
Ideas and beliefs die out, but only when whatever they held of truth and usefulness to society have been corrupted or diminished, and they will do so even in a theocracy.

-Marcel Proust (1903)

I. INTRODUCTION

On November 24, 1995, the citizens of Éire (the Republic of Ireland) voted in favor of legislation allowing divorce for the first time since the country gained independence from Great Britain in 1922. Divorce had been illegal not through any legislative act, but through an explicit ban in the Irish Constitution itself, necessitating the country-wide referendum. The margin of victory was a razor-thin 0.6%, and the social ramifications of the referendum and the provisions of its enabling legislation are still hotly debated. The November referendum’s success was the culmination of a decades-long series of attempts to liberalize the restrictive family law of the country, and the victory for the proponents of divorce, by however slim a margin, is a significant indication of the extent to which the social role of the Roman Catholic Church is being redefined and diminished in Ireland.

An examination of the reasons for the constitutional establishment of the prohibition of divorce, the history of the struggle for pro-divorce legislation, the trends in family law beginning in the 1970s, and the circumstances surrounding the November 1995 referendum and resulting legislation will reveal an Ireland that is being transformed socially through a deliberate long-term liberalization of fam-

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*Céad Míle Fáilte is Irish for “one hundred thousand welcomes,” a common expression of the generous hospitality of the Irish. The author gratefully acknowledges the encouragement, faith, and assistance of Amy Chua, Theresa Newman, Janet Sinder, Amanda McMillian, and David James. This note is lovingly dedicated to the author's parents, Ernest Grogan Brown and Patricia Mahoney Brown.
family law. To place the issue of divorce in Ireland in its proper context, it is necessary to explore the existence of a distinctively “Irish identity,” the extent to which this identity is properly identified with the teachings of the Roman Catholic Church, and how Ireland’s conception of itself as a distinct cultural entity plays out politically. A discussion of the provisional 1922 Constitution of the newly-formed Irish Free State and its handling of divorce issues sets the stage for an analysis of the 1937 Constitution and its foundation in Catholic mores.

The legal status of those couples desiring divorce after 1937 is discussed, from the status quo before the failed 1986 Referendum to the successful 1995 Referendum and the provisions of its enabling legislation. The Irish government is shown to have used both direct and indirect means to shepherd divorce legislation into being; its direct efforts to promote the two referenda were complemented by the passage of many pieces of social legislation which not only fostered a climate within which voting for divorce made sense, but also actually accomplished many of the social goals sought by the divorce proponents. The many political and social motives behind the push for divorce are discussed, from the purely personal to the international; as are the varying legal strategies used by couples seeking to divorce, such as appealing to the European Court of Human Rights and other instrumentalities of the European Union (EU). Finally, some thoughts about the implications of Ireland’s liberalizing family law are discussed; arguably, the new availability of divorce in the Republic of Ireland will mollify those who found Ireland’s family law to be a stumbling block to reunification talks between the Republic and Northern Ireland, and may serve to move the debate forward.

II. THE IRISH IDENTITY

Entire forests have been pulped in the process of creating publications which pursue a definition of Irish identity. Scholars, critics, and crafters of policy have been quick to put pen to paper in the hopes of codifying, once and for all, what is entailed in being Irish and how Irish identity is made manifest in the lives of ordinary Irish citizens. Certainly one of the traits of “Irish-ness” is the strong embrace with which the people of Ireland and the Roman Catholic Church have held each other.

Historically, the articulation of an Irish identity as a specifically Catholic identity was most prominently promulgated by Eamon de
De Valera held up an image of Catholicism that many Irish men and women had long held—that the spiritually pure life of the small, rural, and self-sufficient Catholic farmer was the life of a true Irishman. De Valera summarized his vision:

That Ireland that we dreamed of would be . . . a land whose countryside would be bright with cosy homesteads, whose fields and villages would be joyous with the sounds of industry, with the romping of sturdy children, the contests of athletic youths, the laughter of comely maidens, whose firesides would be the forums for the wisdom of serene old age.

Catholicism had become for the colonially oppressed Irish a force with mythic impact and had created in the Irish mind a “Holy Ireland”; after independence from England, the priests and laymen who ran the Catholic Church turned their energies, formerly dispensed on the fight for social and religious rights for Catholics in a Protestant world, inward to the delineation and monitoring of proper social conduct, as norms for living in the new state were being formed.

Although it may seem for many both in and outside Ireland that the laws on divorce have, like Catholicism, always been a part of the country’s fabric, it was not until the Constitution of 1937 was written under de Valera’s supervision that the absolute prohibition on divorce was established in law. Until the establishment of the Irish Free State in 1922 divorce was still a legal option for those wealthy enough to petition Westminster. However, both Protestants and Catholics, North and South, traditionally abhorred divorce. In the

1. Eamon de Valera, an American born of an Irish mother, was the father of modern Ireland. He almost singlehandedly wrote the Irish Constitution of 1937, founded an Irish newspaper empire, and established the nation’s largest political party, Fianna Fail. See Tim P. Coogan, Eamon De Valera: The Man Who Was Ireland 1 (1993).


4. Prior to the Divorce and Matrimonial Causes Act of 1857, Parliament, not the courts, heard divorce petitions, which were costly undertakings; in practice, only the wealthy achieved termination of their marriages through the passage of private bills in Parliament. Between 1700 and 1857, only 325 divorces were granted to Irish citizens. The Act of 1857, ushering in an era of middle-class divorces, did not apply to Ireland, whose citizens were still constrained to seek divorce through a private act in Westminster and incur costs that in 1910 exceeded £500. Between 1922 and 1937, divorce was technically legal in the Irish Free State, but practically prohibited, because the new Parliament of the Irish Free State could not agree on revising the law that had been in force prior to 1922. See David Fitzpatrick, Divorce and Separation in Modern Irish History, 114 Past & Present 172, 172-75 (1987).

5. See id. at 186. In fact, during the debates regarding divorce law reform in 1857, “few
nineteenth century, the Royal Commission on Divorce heard testimony that “even Belfast Presbyterians showed ‘no desire whatever’ for English-style divorce.”

For de Valera the 1937 Constitution was a means through which a truly Roman Catholic Ireland could be realized. For him the constitution of any state was to be the conduit through which the socio-religious mores of the country were channeled. Rather than a document primarily establishing rules and guidelines for the government, the Irish Constitution was to be a document outlining rules by which the people of Ireland were to organize their lives. De Valera remarked on the inseparability of a country’s system of laws from its national mores in a pair of radio broadcasts. In the first, on St. Patrick’s day, 1935, de Valera stated that “[s]ince the coming of St. Patrick . . . Ireland has been a Christian and a Catholic nation . . . . She remains a Catholic nation . . . .” Two years later, when endorsing the new Constitution on the air, de Valera noted that “[t]here is a stage in the life of every community in which its customs as well as its philosophy of life pass into laws. A system of law which is divorced from the convictions, the beliefs and spiritual character of a people is in no sense a national code.” In light of the increasingly secular nature of contemporary Irish society, de Valera might, if asked today, have to admit that elements of the constitutional system that he helped establish in Ireland had indeed become “divorced from the convictions, the beliefs and spiritual character” of the Irish and had consequently lost some of its value as Ireland’s “national code.” Ironically, those Catholic values that were so important to the national vision of de Valera are the very views of Ireland that have weakened in recent years and that in November 1995 received a significant blow in the referendum on divorce.

