

WHAT GOD HAS UNITED MAN WILL NOW DIVIDE: DIVORCE REFERENDUM CHANGES LAW OF 60 YEARS

Laura A. Marshall*

I. INTRODUCTION

Until November 26, 1995, Ireland was one of only two countries in the Western world with an outright ban on divorce.¹ Its extreme position placed it distinctly alone in the European Union.² After winning its independence from Great Britain in 1922,³ Ireland enacted its own Constitution in 1937⁴ and included a pledge to guard the institution of marriage. In the second referendum on divorce of the last decade, Irish citizens voted by a slim margin to change the Constitution and lift the ban.⁵ The vote created new options for an estimated 75,000 Irish citizens who live in marital limbo, legally married to persons from whom they live completely separate lives.⁶ No divorces can be granted, however, until the referendum passes through a lengthy approval process in the Irish Parliament.⁷

The first step toward approval came when the national Parliament voted to accept the results of the referendum.⁸ Immediately, hardened opponents mounted an attack on the procedural validity of the referendum process, but the Supreme Court unanimously (5-0) approved the results, refusing to find

* J.D. 1997.

¹ Fawn Vrazo, *Irish Vote Today on Whether to Overturn Constitutional Ban*, ATL. J., Nov. 24, 1995, at 12A (Malta is the other country).

² *All Things Considered* (NPR broadcast), Nov. 23, 1995, (transcript #2040-2).

³ *Id.*

⁴ Vrazo, *supra* note 1, at 2.

⁵ Henry Bouvier, *Irish Vote Narrowly in Favor of Divorce*, AGENCE FR. PRESSE, Nov. 25, 1995.

⁶ Vrazo, *supra* note 1, at 2. "I think every single voter knows someone whose marriage is broken," said a Dublin family-law attorney, a leader of the "Right to Remarry" campaign. "It's no longer the abstract concept of importing a social virus from other Western countries. It's now a reality of Irish life."

⁷ Bouvier, *supra* note 5. "The amendment will not go before the Dail, the Irish Parliament before . . . February or March and there will not be a definitive vote before the end of 1996, possibly even before the beginning of 1997. As a result, the first divorce will not come into effect before 1998."

⁸ *Irish Parliament Approves Referendum Result*, IR. TIMES, Dec. 22, 1995.

fault with government advocacy and publicity of the issue before the 1995 vote.⁹ In late September, 1996, nearly a full year after the decisive referendum, the Dail, the lower house of Parliament, passed the Divorce Act.¹⁰ Passage in the Seanad was achieved on November 27, 1996.¹¹ Three months are required after passage for a law to come into effect, and the government designated February 27, 1997 as the first day of the Family Law Act's operation. Passage has not caused media and public attention to turn away from the Act. A test case for the Act's operation has been brought by a terminally ill man seeking a quick divorce under the new law.¹² Typical of the 75,000 citizens the amendment is supposed to relieve, he had a long estranged spouse and a desire to marry his companion of many years.¹³ However, another law requires that couples intending to marry first notify the state and then wait for three months to enter the sacrament.¹⁴ The plaintiff's application to the High Court was brought under Article 41.3.2 as amended.¹⁵ It met all four criteria set out in the constitutional amendment.¹⁶ A decree of dissolution of marriage was granted on January 17, 1997, a few days before the plaintiff's death.¹⁷

⁹ *Court Bid to Overturn Irish Pro-Divorce Vote Fails*, REUTER TEXTLINE, June 12, 1996, available in LEXIS, NWS Library, TXTNWS files.

¹⁰ Geraldine Kennedy, *Divorce Bill is Passed by Dail*, IR. TIMES, Sept. 26, 1996. Two amendments were raised, one calling for couples to complete counselling and mediation before a divorce can be granted, but both failed.

¹¹ Geraldine Kennedy, *First Divorce Case Since Referendum*, IR. TIMES, Jan. 15, 1997.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Christine Newman, *First Divorce since Passing of amendment granted by court*, IR. TIMES, Feb. 18, 1997.

¹⁶ The Fifteenth Amendment reads:

A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that-

- i at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to at least four years during the previous 5 years,
- ii there is no reasonable prospect of a reconciliation between the spouses,
- iii such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iv any further conditions prescribed by law are complied with.

¹⁷ McCullough, *Baseline set for Rules in New World of Divorce*, IR. TIMES, Feb. 3, 1997.

