court can affect a marriage is by dissolving it: and if recognition extends to the most drastic decree a fortiori it must cover a decree of lesser effect."[34]

Sachs, J. approved of the approach adopted in the Australian case of Ainslie v Ainslie,[35] to the same effect as the passage quoted above.

On the possibility of residence as a basis of recognition, Dicey and Morris stated that it "is an open question",[36] submitting that, if both parties, or the respondent are resident

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[32] Law Reform (Miscellaneous Provisions) Act, 1949.

[33] Supra, fn. 30, at 62.

[34] Id., at 62-63.

[35] 39 C.L.R. 381 (1957). For criticism of extending the Ainslie Rationale beyond inter-provincial recognition, see Grodecki, Note: Effect of a Foreign Decree of Judicial Separation, 20 Modern L. Rev., 636, at 637, fn. 4 (1957).

[36] Dicey and Morris, 337 (8th ed., 1967).

where the decree is granted it should be recognised, but that if only the petitioner is so resident, it should not.[37]

There are no decisions on this question in Ireland. Dr North has suggested[38] that the English rules (prior to 1971) should be followed in this country.

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[37] Cf. Hughes v Hughes, [1958] C.L.Y. 502 (judicial separation obtained in Denmark by petitioner resident there but not domiciled there (on account of operation of domicile of dependency, it would appear) not recognised in England, the respondent's domicile and residence remaining English; reliance apparently on English domestic jurisdictional grounds for judicial separation as determinant of recognition of foreign divorces).

[38] North, 386.

CHAPTER 3 PROPOSALS FOR REFORM

(1) Recognition of Foreign Divorces

We must now consider how the law relating to the recognition of foreign divorces may best be reformed. In order to come to any conclusion on this question, it is necessary to be clear on what policy goals our law should attempt to serve.

The present position is indeed a complex one. Ireland is one of the very few states which prohibit divorce.[1] Over the past fifteen years or so, the international legal position relating to divorce has become transformed. Before then, considerably more states prohibited divorce;[2] others permitted divorce on narrowly expressed grounds, generally requiring proof of matrimonial wrongdoing on the part of the respondent spouse. Since then, there has been a strong progression internationally towards "no fault" divorce, based on "breakdown of marriage".[3] Thus divorce decrees by the mutual consent of the spouses or at

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[1] Cf. Latey, chs 15-18, Binchy, Divorce in Ireland: Legal and Social Perspectives, 2 J. of Div. 99 (1978).

[2] In Italy, divorce has been obtainable since 1970: cf. Librando, Italian Law, ch. 7 of A. Chloros ed., The Reform of Family Law in Europe, at 166-177 (1978), Sgritta & Tufari, Italy, ch. 12 of R. Chester ed., Divorce in Europe (1977), Pugsley, Referendum - The Italian Experience, 125 New L.J. 557 (1976). Divorce legislation was enacted in Spain in 1981: cf. Glos, The Spanish Divorce Law of 1981, 32 I.C.L.Q. 667 (1983).

[3] Cf. Chloros, Principle, Reason and Policy in the Development of European Law, 17 I.C.L.Q., at 856 (1968). In England, divorce based on irretrievable breakdown of marriage was introduced by the Divorce Reform Act 1969, analysed by Barton, 86 L.Q. Rev. 348 (1970), Levin, 33 M.L.R. 632 (1970). The same change was made in Scotland in 1976: see E. Clive, The Divorce (Scotland) Act 1976 (1976). In Northern Ireland the move to divorce based on breakdown of marriage occurred in 1978, with the coming into effect of the Matrimonial Causes (Northern Ireland) Order 1978. Legislation in the Netherlands in 1971, Sweden in 1973, France in 1975, the Federal Republic of Germany in 1976 and Portugal in 1977 greatly

the demand of one of the spouses against the wishes of the other have become the norm. Breakdown of marriage is increasingly perceived as a non-justiciable concept,[4] and the overwhelming majority of divorces are not contested. The judicial function in awarding a divorce decree has tended to become a formalised ritual,[5] and there has been a trend towards purely administrative divorce, where papers are filled up without any Court hearing requiring even the attendance of the spouses.

The question of recognition of foreign divorces has also, in consequence, become transformed. Formerly, there was a general consensus internationally that divorce represented a potential threat to the spouse who was not the active party in seeking a divorce. Thus there was a general reluctance to recognise a foreign divorce where the respondent was not domiciled or resident in, or as the case might be, a national of, the foreign state. Since divorce was regarded as being of major juridical significance, recognition of foreign divorces was treated as a serious matter requiring detailed and cautiously framed rules.

Today the international position regarding recognition of

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fn. 3 contd.

expanded the scope of divorce based on breakdown of marriage. The same trend is apparent in Australia, New Zealand and Canada. In the United States, after a transformation of divorce grounds over the past fifteen years, only one state (South Dakota) preserves exclusively fault-based grounds for divorce: in all others, divorce based on breakdown of marriage is permitted: cf. Freed & Foster, Family Law in the Fifty States: An Overview, 17 Family L.Q. 365, at 373-376 (1984).

4 Cf. M. Murch, Justice and Welfare in Divorce, 215 (1980), Freeman, Divorce without Legal Aid, 6 Family L. 255, at 259 (1976), Berkovits, Towards a Reappraisal of Family Law Ideology, 10 Family L. 164, at 172 (1980).

5 Cf. Bromley, 240, English Law Commission Working Paper No. 76, Time Restrictions on Presentation of Divorce and Nullity Petitions, para. 26 (1980), A Better Way Out: Suggestions for the Reform of the Law of Divorce and Other Forms of Matrimonial Relief, 14-15 (A Discussion Paper Prepared by the Family Law Sub-Committee of the English Law Society, January 1979).

foreign divorces has changed radically. Access to easy divorce is perceived legally as a personal entitlement; divorce procedures having lost their judicial solemnity the divorce process is treated more casually by the law. The international thrust in private international law is towards supporting the principle of favor divortii[6] (instead of the formerly prevailing principle of favor matrimonii). Thus the function of recognition of foreign divorces has become one of facilitating individual choice - echoing the norm that is central to the philosophy of modern divorce law.[7] Naturally, the result has been liberal rules of recognition of foreign divorces internationally: for, if most countries regard divorce as a matter of individual entitlement on unilateral demand,[8] whether

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[6] Cf. Siehr, Domestic Relations in Europe: European Equivalents to American Evolutions, 30 Am. J. of Comp. L. 37, at 50 (1982).

[7] Cf. Eekelaar and Katz:

> "[T]he last decade has seen an ever increasing focus on the needs and desires of individuals in contrast to the traditional emphasis on family and other personal relationships." Marriage and Cohabitation in Contemporary Societies, Preface (1980).

See also Goldstein and Gitter:

> "The court should not be empowered to deny divorce because one spouse or a child of the marriage objects. Granting divorce, even over objection, best serves the state's goal of maximizing individual freedom." On Abolition of Grounds for Divorce: A Model Statute and Commentary, 3 Family L.Q. 75, at 86 (1969).

See further Gray, Reallocation of Property on Divorce, 11-13 (1977), Freeman & Lyon, Cohabitation Without Marriage, 207 (1983), Weitzman & Dixon, The Transformation of Marriage Through No-Fault Divorce: The Case of the United States, in Eekelaar & Katz Eds., Marriage and Cohabitation in Contemporary Societies, at 143-153 (1980), Garfield, The Transitory Divorce Action: Jurisdiction in the No-Fault Era, 58 Texas L. Rev. 501, (1980), Alexander & Cohen, Custom, Coupling, and the Family in a Changing Culture, 51 Amer. J. Orthopsychiatry 306 (1981), Foster, Divorce: The Public Concern and the Private Interest, 7 W. Ontario L. Rev. 18, at 28 (1968).

[8] Cf. Raphael, Frank & Wilder, Divorce in America: The Erosion of Fault, 81 Dick. L. Rev. 719, at 729 (1977), Van Zile, Reaching Equal Protection Under Law: Alternative Forms of Family and the Changing Face of Monogamous Marriage, 1 Detroit College of L. Rev. 95, at 109 (1975), Clark, The New Marriage, 12 Willamette L.J. 441, at 450-451 (1976).

or not subject to some limitations, principally relating to required periods of separation, then it is only to be expected that their private international law will seek to create no substantial restrictions upon a party seeking divorce recognition.

In Ireland, a different legal approach continues to operate. Article 41 of our Constitution prohibits the enactment of legislation for the dissolution of marriage. There are no legislative or judicial equivalents in this State of the endorsement of easy divorce which has taken place in many other jurisdictions over the past fifteen years or so.

It seems to us, therefore, that we should approach the problem in three stages. First, we should consider what rules of recognition of foreign divorces would be desirable for people who have close connections with Ireland.[9] Secondly, we should consider what rules of recognition of foreign divorces should apply to other persons. Finally we should consider how best to reconcile these different policies in our rules for recognition of foreign divorces.

(a) Rules of Recognition of Foreign Divorces for People who have Close Connections with Ireland

A number of policy considerations should be identified. First: our present internal law is opposed to divorce. Article 41.3.2° of the Constitution specifies that no law is to be enacted providing for the dissolution of marriage. Where our internal law is so unambiguously opposed to divorce, it is plain that very liberal rules of recognition of foreign divorce

[9] We use this term loosely at present. We will be examining below the question of what the nature of the close connection should be.

for people who have close connections with Ireland would be difficult to justify. To take an extreme case, if our law recognised a divorce obtained abroad by an Irish person on the basis of one day's residence, it would be clear that this rule of recognition would subvert the internal law's prohibition on divorce. A spouse who wished to defeat the policy of the internal law would simply have to go on a day trip abroad. In the context of our internal law, therefore, very liberal recognition rules would create major difficulties.

Where the recognition rules are not quite so liberal but still relatively broadly defined, some damage to the internal law's policy may still be involved inasmuch as evasion of that policy by persons habitually resident here would be relatively easy. Moreover, other difficulties may be created. If, for example, a divorce based on three months' residence abroad were to be recognised here, it could be argued that, as well as subverting the policy of the internal law, this rule of recognition would create injustice since it would make it easier for the financially stronger and more mobile members of society to obtain foreign divorces that would be recognised here in contrast to the less well-off, less mobile members of society. Moreover, since men are more prone to desert the home than women, and as a group have greater financial resources than women, such a recognition rule could operate harshly and unfairly against women in some cases.

It seems, therefore, that whatever recognition rules we adopt should not subvert the policy of existing internal law; nor should they operate unfairly and unjustly so far as they affect different individuals in our society.

Let us examine some possible bases for recognition of foreign divorces, in the light of these policy considerations.

(i) Domicile

A recognition rule based on the common[10] domicile of the spouses has much to recommend it so far as the policy considerations mentioned above are concerned. Since domicile requires an intention to reside permanently or indefinitely in the country in question, it is not possible for a spouse to be domiciled in a country for a specific purpose on a short-term basis. Thus an Irish spouse living here could not realistically expect to obtain a divorce that would be recognised here by going abroad for that purpose for a limited period.