Despite the many social, cultural, and religious transformations in Ireland since Eamon de Valera’s day, many of the cultural and social mainstays of his vision endure and continue to mark Irish cul-

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6. *Id.* at 186.
8. *See id.* at 91.
11. *See BEALE, supra* note 2, at 17.
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ture. The former President of Ireland, Mary Robinson, realizes that in general it is "extremely difficult to reach a satisfactory definition of culture." But, she continues, there are in particular "certain fundamental characteristics which form part of the cultural inheritance of all Irish men and women. Certain habits of mind and means of expression have, over the centuries, generated a distinctively Irish vision of the world." President Robinson admits that even these habits must continue to change, in order to represent contemporary social circumstance and opinion:

One notices throughout Ireland a keen preoccupation with the Irish identity, with what it means to be Irish. This has its roots in our turbulent past and in the continuing division of the present day. It also stems, however, from the rapid social and economic changes experienced by most Western countries in recent times and from the readjustments dictated by our deepening involvement with our European neighbors. There is a growing recognition that we are living in a world whose contours are changing with breath-taking speed and in which the safe certainties of the past are constantly being challenged. Our identity must be constantly rediscovered, or re-created, if we are to come to terms with these changing circumstances.

Implicit in President Robinson's argument is the recognition that Ireland still battles with its relationship with the teachings of the Catholic Church, arguably still the strongest single influence on Ireland's cultural identity. For Ireland to move forward in its relationship with Northern Ireland and to accept comprehensively the responsibilities and benefits of membership in the European Union, the nation has had to reexamine the extent to which its political and legal structures are dependent on a religiously informed vision of the world.

Recognizing this need for change is one matter; a different and altogether more difficult matter is altering the legal and constitutional system to reflect such change. Vestiges of de Valera's nostalgic view of Ireland certainly still mark the Irish identity, as does the fact that 95% of the Irish are baptized Catholics. Yet since the 1950s, many Irish have become increasingly uncomfortable with the

12. See COOGAN, supra note 1, at 693-704.
14. Id. at 5.
15. Id.
extent to which the law and the Church reach into the realm of personal choice, particularly as it relates to abortion and divorce. Moreover, the Church's power has waned considerably during the last several years as a result of general secularization and especially as a result of recent sex scandals involving Catholic clergy.

Over the decades since adopting the 1937 Constitution, the Irish have struggled to balance religious conviction and personal autonomy. The 1995 Divorce Referendum sought a legal remedy to address the consequences of a distressing phenomenon that the Irish had observed for many decades, i.e., that marriages in Ireland were no more secure from breakdown—permanent abandonment, de facto separation, and the formation of other relationships—than were marriages in any other modern Western society. In 1985, it was estimated that seventy thousand married persons in Ireland were living in broken marriages, as the result of desertion and other forms of non-judicial separation. From 1986 to 1991, marital-breakdown figures showed an increase of 48%. In 1991 alone, thirty five hundred individuals were added to the national tally of broken marriages, according to census data.

III. THE 1922 CONSTITUTION OF THE IRISH FREE STATE

The Bunreacht na hÉireann, or the Constitution of Éire (Ireland), put in place in 1937, contained several crucial provisions affecting the status of women and their marital station. This document departed significantly from the preliminary Constitution of 1922, which did not mention divorce. In order to understand the significant extent to which the 1937 Constitution parted with Ireland's social and legal past, one must first examine the changes wrought to the law during the years between 1922 and 1937.

21. See id. The population of Ireland stands currently at approximately 3.5 million. Hence an annual increase of broken marriages by 3,500 cases a year affects a significant portion of Irish marriages.
22. See generally IR. CONST. art. 41 (1937), reprinted in note 50 infra (regarding the state's responsibility to uphold the sanctity of the family).
With the Constitution of 1922, the jurisdiction over divorce matters was transferred, as were all other legal matters, from Westminster to the Irish Free State. Heated debates quickly arose in both the Dáil\(^2\) and the Seanad\(^2\) over which normative standards should be applied in determining divorce law in Ireland.\(^2\) During the years between the two Constitutions, bills were introduced and argued that bolstered the anti-divorce position, which served to alienate the minority of Irish who adhered to the Church of Ireland (Anglican).\(^2\) As argued most vehemently by Senator William Butler Yeats during the debates over the 1925 Private Members Bill that sought to strengthen anti-divorce legislation:

I think it tragic that within three years of this country gaining its independence we should be discussing a measure which a minority of this nation considers to be grossly oppressive. I am proud to consider myself a typical man of that minority. We against whom you have done this thing are no petty people. We are one of the great stocks of Europe. We are the people of Burke; we are the people of Grattan; we are the people of Swift, the people of Emmet, the people of Parnell. We have created the most modern literature of this country. We have created the best of its political intelligence.\(^2\)

In fact, prior to the passage of any specific legislation, citizens of Ireland were in effect denied recourse to divorce as soon as the Irish Free State assumed jurisdiction over family law issues. Because divorce was available in Ireland under British rule, Archbishop Byrne, in concluding that divorce had no place in Ireland, felt safe in stating:

Hitherto, in obedience to the divine law, no divorce with right to remarry has even been granted in this country [i.e., the newly

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24. The Dáil (pronounced Doyle) is the lower house of the Irish Parliament, the Oireachtas.
25. The Seanad is the upper house of the Oireachtas.
27. The 1911 census revealed that 90% of Irish were adherents to the Roman Catholic faith. This figure continued to rise in the succeeding years. See Ronan Fanning, *Independent Ireland* 53 (1983).
28. William Butler Yeats, *quoted in* O'Brien, *supra* note 20, at 9. Divorce, as Yeats predicted, has become one of the principal stumbling blocks of North/South negotiations over the years. Protestants in Northern Ireland would never accept accession to the Republic without some insurance that divorce would continue to be an option for them as it is in the North.