As more suits are brought and divorce enters the social fabric, Ireland must resolve several issues. Families formed under the divorce prohibition when couples, one or both tied to other spouses, lived together as if married. These entities, unrecognized by the state, were known in the vernacular as "second relationships." If couples obtain divorces and remarry, thousands of new legal unions will form. Opponents of the amendment feared that "first families," dependents from the first marriage, will suffer mistreatment in a society with step-families. Opponents also claimed that introduction of divorce into Irish society would "result in additional tax and social welfare bills of hundreds of millions of pounds."¹⁸ However, the Minister for Social Welfare placed estimated additional costs at only 1-2 million pounds per year.¹⁹ Supporters of the status quo feared creation of a "divorce culture," wherein partners would marry and part with little consideration for after-effects. Some pointed to the United States, where one-half of all marriages end in divorce.²⁰ Pro-divorce lobbyists pointed to the generally lower rate of divorce among Catholics and in Northern Ireland to predict that such attitude changes about matrimony would not occur.²¹

Changes in family law and societal attitudes will be dramatic but are not unanticipated. Since 1986, the government has introduced 18 pieces of liberalizing legislation preparing for a lift of the ban.²² Until the last decade, no laws addressed inheritance of property and division of child maintenance responsibilities, as marriage was presumed permanent.²³ When legal separation became possible eight years ago, methods were enacted for division of assets and settlement of child custody.²⁴

Legal divorce may have wholly different ramifications for many components of Irish society. Where once a person took for granted the permanent composition and status of his family unit, there is now a legally created uncertainty. No legal "step-families" currently exist in Ireland, but there is potential for 80,000 to form as the unhappily wed seek divorce in order to marry life partners. Almost as permanent as the home were societal

¹⁸ Joe Carroll, *Republic of Ireland: De Rossa says Bishops Insulting on Divorce*, IR. TIMES, Nov. 1, 1995.

¹⁹ *Id.*

²⁰ Vrazo, *supra* note 1.

²¹ *Id.*

²² Ray Moseley, *A Changing Ireland Votes on Divorce*, CHI. TRIB., Nov. 29, 1995.

²³ *All Things Considered*, (NPR broadcast), Nov. 24 1995, (transcript #1745-2).

²⁴ *Id.*

structures of politics and church. Political parties in place for decades were committed either to conservative or liberal causes.²⁵ Catholicism's influence, once a pillar of Irish society, is now increasingly questioned.²⁶ Finally, the amendment and the methods of its promotion and passage signals that Irish people now view themselves as a part of the European Community.²⁷ Ireland has joined the International Labour Organisation, the Council of Europe and the European Community.²⁸ EC directives helped force "legislators to confront and resolve some of the gender-related problems in Irish law."²⁹ With the passage of the Divorce Act, a distinctive feature of Irish society has disappeared. Once Irish activists and lawmakers fought to create a Constitution tailored to Irish society; now, by popular vote, the old scheme is dismantling so that Irish citizens may conduct lives as do citizens of other nations.

²⁵ Bouvier, *supra* note 5, at 2; a leading conservative party, Fianna Fail—even though it is traditionally opposed to divorce and close to the Catholic Church, and engineered passage of the 1937 Constitution—backed the divorce referendum. Political analysts speculate that a new party may form due to the controversy between party leaders and approximately half of its voters.

²⁶ Michael J. Farrell, *Irish Vote for Divorce Ends Era of Church's Social Dominance*, NAT'L CATHOLIC REP., Dec. 8, 1995, at 19. The Catholic Church attempted to show its muscle days before the vote. Pope John Paul II made a direct appeal to voters, saying, "Our Savior has shown how the nature of love that unites a man and a woman in marriage, and the good of children, calls for total fidelity on the part of the spouses and an unbreakable unity between them." A highly placed spokesman, Bishop Thomas Flynn of Achonry, indicated that divorced Catholics might be refused last rites and other important sacraments. *Id.*

²⁷ Yvonne Galligan *The Legislative Process*, in GENDER AND THE LAW IN IRELAND 36 (Alpha Connelly ed., 1993). "A combination of pressures from organisations concerned specifically with gender equity, . . . directives to government from the European Economic Community and a series of judicial decisions in the 1970s forced legislators to confront and resolve some of the gender-related problems in Irish law. . . . Changes in legislation were often forced on successive governments through legal decisions arising from cases brought by individual women and through having to comply with European directives."; *see supra* note 9. A vehement supporter of the anti-divorce movement expressed regret after defeat of his bid to overturn the referendum results that there was no "provision to allow him to take his case to a higher court in Europe." *Id.*

²⁸ Paul O'Higgins, *International Social Policy: Its Impact on Irish Legal Practice*, in LAW & SOCIAL POLICY: SOME CURRENT PROBLEMS IN IRISH LAW 10 (William Duncan ed. 1987).

²⁹ Galligan, *supra* note 27.