There are, however, some limitations to domicile as an appropriate basis of recognition of foreign divorces. The rules relating to domicile are complicated, mechanistic, and very artificial in some cases. (This matter is more fully discussed in the Commission's Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983).) For example, as a result of the application of rules relating to the revival of domicile of origin, a person may be domiciled in a country in which he or she has never been and never intends to visit. To recognise only a divorce obtained by that person in that country would quite clearly be arbitrary and inappropriate. We would not wish to overstate the force of this criticism, however. In most cases, such inappropriate attributions of domicile would not arise.

Another weakness of domicile as the basis of recognition of foreign divorces should also be noted. In some cases a person may be domiciled in one country but the centre of all his or

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[10] Subject to the doctrine of domicile of dependency of married women, which we have already repudiated in our Report on Domicile (LRC 7-1983). Our analysis in the present Report proceeds on the basis that this doctrine should play no part in our law; our comments on other issues should therefore be understood in this light.

her interests in the immediate and medium term may be in another country. For example, an Irishman, who emigrated to England twenty years previously, may well be domiciled in Ireland in that he intends without question to return to Ireland after he has retired. Yet his everyday reality has been and will continue for some considerable time to be English. To refuse to recognise a divorce obtained in England could well be criticised on the basis that it fails to take account of the fact that, in the here and now, England rather than Ireland is the country with which the man has the more important connection.

(ii) Habitual Residence

In the Report already referred to (LRC 7-1983) the Commission recommended that domicile should be replaced by habitual residence as a connecting factor in the conflict of laws. Overall, habitual residence is a more satisfactory connecting factor than domicile. As a basis for recognition of foreign divorces its principal strength may be gleaned from the example just given of the Irishman long resident in England but domiciled in Ireland. In this case the man's well-established habitual residence in England would appear to offer a more practical and appropriate basis for recognition, whatever his long-term intentions may be. These long-term intentions, it may be argued, should not be allowed to prevail over the well-established facts of habitual residence. Intentions play some part in determining a person's habitual residence but this is of far less significance than for domicile.

Some potential weaknesses of habitual residence as a basis for recognition of foreign divorces should, however, be noted. Habitual residence might allow a spouse to obtain a divorce abroad which would be recognised here by going abroad with the

sole intention of obtaining a divorce and being abroad for as short a period as possible consistent with the acquisition of an habitual residence in the foreign country sufficient to found divorce jurisdiction on the part of its courts. This would mean that a spouse would be able to evade the policy of the internal law by acquiring foreign residence for what might be a relatively short time, for the purposes of obtaining a divorce which would be recognised here. It would be necessary to ensure that such an evasive acquisition of a temporary residence abroad for the primary purpose of obtaining a divorce would not be regarded by Irish courts as a true habitual residence for divorce recognition purposes, even if it were regarded as such for jurisdictional purposes by the foreign court which granted the divorce. More will be said on this point below.

(iii) Nationality

Nationality has been a most important connecting factor in the rules of civil law systems for the recognition of foreign divorces. It has had far less influence in common law systems. An advantage of nationality in this context is that it enables the legislature of a country to lay down specific rules for its own citizens (wherever they are residing) which would not apply to non-citizens who happen to be residing in the country in question. As against this, however, it can be argued that such a distinction would not always be a sensible one. Whatever claim a country may have to make rules for its citizens who are resident in that country, that claim may be considered to lose some of its force where the citizens are no longer residing at home. Thus, for example, it would seem quite inappropriate for Irish law to use nationality as a basis for refusing to recognise a divorce obtained in New York by an Irishman resident there for the past thirty years. Conversely (but less clearly), it might be considered inadvisable for our law not to apply the same

rules of recognition as it would to a divorce by Irish nationals where, for example, a Frenchman who has been living in Co. Kerry for the past thirty years obtains a divorce after a three-weeks residence in a foreign country. If a divorce obtained by an Irish spouse would not be recognised, it is far from self-evident that a different rule should apply to the Frenchman living here. Our present law contains no distinction on the basis of nationality between persons who are domiciled here and has not been criticised for its failure to do so.

Recommendations

Habitual residence is the most appropriate connecting factor for use in determining questions of a person's status. It is, therefore, the most suitable connecting factor for identifying those persons who are so closely connected with this country that the application of special divorce recognition rules to them would be warranted to prevent undermining of the policy of our own law, as represented by the constitutional prohibition on divorce. The special recognition rules would apply to persons who are habitually resident in the State. It should not be possible for such persons to evade the policy of Irish law by establishing a residence of short duration abroad for the primary purpose of acquiring a foreign divorce which would be recognised here. Such a temporary residence abroad might be regarded by the courts of the foreign country as a sufficient "habitual" residence to found divorce jurisdiction on their part. However, where the residence abroad is only a temporary residence acquired with evasive intent in order to obtain a foreign divorce for which recognition would be sought here, it should not be treated by our courts as a genuine habitual residence for divorce recognition purposes. Accordingly, the legislation should specify that a person should be deemed to be habitually resident in the State who, having been habitually

resident here, has temporarily ceased to reside here and has acquired a temporary residence abroad for the primary purpose of acquiring a foreign divorce.

Thus, people who left the country with the primary intention of obtaining a temporary residence in another jurisdiction so as to acquire a divorce there but did not become habitually resident there would still be considered as habitually resident in Ireland for the purposes of divorce recognition. It seems reasonable and prudent that the distinctive recognition rules to be proposed for people habitually resident here should extend to this category of persons who have temporarily interrupted their habitual residence here. Of course, where a person has in the eyes of the Irish court genuinely established an habitual residence abroad, say in England, there would be no question of his being deemed to be still habitually resident here for divorce recognition purposes.

We did consider a further refinement to our above proposals whereby the special divorce recognition rules would apply only to persons habitually resident here who were also Irish citizens. This would mean that foreign nationals habitually resident here would be exempt from these special rules and would be subject to the same divorce recognition rules as persons habitually resident abroad. This alternative had considerable attractions inasmuch as it would enable foreign nationals who came to live in this country to return temporarily to their country of origin and obtain a divorce which would be recognised here. However, it would have the undesirable consequence that there would be discrimination on the basis of nationality between persons habitually resident here, so that a foreign couple would be able to obtain a divorce abroad which would be recognised here, whereas their Irish next-door neighbours would not. We considered that such a distinction should be avoided if at all possible and nationality should in general be left out of

account as a connecting factor for divorce recognition purposes (though, as will be seen later, its introduction to a limited extent in a specific context will be recommended).

We must now consider what rules of recognition should apply to persons who are habitually resident in Ireland. Where both spouses are habitually resident (in the sense already discussed above) in Ireland at the date of the institution of the proceedings a foreign divorce obtained by either of them should not be recognised at all in this country. The reasons of policy underlying such a rule have already been set out and do not require further elaboration. It would be permissible to have such a rule and still adhere to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations (see Appendix A) because Article 19(2) of that Convention allows a Contracting State to refuse to recognise a divorce when, at the time it was obtained, both parties habitually resided in States which did not provide for divorce.

The position is more complex where one of the spouses is habitually resident here and the other is not. In what circumstances, if any, should a divorce obtained in the foreign country where one of them is habitually resident be recognised here? If both parties are foreign nationals the habitual residence of one of them here would not appear to be a sufficiently overwhelming connection with Ireland to warrant refusal of recognition of a divorce obtained in the country where the other spouse is habitually resident.[11] In such a case the divorce should be recognised. If one of the spouses is habitually resident here and one of them is an Irish citizen there are stronger reasons of public policy for non-recognition,

[11] Where both spouses last habitually resided together in Ireland the connection is, of course, stronger, but, on balance, it would seem preferable not to refuse recognition of a decree granted in the country of habitual residence of one of the spouses when they are both non-nationals and are not both habitually resident here.

in some cases at least. Even in such circumstances, however, there are competing policy considerations. On the one hand it would be desirable to provide as little incentive as possible to a deserting spouse here who goes to live abroad and obtains a divorce. Recognition of a divorce in such circumstances would enable that spouse to eliminate or minimise his or her responsibilities to the other spouse, and possibly children, in Ireland and would drastically affect their rights. It might also be argued that adequate underpinning of the constitutional prohibition on divorce would require that there should be no recognition if one spouse is habitually resident here and one spouse is Irish. One alternative course of action, therefore, would be to refuse recognition in all such cases. On the other hand, if one spouse goes to live abroad and obtains a divorce and the spouse still in Ireland submits to the jurisdiction of the foreign court, refusal of recognition is not clearcut. The couple are no longer both habitually resident in Ireland and the spouse who is still habitually resident here, whose interests would be at stake in the matter of recognition of the foreign divorce, has submitted to the jurisdiction of the Court which granted it. Non-recognition to protect the spouse in Ireland in these circumstances might be regarded as unduly paternalistic. Accordingly, a second alternative would be that where only one spouse is habitually resident in Ireland, and one spouse is Irish a divorce obtained in the country where the other spouse is habitually resident should be recognised here if the spouse who is habitually resident here submitted to the jurisdiction of the foreign Court.

It could be argued that consent of the spouse habitually resident here should be required only if he or she is an Irish citizen but not where the absent spouse is. However, this would involve discrimination against foreign nationals who were married to Irish citizens inasmuch as an Irish citizen habitually resident here would have the protection of non-

recognition of a divorce obtained without consent by a spouse who was a foreign national habitually resident abroad, whereas a foreign national habitually resident here would not have the same protection where the spouse habitually resident abroad was an Irish citizen.

The Law Reform Commission's provisional preference is for the second alternative above - i.e. that where one of the spouses is an Irish citizen and only one spouse is habitually resident in Ireland, a divorce obtained in the country where the other spouse is habitually resident should be recognised here only if the spouse who is habitually resident here submitted to the jurisdiction of the foreign court. Furthermore, this requirement of submission should apply only in cases where the spouses last habitually resided together in Ireland. In other words it should only apply where one of the spouses has ceased to live in Ireland after a period when they have habitually resided together here, not where one of them has come to habitually reside in Ireland after they have been habitually resident together elsewhere. An Irish person who deserts the other spouse and goes to live in another jurisdiction and obtains a divorce there should not have the divorce recognised here unless the other spouse has submitted to the jurisdiction of the foreign Court. On the other hand an Irish person who, having been habitually resident in another jurisdiction for many years, deserts the other spouse and comes to live in Ireland should be fully liable to have a divorce obtained by the other spouse in that jurisdiction recognised here.