Although it may be easy to accept Yeats’ contention that his views were representative of the sentiments of all Anglo-Irish, it must be mentioned that there was a significant number of Anglo-Irish who felt that Yeats’ bellicose outpourings did not represent a typical Anglo-Irishman. “The general response among articulate Protestants was that Willie Yeats had made an exhibition of himself again, his extravagant words having tended to discredit the case for divorce by overwhelming the cagier strategies adopted by ‘plainer men.’” Fitzpatrick, *supra* note 4, at 193.
formed Irish Free State]. The bishops of Ireland have to say that it would be altogether unworthy of an Irish legislative body to sanction concession of such divorce, no matter who the petitioners may be.29

By 1925, the government expressly disregarded any divorce bills that came before the Oireachtas.30 In fact, the government considered passing legislation stating explicitly that Private Bills for divorce would not be entertained; however, fearing that such a blatant move in an era in which divorce was still technically a legal option would prove too provocative, the Dáil opted for a more surreptitious approach and made it known that they would suppress any Private Divorce Bills that were proposed, a tactic of questionable legality.31 W.T. Cosgrave, then Taoiseach,32 spoke for the general sentiments of the members of the Dáil when he stated:

The majority of people of this country regard the bond of marriage as a sacramental bond which is incapable of being dissolved. I personally hold this view. I consider that the whole fabric of social organisation is based upon the sanctity of the marriage bond and anything that tends to weaken the binding efficacy of that bond to that extent strikes at the roots of our social life...33

Needless to say, "no other petitioners had the temerity to wander into procedural no man's land during the last twelve years of legal divorce in the twenty-six counties" of Ireland.34

The years between the Constitution of 1922, a constitution which attempted to act as a compromise constitution between the more radical Irish independence movement and those loyal to the British Crown,35 and the 1937 Constitution of Ireland were thus marked by an attempt by the Irish government to whittle away any remaining traces of British rule and influence.36 By 1937, the core of the 1922 Constitution on matters of family law had largely been eviscerated,
and Ireland was in a position to give free rein to those who wished to create a national document based on the social world-view of the Roman Catholic Church.  

IV. THE 1937 CONSTITUTION OF ÉIRE (IRELAND)

In the 1937 Constitution, the provision forbidding divorce was a natural consequence of the direct influence of the Roman Catholic faith in Ireland. As a member of the Dáil, Edmund Duggan remarked of his conversations with Archbishop Byrne of Dublin:

I take it that the result of the absence of facilities for divorce in this country would be that persons desiring such facilities would leave Ireland and become domiciled in some other country in which they are available. The archbishop's view is that Ireland would not lose anything by this.  

In fact, Ireland stood to lose a great deal in not providing for divorce, if it were ever to realize its dream of eventual unification of the twenty-six counties of the South with the six of the North. Article 2 of the Constitution states that "the national territory consists of the whole island of Ireland, its islands and the territorial seas." Although Article 3 reassuringly states that laws promulgated by Ireland are to be effective only within the Irish Free State, and emphasizes the fact that these laws will all be passed "pending reintegration" of the North and South, there is no mention made of any subjection of the basic constitutional provisions to the same divided standard. In-

37. It is interesting to note that just as Ireland was embarking on a new Catholic constitutional era and as a result closing off divorce as a legal option, Britain was expanding and simplifying its divorce laws. In July 1937 the Matrimonial Causes Act gave Britain (and Northern Ireland in 1939) new grounds for divorce; in addition to the long-recognized ground of adultery, the new legislation allowed divorces on grounds of desertion, cruelty, unsoundness of mind, rape, sodomy and bestiality. For England, see Act of 30 July 1937 (1 Edw. 8 & 1 Geo. 6, ch. 57) (Eng.); for extension of the law to Scotland, see Act of 29 July 1938 (1 & 2 Geo. 6, ch. 50) (Eng.); for Northern Ireland, see Act of 4 July 1939 (2 & 3 Geo. 6, ch. 13) (N.Ir. Stat.). Terrence Brown argues that the move to make divorce illegal, along with the passage of the Censorship of Films Act of 1923 and the Censorship of Publications Act of 1929, was indicative of the repressiveness of the Irish government and that these acts during the first crucial decades of Ireland's independence "severely stunted the cultural and social development of a country which a protracted colonial mismanagement had left in desperate need of revival in both spheres." BROWN, supra note 19, at 34.  

38. The 1937 Constitution is the constitution that is in force today in Éire-Ireland. It will henceforth be referred to as merely the Constitution.  


40. IR. CONST. art. 2.
indeed, the intent is just the opposite; the Constitution expressly reserved the "right to exercise jurisdiction over the whole of that [national] territory," even though the exercise of that right is temporarily impeded by the division of the North and South.\(^{41}\) Thus, Articles 2 and 3, while ambiguous, seem to declare that the Constitution is to go into force for North and South alike upon reunification. For those Anglo-Irish Protestants long accustomed to certain personal rights, such as the right to divorce, the codification of church doctrine into the South's Constitution was a realization of their worst fears.\(^{42}\)

The deference accorded the Catholic Church appears incongruous in a document intended theoretically to cover both the predominantly Catholic South and the predominantly Protestant North, but acknowledgement of the Church's preeminent position was reasonable in a document intended as a practical matter to cover only the twenty-six counties of the South. In any case, enshrining the Church in the Constitution was essential for ecclesiastical approval, and was at the time strongly favored by the majority of voters who would be asked to ratify the document.

While Roman Catholicism and hence, by implication, its teachings were specifically mentioned in the Constitution, the entire document stands behind a trinitarian Christian aegis, invoking the

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41. IR. CONST. art. 3.

42. Eamon Donnelly, a Fianna Fail representative in 1937, proposed an amendment on the floor of the Dáil to postpone any referendum on the constitution until the end of partition. Although unsuccessful, "his amendment contained a shrewd comment on the legitimacy of a constitution which claimed jurisdiction over the whole of Ireland, but was not submitted 'to the whole people of Ireland.'" J.J. Lee, Ireland, 1912-1985: Politics and Society 206 (1989).

This concern is not of mere historical interest, since the issues go to the heart of current reunification discussions. For example, in 1984 a New Ireland Forum was established to assess the impact of reunification and the changes that would need to be put in place in order to realize such a goal. See id. at 675. It "embarked on a conscious search for an Irish identity that would simultaneously embrace and transcend the conflicting identities of unionism and nationalism." Id. In so doing, it came to the conclusion that the 1937 Constitution was unsuited to the united Ireland that it claimed to include. See id. at 676. The Forum, however, did not clarify to what extent the Republic should go in eliminating the restrictions on divorce in its Constitution in order to afford Northern Protestants the right to divorce that they have enjoyed in the North. The Catholic bishops involved in the forum "took refuge in unhelpful generalities." Brown, supra note 19, at 265.

In 1993, the Joint Declaration by the Taoiseach Albert Reynolds and Prime Minister John Major recognized that a reunified Ireland would have to protect the "democratic dignity and the civil rights and religious liberties of both communities." Joint Declaration by the Taoiseach (Irish Prime Minister) Mr. Albert Reynolds, TD, and Prime Minister John Major, MP, at 3 (London, Dec. 15, 1993) (on file with author). Although divorce was not specifically mentioned in this general document, it was one of the crucial doctrinal issues dividing North and South at the time.
Holy Trinity, "from Whom is all authority and to Whom, as our final end, all actions both of men and states must be referred." According to the Constitution, God is the preeminent source of political legitimacy, a view held by the Church since the time of St. Augustine. Authorization to seek approval of the Roman Catholic Church of proposed legislation is arguably authorized by Article 1, which states that Ireland is to develop its laws "in accordance with its own genius and tradition."