II. FACTUAL BACKGROUND

Since 1986, when the first referendum on divorce failed by a 2 to 1 margin,³⁰ four successive governments have worked to change the law through progressive legislation and blatant public campaigns in the media.³¹ The new domestic law is seen as another step in modernizing Ireland and in the movement towards a more pluralistic society.³² A coalition of political parties³³ supported the amendment, partially justifying their cooperation on the grounds that eventual reunion with Protestant Northern Ireland will be made smoother if it can be shown that religion is distanced from, rather than codified by, the Irish Constitution, law and policies.³⁴ Given the length and often violent history of the schism between the Republic and Northern Ireland, the change may not have much impact.³⁵ Prior social legislation has not made significant contributions toward rejoining the nations or easing tensions. If the two countries eventually rejoin, similarities in the respective legal systems should ease the process.³⁶

³⁰ *Ireland: People Vote Today*, STAR TRIBUNE, Nov. 24, 1995, at 4A.; Galligan, *supra* note 27, at 39. "The issue was initiated by the Fine Gael-Labour coalition government. . . . The campaign was waged in such a manner as to elicit very differing responses from women and men. . . . The successful mobilisation of a significant number of women to vote against the proposal assisted in procuring a majority in favour of retention of the ban on divorce."; another theory posited for the 1986 defeat is that "rural Irish residents feared divorce would threaten family landholdings." Vrazo, *supra* note 1.

³¹ Dick Walsh, *A Bizarre Campaign Ending on Knife Edge*, IR. TIMES, Nov. 25, 1995, at A12. Although opinion polls showed early strong support for lifting the ban, as time drew closer for the actual vote, poll results began to shift and indicate a leaning toward defeating change.; see RICHARD SINNOTT, *IRISH VOTERS DECIDE*, (1995). The shifts in opinion during the campaign were not unexpected because "there is . . . some evidence of the tendency for conservative instincts to assert themselves in referendums. Faced with the uncertainties of change, voters opt for the status quo." *Id.*

³² *Humane and Overdue: The Irish Should Vote for Divorce Reform Today*, GUARDIAN, Nov. 24, 1994, at 20.

³³ Ireland has six major political parties, all of which supported the ban. Denis Coghlan, *The Divorce Referendum*, IRISH TIMES, Nov. 27, 1995, at 8. These are: Fianna Fail, Labour, Fine Gael (the Prime Minister's party), Democratic Left, the Greens and the Progressive Democrats.

³⁴ *Id.*

³⁵ Suzanne Breen, *Nationalists Applaud Vote but Unionists Still Say No*, IR. TIMES, Nov. 27, 1995, at 13. Nationalists want the two nations to join again, while Unionists, protective of Protestant interests, desire a permanent split.

³⁶ Kader Asmal, *The Protection of Minorities in Ireland: The Role of National and International Law*, in *LAW & SOCIAL POLICY: SOME CURRENT PROBLEMS IN IRISH LAW* 107 (William Duncan ed. 1987).

Observers are correct in examining Irish political actions with a presumption of Catholic influence. In 1937, the Catholic church effectively institutionalized social policies and fundamental rights such as the permanence of marriage and protection of the family in the amended Irish Constitution.³⁷ Despite its influential role in the state and society, the Catholic Church has no official status or legal recognition in Ireland. However, the common law system and the Catholic doctrine that shape and control most Irish citizens' lives are said to be "inter-penetrated" and cooperative.³⁸ Canon law and common law were connected at several different levels throughout history.³⁹ During the reign of Protestant monarchs, statutes "rendered the exercise of papal authority illegal," but even before 1921 and the separation of the two countries, courts declared those edicts invalid.⁴⁰ During the nineteenth century, the Catholic legal code was seen as a system of private rules but was considered when a court found it useful because of its complexity and prestige. During the surge of Irish political activity in the early twentieth century, courts recognized Canon Law as a possible source of law for use by the courts in civil law cases.⁴¹

The Catholic Church was recognized as the "guardian of the faith professed by the great majority of the citizens" in the Constitution.⁴² But Article 44.2.1 guarantees the free practice of religion and Article 44.2.2 declares that the State has no official religion. A 1951 Supreme Court decision declared that the Church had no privileged status before the law.⁴³ Regardless of official pronouncement, it is crucial to realize that in a country where law originated from despised oppressors for centuries,⁴⁴ the individual citizen probably respected and followed his local priest more than

³⁷ Vrazo, *supra* note 1. The 1937 Constitution "pledges [the state] itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

³⁸ JEAN BLANCHARD, *THE CHURCH IN CONTEMPORARY IRELAND* 68 (1963).

³⁹ *Id.*

⁴⁰ *Id.* at 60.

⁴¹ *Id.* at 63. At that time, nullity and divorce cases were not often recorded by name. In *Mck. v. McK.*, [1936] 1R177, Canon Law supplied definitions of impotence and annulment.

⁴² IR. CONST. Preamble.

⁴³ *In re Tilson*, [1951] IR. 1.