Under what circumstances is the spouse habitually resident in Ireland to be deemed to have submitted to the jurisdiction of the foreign court which granted the divorce? If he or she has been the petitioner in the foreign proceedings the divorce should not be recognised here. It would undermine the policy of Irish law if a person habitually resident here were allowed

to invoke the divorce jurisdiction of a foreign court and have the divorce recognised here. If he or she was the respondent in the foreign proceedings and was not given adequate notice of them or an adequate opportunity to take part in the proceedings, recognition should be refused anyway as being contrary to natural justice - Article 8 of the Hague Convention provides for refusal of recognition in such circumstances (this is discussed further below). If the Irish spouse had notice of the foreign proceedings but did not enter an appearance, he or she ought not to be regarded as having consented to the divorce. The same position should obtain if an appearance was entered solely to protest against the jurisdiction of the foreign court (e.g. by contesting the sufficiency of the petitioner's residence in the foreign jurisdiction). What if the Irish respondent has entered an appearance in the foreign proceedings and contested the case on its merits? In this event he or she has submitted to the jurisdiction by actively participating in the proceedings and taking the chance of obtaining a decision in his or her own favour.

<u>The spouse habitually resident in Ireland should be regarded as having consented to the foreign divorce only if he or she submitted to the jurisdiction of the court which granted the divorce by entering an appearance as respondent which was not solely to protest that court's jurisdiction</u>.

It should be noted that it would be possible under the Hague Convention to adopt rules of the kind proposed above for situations where one of the spouses is habitually resident in the State and one is not, and one of the spouses is an Irish citizen. Article 20 of the Convention allows a Contracting State whose law does not provide for divorce to refuse recognition to a divorce if one of the spouses was a national of a State whose law did not provide for divorce. This exception is wider in scope than that proposed above in that

it covers all cases where one of the apouses is a national of a non-divorce State. It would appear to be possible to ratify the Convention while availing of an exception that would be covered by the terms of Article 20 but narrower in its scope.

(b) Rules of Recognition of Foreign Divorces for People who do not have Close Connections with Ireland

We must now consider the question of recognition of foreign divorces for people who do not have close connections with Ireland (in the sense already discussed). A small number of these people may be habitually resident in foreign countries which prohibit divorce[12] but the great majority of them will be habitually resident in countries where divorce is relatively easily obtained.

In our view, the best policy would be for our rules of private international law to have regard to the realities of foreign legal systems and accordingly to recognise foreign decrees for such persons on principles in general harmony with those adopted by other countries.

To that end, we have examined the 1970 Hague Convention on Recognition of Divorces and Legal Separations.[13] In our

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[12] Under the 1970 Hague Convention on the Recognition of Divorces and Legal Separations it is possible to reserve the right to refuse recognition in such cases - see Article 19(2). See also Articles 7 and 20.

[13] For analysis of the Convention, see Graveson, Newman, Anton and Edwards, The Eleventh Session of the Hague Conference on Private International Law, 18 Int. & Comp. L.Q. 619, at 620-643 (1969) (Commission 1: The Recognition of Divorces and Legal Separations, by Professor Anton); Batiffol, La Onzième Session de la Conference de La Haye de droit international privé, 58 Rev. Critique de Droit Int. Prive 215, at 216-

discussion of the Convention in this Working Paper, we shall consider whether it would be desirable for Ireland to ratify the Convention and incorporate it as part of our law.

The Convention[14] requires States which are parties to it to recognise divorces and legal separations obtained in other Contracting States "which follow judicial or other proceedings officially recognised"[15] in those States and which are legally effective there. The Convention does not apply to findings of fault or to ancillary orders, such as for maintenance or in relation to the custody of the children.[16]

Grounds for Recognition of Foreign Divorces under The Hague Convention

Article 2, which is the central provision of the Convention, provides as follows:

> "Such divorces and legal separations shall be recognised in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution

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fn. 13 contd.

226 (1969); von Mehren and Nadelmann, The Hague Conference Convention of June 1, 1970 on Recognition of Foreign Divorce Decrees, 5 Family L.Q. 303 (1971); Duncan, The Future for Divorce Recognition in Ireland, 2 Dublin U.L.Rev. 2, at 8 ff. (1969). For analyses of the Convention in draft form, see Reese, The Hague Draft Convention on the Recognition of Foreign Divorce (A Comment), 14 Am.J.Comp.L. 492 (1966), Foster and Freed, The Hague Draft Convention on Recognition of Foreign Divorces and Separations, 1 Family L.Q. 83 (1967), Graveson, The Tenth Session of the Hague Conference of Private International Law, 14 Int. & Comp. L.Q. 528, at 550-554 (1965), Nadelmann, Habitual Residence and Nationality as Tests at The Hague: The 1968 Convention on Recognition of Divorces, 47 Texas L. Rev. 766 (1969).

14 Cf. Conference de la Haye de Droit Internationale Privé Actes et Documents de la Onzième Session, Tome II, Divorce, 90ff (1970) (hereinafter referred to as "Actes").

15 Article 1.

16 Id.

of the proceedings in the State of the divorce or legal separation (hereinafter called "the State of origin") -

(1) the respondent had his habitual residence there; or

(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled -

(a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;

(b) the spouses last habitually resided there together; or

(3) both spouses were nationals of that State; or

(4) the petitioner was a national of that State and one of the following further conditions was fulfilled -

(a) the petitioner had his habitual residence there; or

(b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or

(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled -

(a) the petitioner was present in that State at the date of institution of the proceedings and

(b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce."

Before considering this Article, it is necessary to refer briefly to the following four Articles, since they qualify and develop the general principles set out in Article 2.[17]

Article 3 provides that

"Where the State of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression 'habitual residence' in Article 2 shall be deemed to include domicile as the term is used in that State.

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[17] The important further qualifications to the rules of recognition provided in other Articles of the Convention will not be discussed here. They are analysed later in this Working Paper.

> Nevertheless, the preceding paragraph shall not apply to the domicile of dependence of a wife."

Article 4 provides that where there has been a cross-petition, a divorce or legal separation following upon the petition or cross-petition is to be recognised if either falls within the terms of Articles 2 or 3. Article 5 provides that, where a legal separation has been converted into a divorce in the State of origin, the recognition of the divorce is not to be refused for the reason that the conditions stated in Articles 2 or 3 were no longer fulfilled at the time of the institution of the divorce proceedings.

Article 6 contains three provisions. It provides, first, that, where the respondent has appeared in the proceedings, the authorities of the State in which recognition of a divorce or legal separation is sought are to be bound by the findings of fact on which jurisdiction was assumed. Secondly, the Article provides that the recognition of a divorce or legal separation is not to be refused either because the internal law of the State in which recognition is sought would not allow divorce or legal separation on the same facts or because a law was applied other than that applicable under the rules of private international law of that State. Thirdly, it provides that, without prejudice to such review as may be necessary for the application of other provisions of the Convention, the authorities of the State in which recognition of a divorce or legal separation is sought are not to examine the merits of the decision.

Returning to Article 2, it is to be noted that the tests of recognition set out there are considerably wider[18] than the

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[18] Duncan, supra, fn. 13, at 8, describes the provisions in Article 2 of the Convention as "extremely wide". It is to be noted, however, that

present test for divorce recognition, which is that of the common domicile of the spouses.[19]

The first ground set out in the Article - the habitual residence of the respondent - would extend the range of recognition considerably. Where a spouse left his or her home in State A and acquired an habitual residence in State B whilst remaining domiciled in State A, a divorce obtained in State B, in proceedings in which he or she was the respondent, would have to be recognised in State A, on the basis of his or her habitual residence in State B.

The second ground set out in the Article extends recognition to a case where the petitioner had his habitual residence in the State of origin and either (a) that habitual residence had continued for not less than one year immediately prior to the institution of proceedings or (b) both spouses last habitually resided together there.

The concept of basing recognition on a connecting factor relating to the petitioner (rather than to the respondent or to both spouses) would be a new one in Irish law. The provision is, however, somewhat qualified by the extra alternative requirements set out in the Article. Nevertheless, it should be noted that the effect of the provision is that a spouse may obtain a divorce capable of recognition under the Convention by having an habitual residence in a country for only a year's duration.

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fn. 18 contd.

the Article adopts the approach favoured by common law systems of basing recognition on jurisdictional tests rather than that favoured by continental European systems of basing recognition on compliance with tests dependent on the application of appropriate choice of law rules: cf. Anton, supra, fn. 13, at 628-629.

[19] Cf. pp. 2-9, supra.

The third ground for recognition set out in Article 2 is that both spouses were nationals of the State of origin. No such ground exists in our law but it is a common ground in many civil law jurisdictions.[20]

The fourth ground is that the petitioner was a national of the State of origin and either (a) also had his habitual residence there, or (b) had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings. Again, there is no equivalent provision in our law. The ground differs from our law in two important respects: first, in adopting nationality as a connecting factor; secondly, in basing recognition on a connecting factor relating to the petitioner (rather than to the respondent or to both spouses), although the entitlement to recognition is restricted by the two alternative extra requirements mentioned above. The effect of the provision is that a spouse who is a national of State A but habitually resident and domiciled in State B may obtain a divorce capable of recognition under the Convention by returning to State A, and acquiring an habitual residence there, although the other spouse remains in State B and has no connection with the State in which the divorce is obtained, possibly never having set foot in it.

The fifth ground of recognition under Article 2 is that the petitioner for divorce was a national of the State of origin and (a) was present there at the date of institution of the proceedings and (b) the spouses last habitually resided together in a State whose law at the date of the institution of the proceedings did not provide for divorce. The effect of this provision is that a person who goes to live with his

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[20] Cf. Rabel, The Conflict of Laws: A Comparative Study, Ch. 12 (2nd ed., by U. Drobnig, 1958).

or her spouse in a State which does not provide for divorce may obtain a divorce which will be capable of recognition under the Convention merely by returning to the State of which he or she is a national and acquiring a divorce there. In other words, the extra requirements of habitual residence set out in the fourth ground of the Article do not apply in relation to the fifth ground.[21]

Analysis of Desirability of Making Article 2 Part of Our Law

The question arises as to whether it is desirable that Article 2 of the Convention should become part of our law.

In favour of accepting Article 2, the following arguments may be made:

(a) it reduces the number of "limping marriages".[22]

(b) It represents the best compromise that may be attained between common law and civil law jurisdictions, whose tests

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[21] Cf. Anton, supra, fn. 13, at 631.

"This provision is designed to meet the case where, for example, a girl of Swiss nationality who is married to an Italian wishes to obtain a divorce in Switzerland without necessarily taking up or resuming an habitual residence there. Though this provision clearly opens the way to a species of air-ticket divorce for the wealthy, the delegates of Italy and Ireland were among those who voted in its favour." The provisions of Articles 19(2) and 20 of the Convention must be borne in mind, however - see further below.

[22] Cf. Actes, supra, fn. 14, p. 140, where the Irish Delegate Mr Hayes "agreed with the Belgian Delegate as to the importance of avoiding limping divorces (or limping marriages) where that was possible". When introducing the legislation in Britain which gave effect to the Convention, Lord Hailsham stated that reducing the number of "limping marriages" was its "principal object": H.L. Debs., vol. 315, col. 483. See also, to similar effect, the statement of the Solicitor-General, Sir Geoffrey Howe, in the House of Commons: H.C. Debs., vol. 816, col. 1547.

of recognition of foreign divorces have historically been very different from each other.