Thus an explicit respect for religion lies at the heart of the Irish legal system. Article 44.1 states that "the State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion." Unsurprisingly, special status was accorded to the Roman Catholic Church in the Constitution as first written; it was pronounced that the "special position of the Holy Catholic Apostolic and Roman Church" would assist the government by being the "guardian of the Faith professed by the great majority of the citizens." Although this explicit favoritism toward the Roman Catholic Church was eliminated by constitutional amendment in 1972, the special focus on the link of Church and State still remains.

One of the consequences of this union is the emphasis that the Constitution attaches to the family; the Constitution stresses the

43. IR. CONST. preamble.
45. IR. CONST. art. 1.
46. IR. CONST. art. 44.1. One example of the Church's hold on Ireland's legislative agenda helps to illustrate the strength of the Catholic grasp. The Mother and Child Scheme of 1951, the government's proposal for a mother and child health-care assistance program, did not comport with Catholic dogma. The Catholic bishops' concerns over the scheme were fourfold: 1) The right to provide for the health of one's children did not belong to the state but to the parents; 2) the state could not give assistance to 10% of neglectful parents, because this would discriminate against the 90% of parents who were being good Catholics and minding their duty to their family; 3) there was no guarantee that official state doctors would respect Catholic principles of gynecological care (although predominately Catholic, almost all physicians were educated in British medical schools); and 4) the scheme would destroy the doctor/patient confidential relationship in its use of a state doctor. Following this determination by the Catholic hierarchy, the government quickly changed the program to comply with the Church's social teachings. See Eamonn McKee, Church-State Relations and the Development of Irish Health Policy: The Mother-and-Child Scheme, 1944-53, IR. HIST. STUD., Nov. 1986, at 159, 171.
47. IR. CONST. art. 44.1.2, amended by IR. CONST. amend. III. Note that article 44.1 still remains in force.
48. See id. The Third Amendment entered into force on June 8, 1972.
49. The "family" as the integral social unit does not mean the conjugal dyad—or nuclear
centrality of the family to a well-ordered State, the primacy of the woman as mother in maintaining familial well being, and the need to protect her position by relieving her of the necessity for working outside the home and by assuring that marriage will remain indissoluble. The family as one of the Constitution's central features paral-

family—as we know it, but rather means the extended family, including grandparents and siblings, under one roof, a notion that has deep roots in Irish society. A recent study of the familial patterns of Ballyduff, County Kerry during the years 1901 to 1911 indicate that the vast majority of households were composed of extended families. See Donna Birdwell-Pheasant, *Irish Households in the Early Twentieth Century: Culture, Class, and Historical Contingency*, 118 J. Fam. Hist. 19, 32 (1993).

The constitutional definition of family also has serious ramifications for the status of children born out of wedlock. Children not born into a "family," one constitutionally defined as being grounded in marriage, are not considered legitimate. In *The State (Nicolaou) v. An Bord Uchtala*, Justice Henchy stated that no union other than one that is grounded in marriage will satisfy the constitutional definition of a family:

> While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Art. 41 is concerned the guarantees . . . are confined to families based upon marriage.

[1966] I.L.R.M. 567 (Ir. H. Ct.), *available in LEXIS*, Irelnd Library, Cases File. The marriage of the parents after the birth of their child, however, will suffice to constitute a marriage for constitutional purposes:

> I find it impossible to distinguish between the constitutional position of a child whose legitimacy stems from the fact that he was born the day after his parents were married, and that of a child whose legitimacy stems from the fact that his parents were married the day after he was born . . . . The crucial fact in each case is that the child's legitimacy and consequent membership of the family are founded on the parent's marriage.


50. Before the successful divorce referendum of 1995, Article 41 of the Irish Constitution stated, in its entirety:

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.

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.

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.

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.

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.

2° No law shall be enacted providing for the grant of a dissolution of marriage.

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.

IR. CONST. art. 41.
lels the importance of the family in Catholic social teaching.\(^{51}\)

In furthering the mandate of Article 41, the courts often have attempted to strike a balance between social ideals and economic realities, for example by refusing to interpret the constitutional expectation that women will remain in the home to mean that the Constitution forbids women to work outside the home. Although President Robinson has commented that Ireland’s restrictive constitutional language has been in some instances glossed over thanks to the “tricky juristic knack of keeping their [constitution’s] old words and apparently antiquated phrases in constant touch with the spirit of successive ages”\(^{52}\) through “formal amendment, legislative action and imaginative judicial interpretation,”\(^{53}\) the courts have largely declined to open the Pandora’s box of Article 41 at all.\(^{54}\)

In *McGee v. Attorney General*,\(^{55}\) the Irish Supreme Court established, by reference to Article 41, a constitutional right to marital privacy, which included the right to use contraceptives, which until this time had been illegal even for married couples. This judicially significant case has had little legislative impact and has been so downplayed by the judiciary that “one sometimes wonders whether or not the Supreme Court actually gave judgment in this matter at all, and whether or not there is a right of marital privacy that must be respected.”\(^{56}\) But the significance of the case remains: *McGee* was the

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51. *See Catechism of the Catholic Church*, para. 2207 (1995); *see also id.* para. 2211 (stating that the political community has a duty to the maintenance of the family).


53. *Id.*

54. *See IR. CONST. art. 41.2.2.*


first time that the Irish courts expressly adopted a holding that ran counter to Catholic teaching. The court, in establishing the right to marital privacy, concluded that this included the couple's right of access to contraception devices. In this respect, the case was a first step, although lightly trod, on the path towards judicial freedom from ecclesiastical constraints.

In some instances the courts would rather ignore any consideration of Article 41 that may arise in the interpretation and evaluation of a case. For example, Article 41.2.2 proclaims that the state shall "endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home." Article 40.1 states that all persons enjoy equal legal status; however, the article qualifies this statement by adding that "this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, both physical and moral, and of social function." Yet the assertion that women's "social function" is in the home and that women have no place in the work force, pursuant to Article 41.2.2., is arguably quite discriminatory, and leaves room for the contention that the Constitution in internally inconsistent. No such argument has been made in a case before the Irish Supreme Court, but it is not outside the realm of reason to anticipate that such an argument might reasonably carry substantial constitutional weight. Even after finding a constitutional right to marital privacy, in no instance did the court tamper with Article 41's prohibition of divorce.