⁴⁴ Farrell, *supra* note 26. "During Britain's ruthless occupation of the island, the notorious penal laws decreed, for example, that a priest caught offering Mass would be hanged at the earliest opportunity . . . The heroism of the clergy during those brutal years won for the church an enduring loyalty in Irish hearts."

policemen or distant parliamentarians. Today, 92 percent of the nation's population professes Catholicism.⁴⁵

III. LEGAL BACKGROUND

Ireland's shifting, often turbulent political history can be tracked by examining the state of its Constitution and Parliament. The Irish Parliament has existed since medieval times, but from 1580 to 1783, the nation could not legislate for itself, instead seeing its rule emanate from Westminster.⁴⁶ A brief period of home rule ended in 1800, when the Irish Parliament was joined with the British Parliament and allowed representation.⁴⁷ In 1921, Ireland finally gained the status of a commonwealth nation by treaty with the United Kingdom.⁴⁸ 1922 brought the Irish free state a new Constitution and saw the beginning of political detachment from England. Several factors, including the complex party system and the involvement of the Catholic Church, made change a difficult and controversial process. By 1932, after Eamon de Valera, a member of the conservative Fianna Fail (a large and powerful party comprised of those defeated in the Irish civil war),⁴⁹ had taken office as Prime Minister, the Constitution was a drastically altered document.⁵⁰ De Valera led a team of drafters in forming a new Constitution with the goal that "the Crown would not even have a symbolic role in internal affairs."⁵¹

The basis for the divorce ban was the 1937 Constitution.⁵² Article 41.3.1, covering "The Family & Education" provides: "The State pledges itself to guard with special care the institution of Marriage, on which the

⁴⁵ Richard Savill, *Irish Vote for Divorce Faces Legal Challenge*, DAILY TELEGRAPH, Nov. 27, 1995, at 1.

⁴⁶ JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 2 (2d ed. 1992).

⁴⁷ *Id.*

⁴⁸ *Id.* at 5, 6. The treaty "Articles of Agreement for a Treaty Between Great Britain and Ireland," set up the relationship between Ireland and the U.K. as expressly analogous to the relationship between the U.K. and Canada. *Id.* at 20. In 1948, Ireland left the Commonwealth by passing the Republic of Ireland Act.

⁴⁹ Casey, *supra* note 46, at 15.

⁵⁰ *Id.* at 15.

⁵¹ *Id.*

⁵² J.M. KELLY, FUNDAMENTAL RIGHTS IN IRISH LAW 199 (2d ed. 1967). The first Constitution, in 1922, did not prohibit divorce. Couples could, as under earlier English controlled legislative bodies, petition the Parliament for a bill of dissolution. Perhaps as an indicator of coming political change, no bills were granted between 1922 and 1937.

family is founded, and to protect it against attack." A Supreme Court justice expressed the view that Article 41 was "the law as it existed prior to the Constitution."⁵³ A closely related section is 41.1.1 which provides: "The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and inprescribable rights, antecedent and superior to all positive law. . . . 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 State." Article 41.3.2 contained the ban: "No law shall be enacted providing for the grant of dissolution of marriage." Irish case law affirmed the Constitution's concept of family values. Marriage, before the recent vote, was "derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique . . . life-long relationship."⁵⁴ More than a moral obligation, marriage was "a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole."⁵⁵

The Constitution provided the Republic with a tripartite government based on separation of powers principles.⁵⁶ The modern Irish Parliament is called the *Oireachtas* in the native tongue.⁵⁷ The current President is Mary Robinson, one of the European Community's most progressive and outspoken leaders.⁵⁸ Executive functions including implementing policies and proposing legislation are performed by the An Taoiseach and ministers under him.⁵⁹ Two houses exist in a bicameral system very similar to England's and our own.⁶⁰ The upper house, roughly analogous to our Senate, is the *Seanad Eireann*, while the lower house is the *Dail Eireann*. Bills usually originate in the *Dail*, but can be proposed by any member of any House. After debate and possible amendment in both Houses, passage may be announced by resolution.⁶¹

⁵³ *Id.*

⁵⁴ *Murray v. Ireland*, [1985] I.R. 532, 535.

⁵⁵ *N. v. K.*, [1985] I.R. 733, 754.

⁵⁶ RAYMOND BYRNE & J. PAUL MCCUTCHEON, *THE IRISH LEGAL SYSTEM* 16 (1989).

⁵⁷ IR. CONST. Art. 15.1.1.

⁵⁸ Savill, *supra* note 45, at 1.; *see supra* note 56, at 18. The President is part of the *Oireachtas* and not an executive figure, although she does sign legislation and serves as the head of state and commander-in-chief of the armed forces.

⁵⁹ BYRNE & MCCUTCHEON, *supra* note 56, at 17.

⁶⁰ *Id.*

⁶¹ *Id.* at 191.