(c) As we have mentioned, at a time when divorce in most countries is extremely easy to obtain, and may be granted to parties irrespective of considerations of personal fault, with relatively limited jurisdictional controls, it might be considered futile to place barriers to recognising their validity.[23]

(d) Whilst the grounds of recognition set out in Article 2 are wide, they are not unduly so: they do not require a State to recognise a divorce unless there was a jurisdictional base of some substance.

As against these arguments in favour of accepting Article 2, it should be recalled that, at present, our law has a very restrictive recognition rule:[24] a foreign divorce will be

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[23] Cf. O'Reilly, Recognition of Foreign Divorce Decrees, 6 Ir. Jur. (n.s.) 293, at 299 (1971):

"In a world of ever-decreasing proportions, it may seem unreasonable not to grant recognition to foreign divorce decrees where the parties have acted in good faith and without collusion."

[24] It is worth noting that in England the legal change involved in accepting the Convention was far less extensive than would be the case in this country, since the decisions in Travers v Holley, [1953] P. 246 (C.A.), and Indyka v Indyka, [1969] 1 A.C. 33 (H.L.) had greatly extended the scope of recognition there. The commentary on these decisions and their progeny is extensive: see, e.g., Webb, The Recognition in England of Non-Domiciliary Divorce Decrees, 6 Int. & Comp. L.Q. 608 (1957); Mann, Note: Recognition of Foreign Divorces, 17 Modern L. Rev. 79 (1954); Blackburn, Note: Recognition of Foreign Divorces: The Effect of Travers v Holley, 17 Modern L. Rev. 471 (1954); Jones, The Non-Recognition of Foreign Divorces in Ireland, 3 Ir. Jur. (n.s.) 299, at 317 ff. (1968); Griswold, Comment: The Reciprocal Recognition of Divorce Decrees, 67 Harv. L. Rev. 823 (1954); Gow, Comment, 3 Int. & Comp. L.Q. 152 (1954); Thomas, Comment, 3 Int. & Comp. L.Q. 156 (1954); Cohn, The External Effects of the Travers v Holley Doctrine, 7 Int. & Comp. L.Q. 637 (1958); Graveson, Note: The Non-Recognition of Foreign Divorce Decrees, 71 L.Q. Rev. 191 (1955); Stone, Note: Reciprocity and Common Form in the Conflict of Laws, 18 Modern L. Rev. 177 (1955); R.H. G[raveson], Comment

recognised only when granted in the jurisdiction of the common domicile of the parties.[25] It might be considered unwise to transform so radically the basis of recognition rules (albeit for persons who do not have close connections with Ireland). However, in the case of such persons the desirability of avoiding limping marriages would appear to outweigh these considerations.

On balance, we consider that Article 2 affords a sound basis of recognition for foreign divorces of persons who do not have close connections with Ireland

Analysis of Articles 3 to 6 of the Convention

Article 3[26] of the Convention is different from the present law,[27] under which it is for the Irish Courts (and not the Courts of the State of origin) to determine whether a person was domiciled in the State of origin by applying the concept as they understand it. If a State defines "domicile" in a very "liberal" fashion - as meaning six weeks' residence, for

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fn. 24 contd.

6 Int. & Comp. L.Q. 351 (1957); Mann, Note: Recognition of Foreign Divorces, 84 L.Q.R. 18 (1968); Korah, Note: Recognition of Foreign Decrees, 20 Modern L. Rev. 278 (1957); Bale, Comment, 46 Can. Bar Rev. 113 (1968); Latey, Recognition of Foreign Decrees of Divorce, 16 Int. & Comp. L.Q. 982 (1967); Webb, The Old Order Changeth - Travers v Holley Reinterpreted, 16 Int. & Comp. L.Q. 996 (1967).

25 It is true that the operation of the historical rule of dependent domicile of married women has the practical effect of broadening the scope of recognition, yet this effect would appear to be limited in its turn by the proviso expressed by Walsh, J. in Gaffney v Gaffney, [1975] I.R. 133, at 152 (Sup. Ct.) - see p. 8 above.

26 Cf. supra, pp. 33-34.

27 Cf. Re Adams Deceased, [1957] I.R. 424, at 434-435 (High Ct., Budd, J.).

example - we would be required to recognise a divorce obtained in that State, subject to the public policy ("ordre public") proviso.

Article 4 of the Convention[28] causes no problems. Nor would Article 5[29] appear to involve any difficulty. The provision is designed to cover cases arising under the law of a number of countries (including Denmark), whereby a legal separation can be converted automatically into a divorce at the end of a prescribed period.

Article 6 of the Convention[30] may be supported on the basis that where the respondent has appeared in the proceedings and has had an opportunity of tendering evidence, it would not be in the public interest for the Court in the State called on to recognise the decree to reopen the facts on the basis of which the foreign Court exercised jurisdiction.[31] The Article would not appear to cause any difficulty in being accepted: even assuming that there is a divorce "haven" somewhere in the world which is disposed to grant a divorce in defiance of the actual facts, the Courts in this country could fall back on the "public policy" (ordre public") proviso contained elsewhere in the Convention.[32]

Articles 7, 19(2) and 20 of the Convention contain special provisions for non-recognition of divorces obtained by certain

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[28] Set out infra, p. 75.

[29] Set out infra, p. 75.

[30] Set out infra, p 75.

[31] Cf. the English and Scottish Law Commissions' Report (No. 34 and No. 16, respectively) Hague Convention on Recognition of Divorces and Legal Separations, para. 10 (Cmnd. 4542, 1970).

[32] In Article 10, discussed, infra, pp. 43-44.

persons. These will be considered later in this Working Paper.[33]

Article 8 provides as follows:

> "If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case, the divorce or legal separation may be refused recognition."

This provision, which is permissive rather than mandatory, would appear to embody a principle which already exists under our law.[34] There appears to be no difficulty in including it specifically in our legislation. It seems to us desirable to express it in mandatory terms.

Article 9 of the Convention provides that:

> "Contracting States may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State in which recognition is sought, or is recognised, or fulfils the conditions required for recognition, in that State."

Again this provision would appear to state what is already part of our law. The English and Scottish Law Commissions considered, however, that "[t]his principle would need to be stated in every legislation".[35] They noted that its ambit was "somewhat narrow",[36] since it applies only when the decision which was incompatible with the decree of divorce or legal separation was prior to that decree:

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[33] Infra, pp.

[34] Cf. English Law Com. No. 34, Scot. Law Com. No. 16 supra, fn. 31, para. 11.

[35] Id., para. 12.

[36] Id.

> "In other words, if a divorce was granted in a country where the parties were habitually resident we should have to recognise it notwithstanding a later inconsistent decree of the court of the domicile (notwithstanding that according to our law, the law of the domicile governs status). On the other hand, if the court of the domicile annulled the marriage prior to the divorce in the country of residence we should not be required to recognise the divorce."[37]

The Commission added that in any legislation the principle should be stated in a way that would make it clearer than the Convention did what decisions were to be regarded as "incompatible" with the foreign decree.

In the legislation which followed upon the Commission's Report, the problem was met by a provision[38] to the effect that:

> "The validity of .... a divorce or legal separation obtained outside the British Isles[39] .... shall not be recognised in any part of Great Britain if it was granted or obtained at a time when, according to the law of that part of Great Britain (including its rules of private international law and the provisions of this Act), there was no subsisting marriage between the parties."

Commenting on this provision, Mr Michael Freeman has observed that it "states the obvious, viz., that our courts shall not recognise a divorce or legal separation if under our legal rules, including our private international law rules, there

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37 Id.

38 Recognition of Divorces and Legal Separations Act 1971, section 8(1) (c.53). The Act is analysed by Karsten, infra, fn. 40, and by Graveson, La nouvelle loi anglaise sur la reconnaissance des divorces et des separations de corps, 61 Rev. Critique de Dr. Int. Privé 543 (1972).

39 Section 10 of the Act defines "the British Isles" as meaning the United Kingdom, the Channel Islands, and the Isle of Man.

was then no marriage in existence".[40]

We consider that there is no difficulty in including Article 9 - which, again, is permissive rather than mandatory - in legislation in this country.

Article 10 of the Convention provides that

> "Contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy ('ordre public')."

It appears to us that this provision should be included in legislation on the Convention.[41] It is interesting to note that the English and Scottish Law Commissions came to the conclusion that the Article should be expressly incorporated in their statute only "after some hesitation",[42] since they considered that Article 8 covered most of the circumstances in which recognition had in the past been refused on the ground of public policy. They eventually favoured inclusion of the Article "lest cases should arise in which our courts would be forced to recognise a foreign decree in circumstances in which it would seem unconscionable to do so".[43]

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[40] Freeman, Annotation to the Act (note on section 8(1)), in Current Law Statutes Annotated 1971. See,however, Karsten, The Recognition of Divorces and Legal Separations Act 1971, 35 Modern L. Rev. 299, at 301 (1972), who argues that, since the section is not limited (as is the Article) to cases where the divorce or legal separation is incompatible with a previous decision determining the parties' matrimonial status, "it would thus appear that (to this very limited extent) the United Kingdom is in breach of its international obligations under the Convention".

[41] It should be noted that this provision, like Articles 8 and 9, is permissive rather than mandatory.

[42] English Law Com. No. 34 and Scot. Law Com. No. 16, supra, fn. 31, para. 11.

[43] Id.

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Having regard to the magnitude of the changes in our law which ratification of the Convention would involve, we consider it particularly desirable that our legislation should include a public policy ('ordre public') provision.

Article 11 of the Convention provides that

> "A State which is obliged to recognise a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognise that divorce."

The provision may involve a change from the present law.[44] The Article differs from Articles 8 to 10,[45] in that it is mandatory rather than permissive, so it must be included in our law if the Convention is to be accepted.

Article 12 of the Convention provides that

> "Proceedings for divorce or legal separation in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting State."

This provision states what was already the position[46] in England and Scotland prior to the 1971 legislation, which accordingly made no specific reference to the question. In this country, obviously the reference to "proceedings for divorce" will not be relevant. Apart from this, the Article appears to us to

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[44] Cf. English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 13, referring to R. v Brentwood Superintendent Registrar of Marriages [1968] 2 Q.B. 956 and the Kilbrandon Report on the Marriages Law of Scotland, p. 27, Case (f) (Cmnd. 4011, 1969). See also Hartley, The Policy Basis of the English Conflict of Laws of Marriage, 35 Modern L. Rev. 571, at 581-583 (1972). Cf. Lett v Lett [1906] 1 I.R. 618 (C.A.).

[45] Cf. supra, pp. 41-43.