V. THE LAW OF DIVORCE IN IRELAND

A. Prior to 1986

Despite the prohibition on divorce in the 1937 Constitution, the termination of marriage was not absolutely forbidden under Irish law, for two well-established but infrequently used principles of law allowed for dissolution of some marriages by judicial declaration. The first of these, referred to as a divorce a mensa et thoro (and as distinct from a divorce a vinculo, or legal, divorce) could be granted

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57. See McGee, I.R. 284 at 289-90, cited in O'Reilly, supra note 55, at 32.
58. IR. CONST. art. 41.2.2.
59. IR. CONST. art. 40.1.
60. See Strong, supra note 44, at 33-34.
61. See id.
62. See William Binchy, Divorce in Ireland: Legal and Social Perspectives, J. Div., Fall
if adultery, cruelty, or unnatural practices can be proven over the defenses of condonation, collusion, and recrimination. The second way in which a marriage may be invalidated is on the petition of nullity. A marriage will be automatically declared null and void where either of the parties was underage, consented to the marriage under duress, was mentally incompetent, was too closely related to the spouse, or where the couple failed to comply with the formal requirements of the marriage, such as marriage registration. A marriage may also be voidable upon a petition of nullity based on impotence. This option links Irish judicial evaluation with Catholic canonical teaching: the inability to consummate a marriage or an illness existing at the time of the marriage ceremony (which would impact the consummation of the marriage) is one of the primary canonical disabilities outlined in Canon 1084 of the Catholic Church. Even when they met the requirements for a divorce a mensa et thoro or through the law of nullity, many couples did not seek a legal solution to their marital breakdown, because neither method conferred the right to remarry.

Another option available to a Roman Catholic couple seeking a termination of their marriage was an ecclesiastical annulment, which, like a civil one, recognizes that the marriage was invalid to begin

1978, at 99, 100. This limited form of separation was valid under section 7 of the Matrimonial Causes (Ireland) Act of 1870.

63. See id. In practice the high burden of proof needed for a divorce a mensa et thoro was unattainable by the vast majority of couples desiring separation. See id.

64. With the passage of the Marriages Act of 1972, the minimum age for contracting a valid marriage was increased to sixteen years of age for either party. Previously the minimum age for males was fourteen years and for females was twelve years. See William Binchy, New Vistas in Irish Family Law, 15 J. Fam. L. 637, 639 (1976-77).

65. See id.; see also Brian Doolan, Constitutional Law and Constitutional Rights in Ireland 130 (1984).


67. See Paul A. O’Connor, Key Issues in Irish Family Law 64 n.119 (1988). O’Connor quotes Canon 1084 as follows:

(1) Antecedent and perpetual impotence to have intercourse, whether on the part of the man or the woman, which is either absolute or relative, of its very nature invalidates marriage. (2) If the impediment of impotence is doubtful, either by reason of a doubt of law or a doubt of fact, a marriage is neither to be impeded nor is to be declared null as long as the doubt exists. (3) Sterility neither prohibits nor invalidates marriage, with due regard for the prescription of canon 1098' [canon 1098 deals with the effect of fraud on marriage].

Id.

68. This inaction can be seen from the fact that approximately forty-two thousand individuals in 1991 were living apart from their spouses (as a result of desertion or other separation) without having resorted to formal judicial separation proceedings. See Tony Fahey and Maureen Lyons, Marital Breakdown and Family Law in Ireland 100 tbl.6.1 (1995).
with, but leaves the partners free to remarry. Unfortunately, the state did not recognize an ecclesiastical annulment as valid and required a civil termination, available only through judicial separation under which no remarriage was possible. This complicated double standard resulted in second marriages being recognized as valid by the Church but regarded as bigamous by the State. Only in one sobering way in this matter did the Church and State agree: any children from the first marriage, whether annulled by the Church or the State, were considered illegitimate by both Church and State.

The use of the law of nullity to provide any reasonable basis upon which a couple might divorce presents a conceptual problem, since the law of nullity applies when the marriage is considered not to have taken place, and thus by definition provides no effective mechanism to address the issue of marital breakdown of an existing valid marriage. Despite this conceptual inconvenience, petitioners, albeit not in large numbers, had increasingly employed the law of nullity in the post-World War II period and were relatively successful in gaining judicial relief.

Courts had also made the option of nullity more promising by expanding the definitional scope of nullity and by refusing in some instances to defer to Church dogma. In N (Otherwise K) v. K, the Supreme Court subscribed to a broad definition and fact-specific application of the concept of duress, one of the ways in which one a plea of nullity can be upheld. The case concerned a nineteen-year-old woman seeking to end a loveless marriage, which she asserted was forced on her by her father, after he had learned of her pregnancy. In the case the majority held that

\[\text{while there was a presumption of validity regarding a marriage ceremony, this could be rebutted by, inter alia, evidence of duress negativing consent; that the concept of duress which would give rise to a decree of nullity of marriage should not be restricted to threats of physical harm or falsely based threats of other harmful consequences; rather, having regard to the fact that marriage constituted the taking on of a status, the courts should examine whether the taking of such a step involved voluntary consent and a fully free ex-}\]


70. See generally Status of Children Act (1987) (helping to resolve this problem); see also infra notes 99-100 and accompanying text.

71. See O'CONNOR, supra note 67, at 1.

72. See FAHEY AND LYONS, supra note 68.

exercise of the independent will of the parties, the test being a subjective one.\textsuperscript{74}

In justifying a broad construction of duress in marital nullity law, Justice Henchy (despite dissenting on the application of such a construction to this specific case) stated:

\begin{quote}
[\textit{I}]n the law of contract duress will usually be recognized as negating consent when it may be said to be such coercion as vitiates the capacity to contract. The inherent subjectivity and flexibility in the latter approach allows the courts a large measure of discretion having regard to the type of contract and the particular circumstances of the case. In relation to the contract of marriage, it is to be said that the courts, at least in this jurisdiction, have given a more liberal scope to the doctrine of duress as a nullifying element than would be applied in the construction of other kinds of contract. This is probably because, the dissolution of marriage being prohibited by the Constitution, certain marriages which at no stage were viable have been declared null on a liberal and humane interpretation of the doctrine of duress in relation to the contract of marriage.\textsuperscript{75}
\end{quote}

The role of canon law in these judicial determinations under the law of nullity has waned in recent decades. Again in \textit{N (Otherwise K) v. K}, Chief Justice Finlay stressed that even through a party may have been granted a decree of nullity by an ecclesiastical court of the Catholic Church, this action was not a factor that the civil court was at liberty to consider.\textsuperscript{76}