Parliament controlled the dissolution of marriage until 1857, when it passed the jurisdiction to a special court for divorce and matrimonial causes.⁶² In 1870, the power of the ecclesiastical courts, formerly the avenue for obtaining a divorce under the auspices of the Church, was transferred to a national court for matrimonial causes⁶³ by the Matrimonial Causes and Marriage Law Amendment Act of 1870.⁶⁴ The court began to exercise the authority of the ecclesiastical jurisdiction by granting judicial separations, a remedy reserved for instances of adultery, desertion and cruelty.⁶⁵ Some limited legal avenues were open to Irish citizens trapped in hopelessly unhappy marriages. Couples could travel to the courts of other countries such as England or America to obtain a divorce decree,⁶⁶ but an Irish court's subsequent recognition of the foreign decree was required in order for either party to remarry in Ireland. The decree's validity depended on a number of factors, often too burdensome for the average couple to satisfy. Prior to a 1986 reform,⁶⁷ for example, both spouses had to be domiciled in the country granting the divorce. Picking up and moving house and home to a foreign country was simply not a financial possibility for most families, and was not utilized very often.

A more common technique was nullity, in which couples petitioned the court to have their marriage declared non-existent.⁶⁸ If the nullity was recognized, the parties were free to remarry. However, high burdens of proof were required to obtain a nullity because of the presumption in Irish law that marriage, whether ceremonial or common-law, is valid⁶⁹ and transcends contractual status.⁷⁰

Nullity arose as a state practice fulfilling the same functions as Catholic annulments, in which the fact of a marriage's existence is erased under the Code of Canon Law. Irish ecclesiastical courts granted nullities until 1870

⁶² Blanchard, *supra* note 38, at 60.

⁶³ *Id.* at 61.

⁶⁴ KELLY, *supra* note 52, at 196.

⁶⁵ *Id.* at 196, 199. The name often used for judicial separation in the cases is "divorce a mensa et toro." The Constitution of 1937 prohibited the "divorce a vinculo matrimonii." (meaning dissolution of marriage).

⁶⁶ PAUL A. O'CONNOR, KEY ISSUES IN IRISH FAMILY LAW 1 (1988).

⁶⁷ J.M. KELLY, THE IRISH CONSTITUTION 1018 n.129 (3d ed. 1995). The Domicile and Recognition of Foreign Divorces Act (1986), Sec 3(1) provides: "... a divorce shall be recognised if granted in a country where either spouse is domiciled."; Duncan, *The future of Divorce Recognition in Ireland*, 2 D.U.L.J. 2 (1971).

⁶⁸ O'CONNOR *supra* note 66, at 3.

⁶⁹ *Id.*

⁷⁰ *Id.* at 4. Indeed, a commercial contract could be broken more easily.

when the power was transferred to the Court for Matrimonial Causes and Matters. Several decisions explicitly name the Code of Canon Law as foreign law in Irish courts,⁷¹ but Irish Catholic judges and legislators looked to the Code as an important source of creating binding agreements between parties.⁷² The underlying facts of nullity cases also required examination of the Code, as many couples appealed first to the "higher" authority of the Church for an annulment and introduced that decree as evidence in the court proceeding.⁷³

Because of restrictive anti-divorce language in Article 41 and the accompanying firm line of precedent, legislators did not modernize the law of foreign divorce and nullity until the last decade. Judges occasionally responded in their decisions to some societal and medical realities by allowing lessenings of the burden of proof required to impugn a marriage. Interpretations of duress, impotence, and illness, the traditional grounds for requesting nullity, were also expanded,⁷⁴ although not so much as to become automatic grounds for nullification. This area of jurisprudence is important to consider because it developed as a means of rectifying the most severely damaged marital situations. The arguments posed in nullification cases will reappear in petitions for divorce. If the new divorce law is applied restrictively, couples may still turn to nullification⁷⁵ and foreign divorce.

IV. LEGAL ANALYSIS

Constitutional protection of marriage and its idealization in Irish society extended to family institutions in general.⁷⁶ Articles 41 and 42 of the Constitution grant "inalienable and imprescriptible rights" to the family.

⁷¹ O'Callaghan v. Sullivan, 1 I.R. 90 (1925).

⁷² BLANCHARD, *supra* note 32, at 68. In *in re Tilson*, the parties had agreed to be legally bound by canon law, and even though it was foreign law, the parties were required to adhere to their choice.

⁷³ O'CONNOR, *supra* note 66, at 49.

⁷⁴ *Id.* at 5, 23, 29. Nineteenth century cases contain many examples of circumstances modern society would consider kidnapping, forced marriage, and criminal insanity, but were found insufficient pleas for supporting a nullity action.

⁷⁵ *Id.* at 55.

⁷⁶ *But see* Farrell, *supra* note 26 for evidence of the disparity between ideals and reality. "In the last ten years, the number of Irish babies born outside of marriage has almost trebled and now accounts for a fifth of live births."