[46] Cf. English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31 para. 14.

present no major problems. It would, however, appear desirable to draft the provision in a permissive fashion, since difficulties might otherwise arise where, at the time proceedings for legal separation were commenced in this country, proceedings for annulment had already been started abroad.

Articles 13 to 16 clarify the position regarding the effect of the Convention on States which have two or more legal systems of territorial or of personal application.

Article 13 provides that

> "In the application of this Convention to divorces or legal separations obtained or sought to be recognised in Contracting States having, in matters of divorce or legal separation, two or more legal systems applying in different territorial units -
>
> (1) any reference to the law of the State of origin shall be construed as referring to the law of the territory in which the divorce or separation was obtained;
>
> (2) any reference to the law of the State in which recognition is sought shall be construed as referring to the law of the forum; and
>
> (3) any reference to domicile or residence in the State of origin shall be construed as referring to domicile or residence in the territory in which the divorce or separation was obtained."

Article 14 provides that

> "For the purposes of Articles 2 and 3 where the State of origin has in matters of divorce or legal separation, two or more legal systems applying in different territorial units -
>
> (1) Article 2, sub-paragraph (3), shall apply where both spouses were nationals of the State of which the territorial unit where the divorce or legal separation was obtained form a part, and that regardless of the habitual residence of the spouses;
>
> (2) Article 2, sub-paragraphs (4) and (5), shall apply where the petitioner was a national of the State of which the territorial unit where the divorce or legal

separation was obtained forms a part."[47]

Article 15 provides that

> "In relation to a Contracting State having, in matters of divorce or legal separation, two or more legal systems applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal systems specified by the law of that State."[48]

Article 16 provides that

> "When, for the purposes of this Convention, it is necessary to refer to the law of a State, whether or not it is a Contracting State, other than the State of origin or the State in which recognition is sought, and having in matters of divorce or legal separation two or more legal systems of territorial or personal application, reference shall be made to the system specified by the law of that State."[49]

The legislation would need to include provisions on these lines since they do not exist under present law.[50]

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[47] Cf. Nadelmann, supra, fn. 13, at 774-775.

[48] The Article was included at the instigation of the delegate of the United Arab Republic.

[49] For discussion of some of the difficulties which international conventions present for federal States, see Nadelmann, Uniform Legislation Versus International Conventions Revisited, 16 Am. J. Comp. L. 28 (1968).

[50] The English and Scottish Law Commissions, in English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 14, referring to these Articles, stated:

> "The legislation will need to give effect to these provisions."

Yet, in neither the draft Act prepared by the Commissions nor the 1971 legislation which followed, are these matters fully covered. Section 3(3) of the Act incorporates the substance of Article 13 but it would appear, in respect of Articles 15 and possibly 16, at all events, that it was assumed that they represented the present law: cf. Graveson, supra, fn. 38, at 565.

Article 17 of the Convention provides that

> "This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations."

The possible extensions to the scope of the rules of recognition will be considered below.[51]

Article 18 contains a provision[52] designed to assist Scandinavian States in particular. It should cause no difficulties for this country.

Consideration of Articles 19(1), 22 and 23 of the Convention

Article 19(1) provides that Contracting States may, not later than the time of ratification or accession, reserve the right

> "to refuse to recognise a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were nationals of the State in which recognition is sought, and of no other State, and a law other than that indicated by the rules of private international law of the State of recognition was applied, unless the result reached is the same as that which would have been reached by applying the law indicated by those rules."

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[51] See infra pp. 57-66.

[52] The Article provides that

> "This Convention shall not affect the operation of other conventions to which one or several Contracting States are or may in the future become Parties and which contain provisions relating to the subject-matter of this Convention. Contracting States, however, should refrain from concluding other conventions in the same matters incompatible with the terms of this Convention, unless for special reasons based on regional or other ties: and, notwithstanding the terms of such conventions, they undertake to recognise in accordance with this Convention divorces and legal separations granted in Contracting States which are not Parties to such other conventions."

The purpose of the provision, which was inserted at the insistence of the Netherlands delegation, is to permit States to refuse to recognise a divorce where the State of origin did not apply to the facts of the case what the State of recognition would consider was the proper law. The English and Scottish Law Commissions noted that neither the law of England nor that of Scotland had regard to the law applied in granting recognition and suggested[53] that their legislation should not take advantage of the reservation permitted under Article 19(1). We consider that the same course should be followed in this country.

Article 22 provides that

> "Contracting States may, from time to time, declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention."

The provision would not appear to be of relevance to this country. Whilst our nationality rules are liberal[54] there would not appear to be any reason why distinctions on the lines envisaged by the Article should be made. It is interesting to note that in Britain, where the question might be regarded as being of considerably more importance, the English and Scottish Law Commissions recommended that no declaration be made. They argued that

> "The effect of making a declaration would merely be to concede a liberty to foreign States to decline to recognise our divorces where the only available criterion under the Convention rules of recognition was nationality and the person concerned belonged to the class of nationals excluded by the declaration. It is difficult to understand what advantage we would gain by conceding such a

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[53] English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 42.

[54] Cf. the Irish Nationality and Citizenship Act 1956 (No. 26).

> liberty to foreign States. Our interest is to see that our own divorces are recognised as widely as possible."[55]

Article 23 entitles[56] a Contracting State with more than one legal system in matters of divorce and legal separation to declare to which of these systems the Convention is to apply. The Article does not appear to have any relevance to this country.

Consideration of Article 24 of the Convention, Relating to the Question of Retroactivity

Article 24 of the Convention raises a question of central importance. It provides as follows:

> "This Convention applies regardless of the date on which the divorce or legal separation was obtained.
>
> Nevertheless a Contracting State may, not later than the time of ratification or accession, reserve the right not to apply this Convention to a divorce or to a legal separation obtained before the date on which, in relation to that State, the Convention comes into force."

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[55] English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 37.

[56] The Article provides as follows:

> "If a Contracting State has more than one legal system in matters of divorce or legal separation, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.
>
> These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the legal systems to which the Convention applies.
>
> Contracting States may decline to recognise a divorce or legal separation if, at the date on which recognition is sought, the Convention is not applicable to the legal system under which the divorce or legal separation was obtained."

A number of arguments may be made in favour of, and against, this country availing itself of the reservation specified by the Article.

The principal argument in favour of adopting the reservation is that it is not a sound principle to alter the law retrospectively, because "it alters expectations legitimately founded upon the existing law".[57] Moreover, retrospective legislation in relation to divorce would be "peculiarly inappropriate",[58] since at present the recognition rules are very narrow, and over the years spouses may well have refrained from participating in foreign proceedings which were clearly incapable of recognition in this country. It would be particularly harsh on such persons to "transform overnight the expectations on which parties have relied in planning their affairs."[59]

Some arguments <u>against</u> the reservation should be considered.

The first, made by the English and Scottish Law Commissions, is that

> "If the principles adopted in the Convention are right, they should be applied irrespective of the date when the Convention comes into force in relation to the United Kingdom. It would be both capricious and anomalous for the law to say that it would recognise a decree if granted today, but not if granted tomorrow."[60]

Whilst this argument may possibly have relevance to the position in Britain, we do not consider that it is a strong

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[57] English Law Com. No. 34 and Scottish Law Com. No. 16, <u>supra</u>, fn. 31, para. 46.

[58] <u>Id.</u>

[59] <u>Id.</u>

[60] <u>Id.</u>, para. 47.

one in the context of this country. The principles adopted in the Convention can hardly be regarded simply as "right" in vacuo. They represent (for this country) a very radical transformation of the existing law. In no sense should they be regarded as embodying principles of a universally "better" nature than those of the present law. They should instead be perceived as creatures of their time, fashioned by way of compromise out of the desire to serve the interests of international harmony. Seen from this standpoint, there seems to us nothing "capricious and anomalous" in the law recognising decrees granted after but not before a specific date.

Another argument against using the reservation under Article 24 was expressed by the English and Scottish Law Commissions as follows:

> "If the existing rules of recognition of foreign divorces were crystal clear in their application, the arguments in [favour of using the reservation] might have considerable weight. But they are not clear. Therefore, the reservation would have the effect of leaving uncertain the validity of a considerable number of past divorces."[61]

This argument has validity to the extent that under the present law in this country the rules of recognition are to some extent uncertain.[62] But we consider that it would not be proper to replace these admitted uncertainties by the certainty of injustice and hardship (albeit possibly not in a large number of cases) which application of the principle of retrospection would involve.

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[61] English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 47.

[62] The question of the extent to which the wife's domicile of dependency has survived the enactment of the Constitution is difficult to assess with absolute certainty. Other areas of possible development are discussed in Duncan, Note: Foreign Divorces Obtained on the Basis of Residence, and the Doctrine of Estoppel, 9 Ir. Jur. (n.s.) 59, at 63 ff. (1975).

On balance, therefore, we consider that, in ratifying the Convention, this country should avail itself of the reservation regarding divorces obtained before the date of entry into force of the Convention for Ireland.

Reservations Under the Convention Regarding Non-Recognition of Certain Foreign Divorces

We must now consider the question of what reservation or reservations we should recommend for this country to make regarding the non-recognition of certain foreign divorces under the Convention, to take into account the restrictive rules of recognition which we have proposed in relation to spouses who are habitually resident in Ireland. We will consider each of the reservations provided for in the Convention in turn.

Article 7 provides that

> "Contracting States may refuse to recognise a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State."

It should be noted that the Article does not relate only to nationals of the State called on to recognise the divorce. In other words, the Article would extend not only to a divorce between two Irish people but also to a divorce between two Argentinians, for example. In view of the fact that our proposals relate to situations where at least one of the spouses is habitually resident in Ireland, it would not be possible to avail ourselves of this reservation.

Article 19(2) of the Convention is, in effect, an alternative to Article 7, since States are not permitted to utilize the reservation in Article 19(2) whilst also refusing recognition

by the application of Article 7. Article 19 provides that

> "Contracting States may, not later than the time of ratification or accession, reserve the right ....
>
> (2) to refuse to recognise a divorce when, at the time it was obtained, both parties habitually resided in States which did not provide for divorce. A State which utilises the reservation stated in this paragraph may not refuse recognition by the application of Article 7."

This reservation would cover the special rules proposed above (p. 27) whereby a foreign divorce would not be recognised where both spouses are habitually resident in Ireland at the date of the institution of the divorce proceedings.

It is worth noting that Article 19(2) was inserted in the Convention at the instigation of the Irish delegation, which envisaged that it "would allow Ireland to contemplate the ratification of the Convention".[63]

Article 20 of the Convention provides that

> "Contracting States whose law does not provide for divorce may, not later than the time of ratification or accession, reserve the right not to recognise a divorce if, at the date it was obtained, one of the spouses was a national of a State whose law did not provide for divorce.
>
> This reservation shall have effect only so long as the law of the State utilising it does not provide for divorce."