\textit{N (Otherwise K) v. K} is a pivotal case which highlights the increased role of the judiciary in making the best of the constitutional prohibition on divorce and the judiciary's concluding cases based on its own and not canonical precedent.\textsuperscript{77} It stressed the need for "a fully free exercise of the independent will of the parties."\textsuperscript{78} An expanded scope of what constitutes duress in the marital setting was thus one of the ways in which the Irish courts mitigated the harshness of the prohibition on divorce.\textsuperscript{79}

\begin{flushright}
\textsuperscript{74} \textit{Id.} at 76.
\textsuperscript{75} \textit{Id.} at 85.
\textsuperscript{76} See \textit{id.} at 81.
\textsuperscript{77} See \textit{O'CONNOR, supra} note 67, at 55.
\textsuperscript{79} Using the laws of nullity to invalidate a marriage does not render unnecessary any divorce laws, since nullity is an imprecise and inapplicable standard by which to adjudicate all divorce claims. Given the express constitutional prohibition on divorce, nullity can in no way serve as a substitute for divorce legislation, which, according to the Constitution, must be enacted through a constitutional amendment allowing for such legislation and which must be pre-
B. The 1986 Divorce Referendum

The expansion of the civil annulment remedy in cases such as N (Otherwise K) v. K spurred the courts to broaden the range of annulment arguments. Beginning in the early 1980s, the High Court began to interpret illnesses, such as manic depression and other psychological illnesses, as "incapacities" to the consummation of a marriage and therefore sufficient cause to justify an annulment. While broadly within the canonical teachings of the Catholic Church, this judicial interpretation stretched church dogma thin. In D v. C, the court found that a medically recognized psychological illness provided adequate grounds for the granting of a judicial separation. In W v. P, moreover, the court found that merely a psychological or emotional disability or incapacity was sufficient to warrant an annulment. In keeping with this low threshold for meeting the requirement for an annulment, the court concluded that basic emotional immaturity satisfied the incapacity test.

In other areas as well, the courts decided not merely to stretch Catholic teaching to make it fit newer social mores, but to disregard the Church's opinions on some matters altogether. In recent cases, the judiciary has been increasingly unlikely to bring in evidence of church teaching as dispositive of a matter or even suggestive of an essential line of inquiry. In T.F. v. Ireland, a 1995 judicial separation case, the Supreme Court upheld a lower court's ruling that barred expert theological testimony on the essential elements of a Christian marriage.

Outside of the courtroom, the public and politicians were contemplating the extent to which the constitutional prohibition on di-

80. See supra text accompanying note 75.
83. See id. at 42.
84. See Whyte, supra note 18, at 738.
85. T.F. v. Ireland, [1995] I.L.R.M. 321 (Ir. S.C.), available in LEXIS, Ireland Library, Cases File. Whyte, supra note 18, discusses other instances in which the Irish courts have displayed a trend of downplaying natural law principles. In the now infamous case of Attorney General v. X, the Supreme Court held that abortions could be legally performed in Ireland under certain narrow conditions. See [1992] 1 I.R. 1, available in LEXIS, Ireland Library, Cases File; see also infra notes 127-45 and accompanying text. In A Ward of the Court, the Supreme Court authorized nourishment support to be stopped for a patient who had been in a vegetative state for over twenty years. See [1995] 2 I.L.R.M. 401 (Ir. S.C.), cited by Whyte, supra note 18, at 738.
divorce could be modified, broadened, or even eliminated. Many members of Parliament attempted to introduce legislation to repeal the constitutional ban. 86 Public opinion polls had indicated throughout the mid-1980s that the Irish public was willing to consider voting for the implementation of divorce legislation. With a moderate margin in the polls of over 61% in favor of divorce, Taoiseach Garrett Fitzgerald's government (a coalition between the Fine Gael and Labour parties) proposed a constitutional amendment bill in 1986 that would allow divorce legislation. 87 A referendum in support of such an amendment was submitted to the electorate for public vote on June 26, 1986; despite polls showing support, 63.5% of those voting (approx. 60.8% of those eligible) opposed the measure. 88 The large anti-divorce turnout, and the decision of many pro-divorce voters to switch their votes at the last minute, was largely the result of heated campaigning by the Roman Catholic Church and other traditionalist organizations against divorce. 89

86. In 1980, Dr. Noel Browne introduced the Eighth Amendment of the Constitution Bill; in February 1983 and in May 1985, Proinsais de Rossa, Teachta Dála (member of the Dáil, or T.D.) of the Worker's Party introduced proposed amendment bills; in November 1985 a back-bencher proposed the Tenth Amendment of the Constitution Bill; and Mr. Taylor, T.D. for Labour introduced the Tenth Amendment of the Constitution (No. 2) Bill, also in November 1985. See Duncan, Ireland: Waiting for Divorce, supra note 77, at nn.3-5 & 7.

The government studied the problem of marital breakdown and issued its findings in a report, entitled Marital Breakdown: A Review and Proposed Changes that contained a number of different solutions to the issue of marital breakdown. See Joint Committee on Marriage Breakdown, Marital Breakdown: A Review and Proposed Changes, Pl. 3074 (1985).

87. For a comprehensive evaluation of the 1986 Divorce Referendum, see generally Michele Dillon, Debating Divorce (1993).


89. Anti-divorce campaigners were able to create uncertainty in the minds of many voters, especially women and the urban electorate, by raising related issues not dealt with in the government proposal, such as alimony and inheritance. See R. Darcy and Michael Laver, Referendum Dynamics and the Irish Divorce Amendment, PUB. OPIN. Q., Spring 1990, at 1, 13. As the campaign became increasingly bitter during its last days, the political elites who had previously supported the promulgation of divorce law withdrew from the debate in order to save face; with their withdrawal, the campaign lost some its political legitimacy. See id. at 16-17.

Some of the private organizations such as Family Solidarity (a group formed to combat the pro-divorce forces at the 1986 Referendum) sponsored particularly well-organized campaigns. Family Solidarity held as its motto, "the family is the true measure of the greatness of the nation." The Chairman of the organization stated, "We are totally and utterly opposed to divorce because it is the ultimate and most deadly attack on the family." In response to a proposal allowing unmarried people access to contraceptives, the Chairman retorted, "Family planning for people who are not forming a family is merely a licence to fornicate and we think this is a threat to the family . . ." Beale, supra note 2, at 16-17.
Opponents based their arguments both on the Church’s belief that marriage is indissoluble and on secular opinions that divorce eats away at the foundation of the marital system; the availability of divorce was thought to grease a slope down which couples in unsteady marriages could slide, encouraging even more divorces; to victimize women economically; to cause children needless economical and psychological suffering; and to leave families of subsequent marriages unusually troubled. Proponents of divorce maintained that the family system in Ireland was becoming more pluralistic; that the introduction of divorce in Ireland would not entail the social reorganization of the nation; that a prohibition on divorce is not a safeguard against marital breakdown; that the institution of divorce would not merely legalize a prevalent situation of couples in broken marriages living apart and often involved in second relationships, but would instead give them the freedom to remarry; and that the bulk of the psychological troubles suffered by children from divorced parents actually occurs prior to the divorce.