Responding to the changing structure of Irish family life, the government has acted aggressively to further social liberalization in the last ten years by passing 18 pieces of legislation aimed at modernizing legal concepts of the family. Even before the government was spurred to action by its sound defeat in the 1986 divorce referendum, developments in the early 1970s indicated a loosening of the strict moral code and the traditional view of women and family roles.⁷⁷ The women's movement became highly visible in the early 1970s, forcing discussion of "sexually-related issues."⁷⁸ Rather than continue the nineteenth century imposition of religious beliefs on all citizens, Irish lawmakers have started to recognize that family law should "accommodate and reflect changing patterns of family life and increasingly diverse value systems."⁷⁹ In 1979, contraceptive sales to married couples were legalized; as of 1992 single persons 17 and over can buy condoms. In addition, Rape and domestic violence legislation passed in the 1980s, and an abortion ban was reaffirmed and strengthened during that decade when a 2-1 majority passed a referendum recognizing the constitutional right to life of the unborn; however, a 1992 referendum revealed that two-thirds of voters favored laws increasing access to information about "pregnancy options" and allowing travel abroad for abortions.⁸⁰ Women also gained importance in government during the 1980s, with the formation of several commissions at the administrative and legislative levels.⁸¹ These changes, along with inclusion in the Constitution of a right to privacy, probably accelerated the expansion of individual rights and paved the way for the divorce amendment.⁸²

Laws in place since the nineteenth century are changing to fit twentieth century Ireland and address serious problems ignored by past society.

⁷⁷ Denis Coghlan, *Yes Vote Indicates a Gradual Move to Pluralism*, IR. TIMES, Nov. 27, 1995. "Having processed legislation dealing with contraception, abortion, and homosexuality, the final piece of the agenda [was] a right to remarry."; O'Connor, *supra* note 66, at 117. A law forbidding the importation of any contraceptive device was declared unconstitutional in 1973.

⁷⁸ Galligan, *supra* note 27, at 36.

⁷⁹ William Duncan, *Family Law and Social Policy*, in LAW & SOCIAL POLICY: SOME CURRENT PROBLEMS IN IRISH LAW 126 (William Duncan ed. 1987).

⁸⁰ *Id.*

⁸¹ Galligan, *supra* note 27, at 40. "The Joint Oireachtas Committee on Women's rights, first established in 1983, continued to be re-instated after each election. . . . The Department of Women's Affairs and Family Law Reform was established as a junior ministry . . . after the November 1982 election. . . ." The Second Commission on the Status of Women presented its report to the legislature in January 1993.

⁸² IR. CONST. Article 40.3.1 guarantees a right to marital privacy.

Illegitimate children and deserted wives in need of support from spouses or the social welfare system had redress for decades under the Maintenance in Case of Desertion Act of 1886.⁸³ A 1987 statute, passed in anticipation of a divorce amendment, gender-equalized treatment of deserted spouses and removed the legitimacy of a child as a factor in the support assessment.⁸⁴ When divorces create step-children, the law may have to change again to accommodate their needs rights in areas such as inheritance, support and tax status.

Matrimonial law and custom also impacted the development of property rights, and it is unclear what patterns of ownership and partition will emerge once divorce settlements become more commonplace. Marital property rights developed in a unique manner in Ireland. At common-law, wives could own property, but husbands automatically enjoyed control rights and thus had the equivalent of ownership. In the late nineteenth century, women's rights began to emerge as a societal issue,⁸⁵ and by the mid-twentieth century, a separate property system was established.⁸⁶ At first glance, a system in which "parties to a marriage stand in the same relationship to property rights as if they were unmarried" seems progressive. But coupled with the Irish tendency toward keeping women at home and married, it results in women's nearly total financial dependence on men and on the permanence of one marital relationship. Some courts have awarded wives equitable interest through a resulting trust in homes or other marital property when they made financial contributions, but courts have been less willing to grant any equitable title when the consideration was domestic services.⁸⁷

Political analysts predicted that Prime Minister John Bruton would appease the anti-divorce lobby by changing the Constitution as little as possible in removing the ban.⁸⁸ The close outcome⁸⁹ of the vote—the margin was only 9,124—required that issues be handled carefully in the legislature and the courts.⁹⁰ The government may also continue to contend with non-Irish

⁸³ O'CONNOR, *supra* note 66, at 118-19; Horgan, *The Financial Support of Illegitimate Children* 11 IR. JUR. 59 (1976).

⁸⁴ Status of Children Act (1987).

⁸⁵ Married Women's Property Act (1882).

⁸⁶ Married Women's Status Act (1957).

⁸⁷ O'CONNOR, *supra* note 66, at 180-81.

⁸⁸ Bouvier, *supra* note 7.