This provision is similar to Article 7, but is somewhat different in its scope. Unlike Article 7, which relates to the right of any Contracting State not to recognise foreign divorces of nationals of States which do not provide for divorce, Article 20 relates only to the right of Contracting States whose law does not provide for divorce to refuse to

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[63] Actes, supra, fn. 14, p. 170. The original draft of the provision was set out in Working Document No. 37, which appears on p. 163.

recognise such divorces.[64]

We consider that Article 20 should cover the special recognition rule proposed above (p. 29) to cater for situations where one of the spouses is an Irish citizen and only one spouse is habitually resident in Ireland. The exception provided for in that proposed special rule is narrower in scope than that provided for in Article 20. It should be possible to ratify the Convention while availing of an exception that would be covered by the terms of Article 20 but would be narrower in its scope.

(2) Recognition of Foreign Legal Separations

We must now consider the subject of the recognition of foreign legal separations. Again the Hague Convention offers an opportunity for reform along lines that have met with broad approval at an international forum. The great majority of the Articles in the Convention relate to both divorce and legal separation, but some specific differences will be noted in due course.

Nowhere in the Convention is the term "legal separations" defined. The only requirement is that they must "follow judicial or other proceedings officially recognised in th[e] State [of origin] and [be] legally effective there."[65]

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[64] Another difference between the Articles should be noted. In Article 7 the parties must have been "nationals of States which did not provide for divorce and of no other State"; in Article 20, however, it is necessary that one of the spouses be a "national of a State whose law did not provide for divorce", the proviso regarding other States not being stipulated.

[65] Article 1 of the Convention.

As a broad statement of the approach to be taken in analysing the provisions of the Convention, it may be observed that, when dealing with legal separations, there is less need to adopt the restrictive standpoint favoured above in relation to divorce. While legal separation may have important legal effects,[66] constitutional problems do not affect the issue to the same extent as in relation to divorces. Accordingly we do not propose special rules of recognition in respect of spouses who have close connections with this country.

Recognition of Legal Separations Under Article 2 of the Convention

The central question (as was the case in relation to divorce) is whether Article 2 is acceptable in relation to legal separations. The present law of recognition of foreign legal separations is uncertain,[67] but it would appear clear that the present tests for recognition are far less extensive than those set out in Article 2.

It appears to us that the tests set out in Article 2[68] provide a sound set of rules for recognition of foreign legal separations. Whilst a "limping separation" no doubt causes less social and personal difficulties than a "limping divorce", it appears desirable that as much international uniformity as possible should be achieved, provided that it is not

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66 Under the Succession Act 1965, section 120(2) (No. 28), for instance. It should be remarked that the Convention does not apply to ancillary orders pronounced on the making of a decree of legal separation: Article 1 of the Convention.

67 See supra, pp. 13-16.

68 A difference between recognition of divorces and of legal separations under Article 2 should be noted: paragraph (5) of the Article applies only to divorces.

inconsistent with the interests of the spouses or of the social policy of this State.

Articles 3 to 6 of the Convention do not appear to us to cause any difficulty in relation to legal separations. Articles 7, 11, 19(2) and 20 of the Convention relate to divorces only.

Article 8 appears to us to cause no difficulty in the context of legal separations. Article 9 (which deals with previous incompatible decisions regarding matrimonial status), Article 10 (the public policy ("ordre public") provision) and Article 12 (pending proceedings) appear to us to be acceptable in relation to legal separations, as they do in relation to divorce.

Articles 13 to 16, which are concerned with States having two or more legal systems, cause no difficulty.

Article 17 enables a Contracting State to apply rules of law more favourable to the recognition of foreign legal separations than those set out specifically in the Convention. We will consider this Article below[69] when discussing what possible further changes should be made in the legislation, extending beyond what is required by the Convention. Article 18 of the Convention is not of any major relevance to this country[70] and poses no problems for us.

Paragraph (1) of Article 19 of the Convention is also not of any great relevance to this country.[71] We see no reason why

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[69] Infra, pp. 60 ff.

[70] Cf. p. 47, supra.

[71] Cf. pp. 47-48, supra.

the reservation permitted by the paragraph should be availed of.

Article 21 provides that

> "Contracting States whose law does not provide for legal separation may, not later than the time of ratification or accession, reserve the right to refuse to recognise a legal separation when, at the time it was obtained, one of the spouses was a national of a Contracting State whose law did not provide for legal separation."

This is the only Article in the Convention which relates to legal separations exclusively. It has no relevance to this State, however, since our law does provide for legal separations.[72]

The remaining Articles of the Convention raise no particular problems in relation to legal separation.

Supplementary Legislative Provisions that Appear Desirable

The Convention in a number of respects is more limited in scope than might appear desirable. Accordingly we must consider whether it would be desirable to make certain extensions to its scope when drafting the legislation which will give effect to the Convention.

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[72] It is noteworthy that, just as States which formerly did not provide for divorce now do so, there is also a trend in the other direction, whereby States which formerly provided for legal separation (e.g. Australia) no longer do so: cf. Nygh, Guide to Family Law Act 1975, 3, 142-143 (1975). (Injunctive powers under section 114(2) of that Act closely resemble legal separation in effect, however.) Article 21 of the Convention was designed to facilitate States influenced by Soviet law, which regards decrees for legal separation as being contrary to public policy.

The first possible extension relates to the question whether recognition of divorces and legal separations should be limited, as the Convention specifies,[73] to those obtained in another Contracting State, or whether the principles should apply to divorces obtained in any State in the world. The English and Scottish Law Commissions examined this question. They considered two arguments in favour of limiting the scope to divorces obtained in another Contracting State. The first was that, since the Convention applies to virtually any form of divorce or legal separation provided it follows "judicial or other proceedings officially recognised in [the State of origin] and which are legally effective there",[74] there might be forms of divorce emanating from some State or system which it might be considered undesirable to recognise.

The Commissions did not regard this argument as being of great weight. Under existing law, English and Scottish Courts would recognise any divorce, whatever its form, method or grounds, provided that the jurisdictional requirements were met and "[i]t would be a retrograde step to resile from this".[75] Any residual problems could, in the Commissions' view, be met by invoking the doctrine of public policy.[76]

The second argument in favour of limiting the legislation to divorces obtained in other Contracting States was that it might be advisable to retain a bargaining position for use if a particular foreign system adopted a restrictive attitude to the recognition of British divorces.

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[73] In Article 1. See also Article 23(3).

[74] Article 1 of the Convention.

[75] English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 18.

[76] Cf. Article 10 of the Convention, and see supra, pp. 43-44.

The Commissions disposed of this argument by stating that "we stand a better chance of extending the area of recognition for our decrees if we set an example by recognising those of other countries, rather than by refusing to afford recognition except on a reciprocal basis".[77]

The Commissions set out three arguments in favour of extending the scope of the Convention to divorces obtained in any State. One of these arguments was based on principle; the others were based on practical convenience.

The first argument was that Britain's ratification of the Convention was an implied acceptance that the rules of the Convention were satisfactory and that if they were satisfactory, they should apply equally to countries which adopt the Convention and those which do not. The second argument was that to have one set of rules applicable to all countries could be a great simplification and would avoid the creation of anomalies. The third argument was that since States would adopt the Convention at different times, some perhaps in relation to some of their territories only,[78] and since others might withdraw from the Convention,[79] it would be necessary to keep abreast of these changes by subordinate legislation. This "would complicate the task of those concerned both with the making and the application of the laws".[80]

The English and Scottish Law Commissions concluded[81] that it

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[77] English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 18.

[78] Cf. Article 29 of the Convention.

[79] Cf. Article 30 of the Convention.

[80] English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 19.

[81] Id.

would be more satisfactory to have one set of rules applicable to all countries. The legislation in those countries has followed this course.[82]

On this question we take the same view as the English and Scottish Law Commissions. We are satisfied that the public policy ("ordre public") provision will ensure that the scope of recognition is kept within reasonable bounds.

The next question that arises is whether the rules of recognition set out in the Convention should be expressed more widely, as the Convention permits.[83]

The strongest argument against such an extension is that the rules set out in the Convention constitute a very major transformation of our law and that the real question is whether they go too far[84] rather than far enough. Moreover, there is a risk that extending the rules further than those set out in the Convention would encourage forum-shopping.

It is, however, of considerable interest that the English and Scottish Law Commissions proposed[85] successfully[86] that the recognition rules should be extended beyond those set out in

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82 Recognition of Divorces and Legal Separations Act 1971, section 2 (c. 53).

83 Article 17 of the Convention provides that

> "This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations."

84 Cf. supra, pp. 38-39.

85 English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 29.

86 Cf. the Recognition of Divorces and Legal Separations Act 1971, section 3 (c. 53).

the Convention. The principal reasons mentioned in support of this proposal were the desire to avoid limping marriages and the need for practical simplicity in the framing and application of the tests of recognition, "particularly since the question whether a divorce is effective in this country may in practice fall to be decided at an administrative rather than a judicial level".[87]

We do not consider that these arguments are sufficiently strong to counterbalance those which we have already mentioned against extending the tests of recognition in the legislation in this country.

The next question that requires consideration is whether it would be desirable to extend the principle embodied in paragraph (1) of Article 6 of the Convention, which provides that

> "Where the respondent has appeared in the proceedings, the authorities of the State in which recognition is sought shall be bound by the findings of fact on which jurisdiction was assumed."

The English and Scottish Law Commissions[88] argued that, where the respondent appeared in the proceedings, practical convenience

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87 English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 29. The Commissions also agreed that after the support which had been given by some Lords in Indyka v Indyka, [1969] 1 A.C. 33 for the view that the nationality of the respondent was a sufficient ground for jurisdiction, failure to recognise divorces based on this ground (as the Convention would require) could cause difficulties.

88 The argument appears worthy of extended quotation:

"Where the respondent has appeared in the proceedings, it seems right that the English and Scottish courts should be bound not merely by the findings of fact on which the court of origin assumed jurisdiction but by all the findings relevant to jurisdiction, including the inference drawn that a party was habitually resident or domiciled in, or a national of, the country. In this context it may be recalled that, except as regards the attribution to a wife of a domicile of dependence,

and the policy of avoiding limping marriages as far as possible meant that findings made by the Court of the State of origin as to a party's being domiciled (as that term is used in the State of origin) or habitually resident there or being a national of that State, should be binding on the State of recognition.[89] We take the same view and recommend accordingly insofar as divorces obtained by persons who do not have close connections with Ireland are concerned. In the case of persons who do have such connections the policy of preventing evasion of the constitutional prohibition on divorce must take precedence over that of avoiding limping marriages. We proposed above (pp. 25-26) that the legislation should specify that a person should be

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fn. 88 contd.

the English and Scottish courts are bound by the terms of Article 3 to accept the court of origin's characterisation of the concept of domicile. To contest the foreign court's attribution to a person of domicile in this sense would be to argue that the foreign court has not properly applied its own concept of domicile. We think it undesirable that our courts should be called upon to pronounce upon whether a foreign court has properly applied its own law to the facts of a case. Similarly, since a person's nationality of a State is a matter for the law of that State to determine we think it appropriate that, in proceedings in which the respondent has appeared, a foreign court's determination that a person is a national of its own State should be accepted as conclusive. The same argument does not apply to the concept of habitual residence, since the Convention does not bind Contracting States to accept foreign characterisations of that concept. Habitual residence, however, while a legal concept susceptible of differing interpretations from one system to another in its concrete application to the facts of any case, seems to depend largely upon assessment by the court of the relevant facts. While there may be cases where a foreign system would attribute to a person a habitual residence in circumstances where our system would not do so, these cases must be relatively rare. Moreover, to disregard a finding that a spouse was habitually resident in the State of origin would merely result in a limping marriage. Hence, we also think it desirable that, when the respondent has appeared in the proceedings, the foreign court's attribution to a person of a habitual residence should be binding here": English Law Com. No. 34 and Scottish Law Com. No.16, supra, fn. 31, para. 32.