The Catholic Church was obviously deeply involved in the debates. In its publication What God Has Joined, the Irish Theological Commission argued that marriage is part of God’s design and that, regardless of an individual’s religious beliefs, the Church has an obligation to monitor and uphold the accepted and time-tested values of family life. The Catholic Church stressed that it trusted its adherents to vote according to their consciences, while conveying its opposition through messages at mass across the country during the weeks of the campaign.

Compared to the well-oiled lobbying machinery of those who fought against divorce, the pro-divorce campaign was comparatively small, poor, and ultimately unsuccessful. See Evelyn Mahon, Women’s Rights and Catholicism in Ireland, NEW LEFT REV., Nov./Dec. 1987, at 53, 67. The main organization for divorce, the Divorce Action Group, led by feminist and Labour Party member Jean Tansey, found support in some high profile feminists, including Mary Maher of the Irish Times and Mary Kenny of the Irish Press, journalists who had exposed the plight of deserted housewives and criticized the legal preclusion to their remarriage. See id. at 58.

90. See Kathleen O'Higgins, Divorce and Remarriage in Ireland: An Examination of the Main Issues and Arguments For and Against, 34 ADMIN. 164, 178 (1986).
91. See generally id. at 178-92.
92. See id. at 170.
94. The Catholic Church launched a “full-scale offensive. For weeks Sunday sermons were given on the family and on the evils of divorce, and extensive literature was delivered to every home in Ireland at enormous cost. Archbishop McNamara of Dublin compared the introduction of divorce with the aftermath of the then topical Chérmobyl disaster.” Mahon, supra note 89, at 67.
The referendum's defeat compelled the legislature to devise alternate methods of addressing the inconsistencies and injustices wrought by the strict prohibition on divorce. Public opinion polls taken immediately after the referendum showed results consistent with pre-referendum percentages; a substantial majority of the public was still in favor of divorce, at least in principle. Some politicians were concerned about the negative message sent to the Northern Irish by the outcome of the divorce referendum, particularly since it came on the heels of the 1985 Anglo-Irish Agreement, which gave the Republic a consultative role in the affairs of Northern Ireland. Barry Desmond, Labour minister for Health, argued that the issue of Northern Ireland was extremely relevant to the divorce proposal:

Few are naive enough to believe that the introduction of divorce in the Republic would persuade the Unionists to look with more favour on their Catholic neighbours. However, in the proposed referendum we cannot ignore the implications of a decision to maintain the constitutional prohibition on divorce for our aspiration to bring peace and stability to this island. A "no" vote will reaffirm the traditional view of southern society that one moral principle of one Church, the indissolubility of marriage, is more important that the moral principle of fundamental respect for the rights of others; a "yes" vote will, on the other hand, be a vote in favour of a new Ireland with which all traditions might identify.

The defeat of the proposed divorce amendment in 1986 was due in great part to the inefficiency and shortsightedness of its proponents. Many of the essential provisions concerning pension, benefit, and inheritance rights of the newly separated spouses were not worked out until the very eve of the Referendum; such issues as whether a divorced wife who had never worked could assert any right to a portion of her working husband's pension had not been worked out. Government proponents of divorce reform could only offer

95. See Lee, Dynamics of Social and Political Change, supra note 88, at 127. Of those polled in February 1986, 77% were willing to allow divorce under certain circumstances. In October 1986, following the referendum, 70% remained willing to permit divorce under certain circumstances. Similarly, in February 1986, 52% of those polled were in favor of a complete removal of the constitutional ban on divorce. By October 1986, following the defeat of the bill, 51% of those polled still were in favor of the removal of the divorce ban. "Attitudes toward divorce were not changed during the campaign, only attitudes toward the government's divorce amendment." Darcy and Laver, supra note 89, at 4.

96. See Coakley, supra note 69, at 291-92. The defeat of the divorce amendment signaled to the North that the Republic remained staunchly priest-ridden and backward. Id. at 295.

97. 366 DÁIL DEB. col. 1323 (May 15, 1986), quoted in Dillon, Debating Divorce, supra note 86, at 65.

98. See Mahon, supra note 89, at 68. Many of the unresolved issues of economic support
“vague promises that their legislation, when eventually finalised, would deal with the issues raised by objectors.”

C. Developments in the Wake of the 1986 Referendum on Divorce

In the years following the defeat of the referendum, the Irish legislature enacted significant pieces of legislation intended to soften the edges of the divorce prohibition and to ease Ireland into an era in which divorce legislation might be a more realistic prospect. Through the enactment of the 1987 Status of Children Act, the legislature helped to ameliorate the harsh consequences (such as the legal incapacity to inherit) to children rendered illegitimate as the result of their parents being granted a judicial separation. This legislation changed the legal status of children born out of wedlock by minimizing the legal consequences of illegitimacy and granting to those children born outside of a marriage the same rights and guarantees of inheritance and maintenance of a minimum standard of living given to those born within a marriage.

of spouses and children were addressed in other legislation passed subsequent to the 1986 referendum. See infra note 183 and accompanying text.

99. Patrick Riordan, Creating Space for Debate: The Catholic Church’s Contribution, in DIVORCE?: FACING THE ISSUES OF MARITAL BREAKDOWN at 123, 129-30, supra note 20. William Binchy, author of Is DIVORCE THE ANSWER? AN EXAMINATION OF NO-FAULT DIVORCE AGAINST THE BACKGROUND OF THE IRISH DEBATE (1984), and one of the long-time scholars sympathetic to the possibility of divorce legislation in Ireland, chose to side in this referendum with the anti-divorce cause and became the legal spokesman for the anti-divorce organization, Family Solidarity. See Mahon, supra note 89, at 67.

100. As explained in a 1992 government review of divorce:

In the area of succession rights, the former position was that a child of parents not married to each other had limited rights to succeed on the death of its mother where she had not made a will and no rights at all on the death of its father or anyone related through him where the father had not made a will. As regards wills, there was a rule of interpretation the effect of which was that a reference to family relationship excluded any links to or through an illegitimate relation unless the contrary intention appeared. Since the coming into effect of the [Status of Children] Act, distribution of an estate where there is no will is now carried out without distinction based on the marital status of any relative’s parents; and wills and other instruments made since then are interpreted on the basis that references to family relationships are to be construed, unless the instrument otherwise provides, without regard to whether any person’s parents have married each other. The provision of the Succession Act, 1965—section 177—which enables a child of a person who died having made a will to apply to court for proper provision out of the estate, where such provision has not been made, applies to all children of a deceased who died after the coming into effect of the Act, whether or not the deceased had married the child’s other parent.

MINISTER FOR JUSTICE, MARITAL BREAKDOWN: A REVIEW AND PROPOSED CHANGES, PI. 9104 (1992), § 7.11, at 51. Note that in 1985 the Joint Committee on Marital Breakdown issued a report with the identical title. See supra note 86.