⁸⁹ *Id.* 50.23 percent voted for divorce, and 49.77 against.

⁹⁰ Ray Moseley, *A Changing Ireland Votes on Divorce*, CHICAGO TRIBUNE, Nov. 24, 1995. The conservative Fianna Fail party leader could become the next Prime Minister.

forces—it is suspected that American fundamentalists partially funded the anti-divorce campaign.⁹¹ Both the sensitivity of the issues and the overload of parliamentary business caused a lengthy period to elapse before passage of the bill in November, 1996.⁹²

The Irish Constitution is not a static document, having undergone frequent transformations since its inception in 1922. But some questioned whether last year's radical amendment as approved by the public could pass the legislature. Article 15, section 4 provides that: "The Oireachtas shall not enact any law which is in any way repugnant to the Constitution or any provision thereof."⁹³ Taken literally, Article 15 means the 1937 Constitution is set in stone. However, change is possible because the Oireachtas holds the legislative power,⁹⁴ and any act passed by it has a presumption of constitutionality.⁹⁵ The Constitution has been amended 15 times, under the power of Article 28.3.3,⁹⁶ which frees the Oireachtas from the restrictions of Article 15. Thus, the fundamental right of permanent marriage can be altered.

Article 34 allows the High and Supreme Courts to declare laws invalid if in conflict with the Constitution.⁹⁷ A High Court⁹⁸ judge recently dismissed a constitutional attack on the Judicial Separation Act (JSA).⁹⁹ *T.F.*

⁹¹ Boyd Tonkin, *Dublin's Splitting Headache*, NEW STATESMAN AND SOC., Dec. 1, 1995, at 22.

⁹² Breen, *supra* note 35, at 8.

⁹³ CASEY, *supra* note 44, at 85.

⁹⁴ IR. CONST., Article 15.2.1 ("[T]he sole and exclusive powers of making laws for the State is hereby vested in the Oireachtas.").

⁹⁵ BYRNE & McCUTCHEON, *supra* note 56. *East Donegal Cooperative Livestock Mart Ltd. v. Attorney General* 1970 I.R. 317.

⁹⁶ CASEY, *supra* note 46, at 149. "Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war and armed rebellion."; *see also id.* at 150. Subsequent decisions made it clear that the legislative body has *carte blanche* to rewrite the Constitution.

⁹⁷ Tuohy v. Courtney, 2 ILRM 503 at 514 (Ir. S.C. 1994). "In a challenge to the constitutional validity of any statutes in the enactment of which the Oireachtas has been engaged in . . . a balancing function, the role of the Courts is not to impose their view of the current or desirable balance in substitution for the view of the legislature as displayed in their legislation, but rather to determine from an objective stance whether the balance . . . is so contrary to reason and fairness as to constitute an unjust attack on some person's constitutional rights. . . ."

⁹⁸ Ireland's High Court considered challenges to the referendum. The Supreme Court is the highest judicial body.

⁹⁹ Judicial Separation and Family Law Reform Act (Sec. 6) (1989).

v. Ireland and the Attorney General,¹⁰⁰ indicated shifting judicial attitudes toward the liberal legislation package and impending divorce reform and limited the interpretation of Article 41. A jilted husband challenged the constitutional validity of the sections of the JSA which allow a court to decree a judicial separation and if necessary, divest the non-dependent spouse of residence rights in the home. On appeal, the plaintiff relied on the individual right given him in Article 41.3 to have the state protect his marriage from dissolution and asserted that the law improperly took away his rights in property.¹⁰¹ The court held that Article 43.1, construed in light of recent developments in family law, did not allow the rights of an individual in his marriage to supersede the rights of all people to have harmonious society. The court upheld the JSA, saying that the decree only affected the legal duty between parties to continue to co-habit,¹⁰² and did not attack the bond of marriage or preclude the possibility of reconciliation.¹⁰³ As to the property arguments, the court decided that providing for dependents superseded the interest a spouse has in residing in his home, and that awarding a right of residence does not unjustly attack property rights.¹⁰⁴ In a further holding that was not required by the facts of the case, the court interpreted Article 41 as protecting the common good and not solely concerned with marriage itself or with the spouses in a marriage.¹⁰⁵

¹⁰⁰ *TF v. Ireland and the Attorney General et al.*, Q ILRM 321 (July 14, 1995).

¹⁰¹ *Id.* at 2, 3, 6. The plaintiff specifically cited five sections of the act as violating his rights in marriage and property contexts. Section 2(1) provides that: "an application by a spouse for a decree of judicial separation from the other spouse may be made to the court having jurisdiction to hear and determine proceedings . . . on one or more of grounds [e-f] . . ." Section (f) requires: "that the marriage has broken down to the extent that the Court is satisfied in all circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application." Section 16(a) provides: "On granting a decree of judicial separation, or at any time thereafter, the court may, on application to it by either spouse, make . . . an order conferring on one spouse for life or for such other period . . . as the Court may specify the right to occupy the family home to the exclusion of the other spouse."