89 Legislative effect was given to the Commission's recommendations by the Recognition of Divorces and Legal Separations Act 1971, section 5 (c.53). The uncertainty of the expression "findings of fact" in the Article would also benefit from clarification on these lines: cf. Nadelmann, supra, fn. 13, at 776.

deemed to be habitually resident in the State who, having been habitually resident here, has temporarily ceased to reside here and has acquired a temporary residence abroad for the primary purpose of obtaining a foreign divorce. This proposal clearly envisages that in these particular cases an Irish court's concept of habitual residence, as thus elaborated on for divorce recognition purposes, would, if necessary, take precedence over the concept of habitual residence employed by the foreign court for the purpose of founding its own divorce jurisdiction. The Convention does not appear to require a Contracting State's court to accept a foreign court's concept of habitual residence,[90] so the proposal just referred to would not seem to be at variance with the Convention's general provisions. Even if it is, it would seem to be covered by Articles 19(2) and 20 of the Convention, the exceptions which, it has already been suggested (pp. 52-54 above), could be availed of to cover the special rules proposed in this Working Paper for cases where both spouses are habitually resident in Ireland or one spouse is and one spouse is an Irish citizen.

Where the respondent has not appeared in the proceedings in the State of origin, the position is somewhat different. He or she may have refrained from doing so for conscientious reasons or in the belief that the proceedings lacked a proper jurisdiction. Where the foreign Court has heard only one side of the story, it might be considered unjust for the legislation to bind the Court in the State of recognition by the findings of fact and the findings relevant to jurisdiction to the same extent as has been proposed above in cases where the respondent has appeared in the proceedings. The English and Scottish Law Commissions recommended that in such cases "if the

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[90] See fn. 88 above on pp. 61-62.

courts[91] [in the State of recognition] are satisfied that the foreign court has made certain findings of fact and drawn certain inferences of law or fact from them, they should be entitled to accept as proved those findings and inferences, but should not be bound to do so.[92]

The legislation which followed appears to have gone somewhat further than the Commissions' recommendations.[93]

We take the view that the best approach would be to give the Court a broad discretion as to whether to accept as proved the findings and inferences of the foreign Court in such cases (subject to the qualification already mentioned about an Irish court's finding of habitual residence in Ireland taking precedence in certain cases).

A matter that has caused considerable controversy and confusion in Britain is the question of the recognition of extra-judicial divorces.[94] The Convention clearly envisages that recognition

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[91] The Commissions added that, although they had spoken of courts, they also had in mind all persons who were concerned with the validity of foreign decrees: "such persons would then act, as they do now, on their assessment of the view which the courts here would take in any given situation": English Law Com. No. 34 and Scottish Law Com. No. 16, supra, fn. 31, para. 33.

[92] Id.

[93] The legislation provides that the finding of fact by the Court of the State of origin is to "be sufficient proof of that fact unless the contrary is shown": Recognition of Divorces and Legal Separations Act 1971, section 5(1)(b) (c. 53). In contrast, the Commissions' draft Bill, in section 5(1)(b) provides that such a finding "may .... if the court thinks fit, be treated as sufficient evidence of the fact found".

[94] See North, Recognition of Extra-Judicial Divorces, 91 L.Q. Rev. 36 (1975) (and the literature cited therein in fn. 1). Subsequent commentary includes Jaffey, Note, 91 L.Q. Rev. 320 (1975), Gravells, Recognition of Extra-Judicial Divorces: Theoretical Problems Realised, 92 L.Q. Rev. 347 (1976).

should not automatically be denied to a divorce on account of the fact that it did not follow judicial proceedings, since Article 1 provides that the Convention is to apply

> "to the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State which follow judicial or other proceedings".

The problem therefore arises as to whether all non-judicial divorces or merely some of them are afforded recognition by the Convention. The types of non-judicial divorces that may call for recognition extend from administrative processes (as in Denmark, Norway or the U.S.S.R.) to religious procedures of varying decrees of informality, such as the Moslem talak, the Jewish gett and the Hindu customary divorce.

Unfortunately, the Hague Convention does not clearly indicate the extent to which these types of divorces will require recognition.[95] The use of the expression "proceedings" in Article 1 and the other Articles would appear to require something more than a mere unilateral repudiation of one spouse by the other, and would seem to envisage some official act by a third party.

The question is, of course, one of considerable importance in Britain, where there is a substantial Moslem population. The attempts by legislation in 1971 and subsequently to resolve the problems of policy and drafting have proved less than fully satisfactory.

In Ireland, the practical importance of this subject is limited (though, perhaps, with increasing mobility between this country and other member States of the European Economic

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[95] Cf. North, supra, 46ff., Anton, supra, fn, 13, at 627, Graveson, supra, fn. 38, at 549-550.

Community, it may be expected to gain increasing significance). The present status of the recognition of non-judicial divorces in this country is also unclear.[96] We consider that the best solution, consistent with the provisions of the Convention, is for the legislation to leave it to the Courts to determine whether any particular non-judicial divorce should be recognised under the provisions of the Act. The public policy ("ordre public") proviso protects us from being obliged to recognise divorces which are manifestly incompatible with our public policy.

Another matter for which it might appear desirable to provide expressly in the Act is a definition of "divorce" and "legal separation". The Convention is silent on this question[97] and it could be argued that a definition of these concepts would clarify the position.[98] The question has already arisen in the limited context of non-judicial divorces, where it was recommended that it would be better to leave this matter to the Courts to determine. In the present context, we consider that the same approach should be followed.

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[96] The English courts, despite former dicta to the contrary in R. v Superintendent Registrar of Marriages for Hammersmith, [1917] 1 K.B. 634, have afforded increasing recognition in post-war years to such divorces: cf. North, 43, Swaminathan, Recognition of Foreign Unilateral Divorces in The English Conflict of Laws, 28 Modern L. Rev. 540 (1965). Whether the same approach would be favoured in this country is uncertain.

[97] Cf. Anton, supra, fn. 13, at 626-627.

[98] During the passage of the British legislation of 1971 through the House of Commons, an amendment was moved by Mr Silkin, M.P. expressly defining legal separation as including "judicial separation": H.C. Debs., vol. 816, col. 1568. The amendment was not successful.

(3) Ancillary Orders

The question of orders ancillary to a foreign divorce decree - such as orders for maintenance or financial provision - raises important and wide-ranging issues. These issues go well beyond the limited context of recognition of foreign divorces. The subject includes such matters as: the jurisdiction for maintenance proceedings in this country; choice of law problems; recognition of foreign maintenance orders; the relationship between a maintenance order obtained here and one obtained by the same spouse in proceedings abroad; the effect of termination of maintenance entitlements in one jurisdiction but not another; the rights of former spouses to apply to the Court under section 12 of the Married Women's Status Act 1957 and the range of orders permissible in such circumstances; the succession rights of divorced spouses and the position of former spouses with respect to rights under the Family Home Protection Act 1976 and under the Family Law (Protection of Spouses and Children) Act 1981.

It is beyond the scope of the present Working Paper to resolve all of these issues. This will be the subject of a forthcoming document. At present we confine ourselves to the limited context of spouses who have close connections with Ireland in the sense already discussed above (pp. 25-30). We consider it desirable that the legislation should include a provision which would confer on the Irish court in such cases a discretionary power, acting on the principles of our domestic legislation, to protect the rights of a spouse divorced abroad (where the divorce is recognised here) with respect to maintenance, occupation and beneficial ownership

of the family home and barring orders.[99] In exercising its discretion the Irish Court should have regard to all the circumstances of the case including:

(a) the extent to which each of the spouses actively participated in the foreign divorce proceedings;

(b) the respective resources of the spouses;

(c) the respective ages and health of the spouses;

(d) the extent (if at all) to which the orders ancillary to the foreign divorce decree adequately protect the interests of each spouse.

In the light of international experience especially with regard to maintenance obligations following a divorce, we consider it essential to include statutory provisions along these lines. The general international trend has been towards reducing the amount and duration of support of divorced women.[100] We consider that, for persons with close connections with Ireland, some discretionary protection is necessary, to deal with cases of hardship or injustice.

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[99] Succession entitlements raise separate issues, which we consider would not easily be resolved under this proposed discretionary power. Guardianship of children also raises separate issues. We will be publishing a document on certain international aspects of guardianship shortly.

[100] Cf. the Scottish Law Commission's Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981); O'Donovan, Should All Maintenance of Spouses be Abolished?, 45 M.L.R. 424 (1982); De Sousa, Maintenance on Divorce, 8 Ottawa L. Rev. 349 (1976); Bruch, Of Work, Family Wealth, and Equality, 17 Family L.Q. 99 (1983); Weitzman & Dixon, The Alimony Myth: Does No-Fault Divorce Make a Difference?, 14 Family L.Q. 141 (1980); Hauserman, Homemakers and Divorce: Problems of Invisible Occupation, 17 Family L.Q. 41 (1983); Seal, A Decade of No-Fault Divorce, 1 Family Advocate 10 (1979); Fineman, Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce, [1983] Wis. L. Rev. 789; Atkin, Spousal Maintenance: A New Philosophy?, 9 N.Z.U.L. Rev. 336 (1981).

We also consider that the same discretionary power should be conferred on the Irish Court with respect to foreign legal separations where the spouses have close connections with Ireland in the sense already discussed above (pp. 25-30). There is likely to be far less of a social problem with respect to such legal separations but nonetheless it seems to us prudent to include a provision to this effect to cover the small number of cases where injustice and hardship could otherwise arise.

CHAPTER 4 SUMMARY OF RECOMMENDATIONS

1. For divorce recognition purposes a person should be deemed to be habitually resident in the State who, having been habitually resident here, has temporarily ceased to reside here and has acquired a temporary residence abroad for the primary purpose of obtaining a foreign divorce: pp. 25-26.

2. Where both spouses are habitually resident in the State at the date of the institution of the divorce proceedings, a foreign divorce obtained by them should not be recognised at all in this country: p. 27.

3. Where

(i) one of the spouses is an Irish citizen, and

(ii) only one spouse is habitually resident in the State, and

(iii) the spouses last habitually resided together in the State,

a foreign divorce should be recognised here only if the spouse referred to at (ii) above submitted to the jurisdiction of the foreign court (by entering an appearance as respondent which was not solely to protest that court's jurisdiction) and the divorce is obtained in the country where the other spouse is habitually resident at the date of the institution of the proceedings: pp. 29-30.

4. The 1970 Hague Convention on Recognition of Divorces and Legal Separations should be the basis of our rules of recognition of foreign divorces in other cases and of recognition of foreign legal separations: pp. 39 ff.

5. Following Article 8 of the Convention the legislation should provide for refusing recognition to foreign decrees of divorce or legal separation if adequate steps were not taken to give notice of the proceedings to the respondent or if he was not afforded a sufficient opportunity to present his case: p. 41.

6. Following Article 9 of the Convention the legislation should include a provision whereby the State may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State, or is recognised, or fulfils the conditions required for recognition, in the State: p. 43.

7. Following Article 10 of the Convention, the legislation should include a provision to the effect that the State may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with the State's public policy ("ordre public"): p. 44.

8. Following Article 12 of the Convention, the legislation should include a provision to the effect that proceedings for legal separation in the State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another State: pp. 44-45.

9. As permitted by Article 24 of the Convention, the legislation should provide that the recognition rules in the Convention would not be applied retrospectively: p. 52.

10. For the purpose of giving effect to Recommendation 2 above, the reservation permitted under Article 19(2) of the Convention should be utilized: p. 53.

11. For the purpose of giving effect to Recommendation 3 above, the reservation permitted under Article 20 of the Convention should be utilized: p. 54.

12. No special rules of recognition of foreign legal separations should apply to persons habitually resident in Ireland: p. 55.

13. The rules of recognition of foreign divorces and legal separations proposed above should apply to foreign divorces and legal separations wherever obtained: p. 60.

14. The legislation should not establish rules of recognition of foreign divorces and legal separations wider than those specified in the Convention: p. 61.

15. Subject to Recommendation 1 above, the legislation should include a provision to the effect that, where the respondent appeared in the proceedings, findings made by the court of the State where the divorce or legal separation is granted as to a party's being domiciled or habitually resident there or being a national of that State, should be binding for the purposes of recognition: p. 62.

16. Subject to Recommendation 1 above, the legislation should include a provision giving the Court a broad discretion as to whether to accept as proved the findings and inferences (whether of law or fact) of the foreign court where the respondent has not appeared in the foreign proceedings: p. 64.

17. In cases where a divorce is recognised under Recommendation 2 or 3 above, the Court should have a discretionary power, acting on the principles of our domestic legislation, to protect

the rights of a spouse with respect to maintenance, occupation and beneficial ownership of the family home and barring orders: pp. 67-68.

18. A similar discretionary power should be conferred on the Court in relation to a foreign legal separation where one (or both) of the spouses has (or have) close connections with Ireland of the kind envisaged in Recommendations 2 and 3 above: p. 69.

APPENDIX A CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS (Concluded June 1st, 1970)

The States signatory to the present Convention,

Desiring to facilitate the recognition of divorces and legal separations obtained in their respective territories,

Have resolved to conclude a Convention to this effect, and have agreed on the following provisions:

Article 1

The present Convention shall apply to the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State which follow judicial or other proceedings officially recognized in that State and which are legally effective there.

The Convention does not apply to findings of fault or to ancillary orders pronounced on the making of a decree of divorce or legal separation; in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children.

Article 2

Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called 'the State of origin') -

(1) the respondent had his habitual residence there; or

(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled -

a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;

b) the spouses last habitually resided there together; or

(3) both spouses were nationals of that State; or

(4) the petitioner was a national of that State and one of the following further conditions was fulfilled -

a) the petitioner had his habitual residence there; or

b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or

(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled -

a) the petitioner was present in that State at the date of institution of the proceedings and

b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

Article 3

Where the State of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression 'habitual residence' in Article 2 shall be deemed to include domicile as the term is used in that State.

Nevertheless, the preceding paragraph shall not apply to the domicile of dependence of a wife.

Article 4

Where there has been a cross-petition, a divorce or legal separation following upon the petition or cross-petition shall be recognized if either falls within the terms of Articles 2 or 3.

Article 5

Where a legal separation complying with the terms of this Convention has been converted into a divorce in the State of origin, the recognition of the divorce shall not be refused for the reason that the conditions stated in Articles 2 or 3 were no longer fulfilled at the time of the institution of the divorce proceedings.

Article 6

Where the respondent has appeared in the proceedings, the authorities of the State in which recognition of divorce or legal separation is sought shall be bound by the findings on which jurisdiction was assumed.

The recognition of a divorce or legal separation shall not be refused -

a) because the internal law of the State in which such recognition is sought would not allow divorce or, as the case may be, legal separation upon the same facts, or,

b) because a law was applied other than that applicable under the rules of private international law of that State.

Without prejudice to such review as may be necessary for the application of other provisions of this Convention, the authorities of the State in which recognition of a divorce or legal separation is sought shall not examine the merits of the decision.

Article 7

Contracting States may refuse to recognize a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State.

Article 8

If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case, the divorce or legal separation may be refused recognition.

Article 9

Contracting States may refuse to recognize a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State in which recognition is sought, or is recognized, or fulfils the conditions required for recognition, in that State.

Article 10

Contracting States may refuse to recognize a divorce or legal separation if such recognition is manifestly incompatible with their public policy ('ordre public').

Article 11

A State which is obliged to recognise a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognize that divorce.

Article 12

Proceedings for divorce or legal separation in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting State.

Article 13

In the application of this Convention to divorces or legal separations obtained or sought to be recognized in Contracting States having, in matters of divorce or legal separation, two or more legal systems applying in different territorial units -

(1) any reference to the law of the State of origin shall be construed as referring to the law of the territory in which the divorce or separation was obtained;

(2) any reference to the law of the State in which recognition is sought shall be construed as referring to the law of the forum; and

(3) any reference to domicile or residence in the State of origin shall be construed as referring to domicile or residence in the territory in which the divorce or separation was obtained.

Article 14

For the purposes of Articles 2 and 3, where the State of origin has in matters of divorce or legal separation two or more systems applying in different territorial units -

(1) Article 2, sub-paragraph (3), shall apply where both spouses were nationals of the State of which the territorial unit where the divorce of legal separation was obtained forms a part, and that regardless of the habitual residence of the spouses;

(2) Article 2, sub-paragraphs (4) and (5), shall apply where the petitioner was a national of the State of which the territorial unit where the divorce or legal separation was obtained forms a part.

Article 15

In relation to a Contracting State having, in matters of divorce or legal separation, two or more legal systems applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 16

When, for the purposes of this Convention, it is necessary to refer to the law of a State, whether or not it is a Contracting State, other than the State of origin or the State in which recognition is sought, and having in matters of divorce or legal separation two or more legal systems of territorial or personal application, reference shall be made to the system specified by the law of that State.

Article 17

This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations.

Article 18

This Convention shall not affect the operation of other conventions to which one or several Contracting States are or may in the future become Parties and which contain provisions relating to the subject-matter of this Convention.

Contracting States, however, should refrain from concluding other conventions on the same matter incompatible with the terms of this Convention, unless for special reasons based on regional or other ties; and, notwithstanding the terms of such conventions, they undertake to recognize in accordance with this Convention divorces and legal separations granted in Contracting States which are not Parties to such other conventions.

Article 19

Contracting States may, not later than the time of ratification or accession, reserve the right -

(1) to refuse to recognize a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were nationals of the State in which recognition is sought, and of no other State, and a law

other than that indicated by the rules of private international law of the State of recognition was applied, unless the result reached is the same as that which would have been reached by applying the law indicated by those rules;

(2) to refuse to recognize a divorce when, at the time it was obtained, both parties habitually resided in States which did not provide for divorce. A State which utilizes the reservation stated in this paragraph may not refuse recognition by the application of Article 7.

Article 20

Contracting States whose law does not provide for divorce may, not later than the time of ratification or accession, reserve the right not to recognize a divorce if, at the date it was obtained, one of the spouses was a national of a State whose law did not provide for divorce.

This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce.

Article 21

Contracting States whose law does not provide for legal separation may, not later than the time of ratification or accession, reserve the right to refuse to recognize a legal separation when, at the time it was obtained, one of the spouses was a national of a Contracting State whose law did not provide for legal separation.

Article 22

Contracting States may, from time to time, declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention.

Article 23

If a Contracting State has more than one legal system in matters of divorce or legal separation, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign

Affairs of the Netherlands, and shall state expressly the legal systems to which the Convention applies.

Contracting States may decline to recognize a divorce or legal separation if, at the date on which recognition is sought, the Convention is not applicable to the legal system under which the divorce or legal separation was obtained.

Article 24

This Convention applies regardless of the date on which the divorce or legal separation was obtained.

Nevertheless a Contracting State may, not later than the time of ratification or accession, reserve the right not to apply this Convention to a divorce or to a legal separation obtained before the date on which, in relation to that State, the Convention comes into force.

Article 25

Any State may, not later than the moment of its ratification or accession, make one or more of the reservations mentioned in Articles 19, 20, 21 and 24 of the present Convention. No other reservation shall be permitted.

Each Contracting State may also, when notifying an extension of the Convention in accordance with Article 29, make one or more of the said reservations, with its effect limited to all or some of the territories mentioned in the extension.

Each Contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Such a reservation shall cease to have effect on the sixtieth day after the notification referred to in the preceding paragraph.

Article 26

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Converence or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy of each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to

the Ministry of Foreign Affairs of the Netherlands.

The extension will have effect only as regards the relations with such Contracting States as will have declared their acceptance of the extensions. Such a declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The extension will take effect in each case sixty days after the deposit of the declaration of acceptance.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following -

a) the signatures and ratifications referred to in Article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

c) the accessions referred to in Article 28 and the dates on which they take effect;

d) the extensions referred to in Article 29 and the dates on which they take effect;

e) the denunciations referred to in Article 30;

f) the reservations and withdrawals referred to in Articles 19, 20, 21, 24 and 25;

g) the declarations referred to in Articles 22, 23, 28 and 29.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the first day of June, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

APPENDIX B TABLE OF ABBREVIATIONS

BROMLEY	P. Bromley, Family Law (6th ed., 1981).
DICEY & MORRIS	A.V. Dicey & J.H.C. Morris, The Conflict of Laws (10th ed., 1980).
KELLY	J.M. Kelly, The Irish Constitution, (2nd ed., 1984).
LATEY	W. Latey, The Tide of Divorce (1980).
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