¹⁰² *N. v. K.*, [1985] I.R. 733. Marriage in Ireland does create a duty for a couple to cohabit, because that is an essential element of marriage.

¹⁰³ *TF v. Ireland*, *supra* note 100, at 412. The court relied on both the Judicial Separation Act and the Family Law Act of 1988 to assert that the law has a "clear and proper recognition of the fact that neither the institution of marriage nor the rights of either party . . . could be invoked in modern times . . . so as to compel one party to cohabit with another."

¹⁰⁴ *TF v. Ireland*, *supra* note 100.

¹⁰⁵ *N v. K.*, *supra* note 102, at 20.

When it became apparent that Ireland would soon vote on divorce, the opposition forces quickly began to attack the government, which had announced as early as April 1994 that it intended to spend public monies on the referendum. Many citizens, regardless of their position towards divorce reform, felt the government should not influence debates and voting with public monies. The Supreme Court handed down a decision on November 17, 1995 that the government acted outside its authority in appropriating public funds for use in its campaign.¹⁰⁶

The 1996 amendment does not create divorce as we know it in the United States. Perhaps to allay fears that people will begin to divorce as often as American and British couples, husband and wife must prove that they have been separated at least four years of the last five years and prove to a judge that there is no possibility of reconciliation.¹⁰⁷ This burden is greater on spouses than the time limits imposed in the JSA.¹⁰⁸ Also, a dependent spouse and children will have to be provided for by a clear, workable plan demonstrated to court.¹⁰⁹ Cost incentives are also built into the process, increasing assurances that only sincere divorce applicants will pursue the new judicial remedy.

However, the interests of low income levels are considered to some extent. If the couple agrees on child custody and property divisions before coming to court, the cost of approving the arrangements is low.¹¹⁰ Any such problems requiring court involvement to reach a solution will raise the cost to 3000 Irish pounds and can go higher if a lengthy court battle ensues. Other estimates place the cost much higher, at 9000 pounds per spouse in a contested proceeding.¹¹¹ Still, these costs will probably not reach the price of foreign divorces, making divorce more accessible to the average Irish citizen.¹¹²

¹⁰⁶ *In re Bunreacht Na Heireann*; Patricia McKenna v. An Tanaiste et al., 1 I.L.R.M. 81 (Ir. S.C. 1995) (Bunreacht Na Heireann is the name of the Irish Constitution).

¹⁰⁷ Bouvier, *supra* note 7. The actual burden a divorce plaintiff must meet is "no reasonable chance" of reconciliation.

¹⁰⁸ *See supra* note 93, at Sec. 2.

¹⁰⁹ *All Things Considered*, *supra* note 2.

¹¹⁰ Bouvier *supra* note 7.

¹¹¹ Eugene Donohoe, *The Cost of Divorce*, IRISH TIMES, June 19, 1996. The author notes that in England, simple divorces may cost as little as 100 pounds total.

¹¹² One probable pitfall is the limited access Irish citizens have to civil courts. *See* Gerry Whyte, *Ideology and Access to the Courts*, in LAW AND LIBERTY IN IRELAND, 150 (Anthony Whelan ed., 1993). "There is an implied right of access to the courts, but there is no

Many safeguards are built into the Divorce Act, designed to make applicants aware of alternatives to divorce proceedings before a case goes forward. For example, discussions of mediation with a solicitor are required and spouses can attempt to change the divorce proceeding to one for a judicial separation or annulment. Courts are granted wide discretion to make orders for financial compensation between spouses, and, if necessary, to transfer property between parties.¹¹³

V. CONCLUSION

The protective nature of the legal system toward the family and traditional roles may have eroded somewhat, but the old attitudes are still in place and will probably cause some courts and administrative agencies to provide disincentives to divorce. Frequent judicial challenges to the new law are expected. Anti-divorce campaigners, declaring their intentions to continue legal challenges to the referendum and to infiltrate the voting processes, have threatened to contest the issue for the next 50 years.¹¹⁴ Once the system can operate more smoothly, the nation will discover that more than 80,000 citizens favored liberalization of the Irish divorce law. The government may be required to put more money toward dissolving families than it now spends to keep them together, as the liberal compensation provisions are manipulated by parties and their lawyers. Coming decades will reveal the changes the new divorce law brings to Irish families.

recognition of any duty by the State to assist an individual in overcoming an obstacle, for which the State bears no immediate responsibility.”

¹¹³ *Id.*

¹¹⁴ Geraldine Kennedy, *No-Divorce Campaign to Seek New Referendum*, IRISH TIMES, June 14, 1996.