101. See Dervla Browne, Legal Changes in the Law Covering Marital Breakdown, in DIVORCE?: FACING THE ISSUES OF MARITAL BREAKDOWN 55, 65, supra note 20; see also Mags O’Brien, et al., Separating and Coping Alone or in a Second Relationship, in DIVORCE?:
In 1989, the legislature passed the Judicial Separation and Family Law Reform Act, which provided a more expansive procedure for judicial separation than did the Matrimonial Causes (Ireland) Act of 1870. Instead of having to prove adultery, cruelty and/or unnatural practices in order to obtain a divorce *a mensa et thoro*, under the 1989 Act grounds for judicial separation include adultery, unreasonable behaviour, desertion, separation with consent for one year, separation without consent for three years, and irrevocable marital breakdown for a minimum of one year preceding the date of application for separation. The lack of clear tests by which courts were to determine whether couples have met one of these six prerequisites for judicial separation proved troublesome. The sixth option was vulnerable to broad interpretation; for it allowed a separation if the court found that a “normal marital relationship had not existed between the spouses” for at least one year gave courts a power approaching a no-fault separation option.

In *F v. F, Ireland and the Attorney General*, it was argued that the provision of the 1989 Act allowing a judicial separation when one of the spouses did not consent was unconstitutional, for the resulting separation order impinged on the non-consenting spouse's rights to both property and family life. The High Court, however, held that these rights were not impinged upon, since the legislature had given the judiciary the mandate to separate couples whose marriages had met the threshold requirements for separation.

Another key component of the 1989 Act was the provision for the first time that lump sum payment orders can be made and that maintenance orders (orders for financial support analogous to alimony in the United States) can be secured on any assets or property owned by a spouse.
The principal drawback of the 1989 Act was the discretionary latitude accorded to the judiciary; couples before judges unsympathetic to divorce had little recourse. Certainly the lack of specific guidelines for the evaluation of each prerequisite listed in section 2 of the Act contributed to this problem. Compounding the administrative difficulties of arriving at consistent judgements was the fact that the bulk of these cases were heard by the Circuit court, whose opinions are rarely published and do not establish legal precedent.

1. Recognition of Foreign Divorces. The constitutional prohibition on divorce was relatively clear: only those marriages terminated by divorce a mensa et thoro or under nullity law were considered judicially dissolved. The status in Ireland of divorces obtained in another country, however, is not so clearly assessed from a reading of the Constitution. From 1937 until 1986, the law stated that a foreign divorce decree was to be recognized as valid in Ireland only if both husband and wife were domiciliaries of the country in which the divorce was granted. Any other reading would run counter to Article 41.3.3 which states that one spouse cannot establish his or her domicile elsewhere, obtain a divorce, and then enter into another marriage until the death of the spouse from whom the foreign divorce was obtained. Since at common law the wife’s domicile was considered that of her husband’s, Article 41.3.3 affected, in practice, only a wife’s rights: a husband could move to another country and validly divorce his wife in the new country, since the wife’s domicile fictionally travelled with him; a wife, on the other hand, could not do the same, since her domicile remained with her husband’s.

The Domicile and Recognition of Foreign Divorces Act of 1986 did much to alleviate the unjust double standard of domicile in this regard by stating that the domicile of either spouse will suffice to establish domicile sufficient for the granting of a foreign divorce.

108. For a discussion of the ramifications of this judicial breadth, see Anna Margaret McDonough, When Irish Eyes Aren’t Smiling—Legalizing Divorce in Ireland, 14 DICK. J. INT’L L. 647, 654-56 (1996).
110. See supra notes 63-72 and accompanying text.
111. See WALLS AND BERGIN, supra note 103, at 216.
112. IR. CONST. art. 41.3.3.
113. See McDonough, supra note 108, at 650.
114. Section 5(1) of the Domicile and Recognition of Foreign Divorces Act states: "[f]or
This change, however, was limited only to either spouse's establishment of domicile in the restricted jurisdictions of England, Wales, Northern Ireland, the Isle of Man, and the Channel Islands.\textsuperscript{115} Another piece of legislation, the Family Law Act of 1986, Part II, provided a jurisdictional basis for divorce recognition of other transnational divorces. Overseas divorces which are obtained by means of proceedings, judicial or otherwise, are held to be valid if one of the spouses is a domiciliary in the country in which this proceeding took place.\textsuperscript{116}

In the midst of the debates leading to the Domicile and Recognition of Foreign Divorces Act and the 1986 Divorce Referendum debates, a seminal case dealing with the rights of foreign divorcees to remarry was heard before the European Court of Human Rights and brought the issues involved to public attention.\textsuperscript{117} In \textit{Johnston v. Ireland},\textsuperscript{118} Roy Johnston, having been legally separated from his wife for many years desired to remarry. He petitioned the court, arguing that his rights under Articles 8 and 12 of the European Convention on Human Rights\textsuperscript{119} were being infringed by the prohibition on divorce

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118. 112 Eur. Ct. H.R. (ser. A) (1986). Roy Johnston, an Irishman, had been granted a judicial separation from his wife and three children; after several years, he met Janice Williams-Johnston. Following a relationship of seven years, they had a daughter, Nessa. The couple wished to marry, but were precluded from doing so by the fact that he could not obtain a valid divorce in Ireland. For a discussion of the case, see John Andrews and Ann Sherlock, \textit{European Court of Human Rights, Family Life and the Constitutional Ban on Divorce in Ireland: Case of Johnston and Others, EUR. L. REV., Oct. 1987, at 393; Louis McRedmond, Divorce: The Irish Constitution and the European Convention, LAW & JUST., Easter 1985, at 14.}

119. Article 8 of the European Convention on Human Rights states: Everyone has the right to respect for his private and family life, his home and his correspondence . . . . There shall be no interference by a public authority with the exer-
in the Irish Constitution. Because he was unable to obtain a divorce from his wife who remained in Ireland, his child with his subsequent partner was legally illegitimate and suffered the social stigmatization accompanying this status. The court found that the Johnstons’ second union and their child satisfied the definition of a family and hence found Article 8 applicable to them, despite the fact that they were not married. However, the court declined to find that this necessitated a finding of a right to divorce for Mr. Johnston within Article 8, because the more specific guidance of Article 12 controlled.

The court also held that Ireland was not upholding the institution of the family as it purported to in its Constitution since it allowed children to be stigmatized by illegitimacy and deprived them of familial rights. The court held that the Article 8 rights of Mr. Johnston, his new partner, and their child were violated and that the best relief was to allow divorce.

Following this landmark case, the Irish government did attempt to modify and eliminate the most egregious aspects of the legal status of children born outside of marriage by passage of the Status of Children Act of 1987, in which the consequences of illegitimacy were minimized and children born outside of marriage were given inheritance rights. The Domicile and Recognition of Foreign Divorces Act of 1986 also now affords subsequent "Mr. Johnstons" with a remedy for divorces sought in approved jurisdictions.

2. Abortion: Ireland’s Other Moral Debate. Johnston, appealing as it did beyond the boundaries of Ireland and Irish law,
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resonates with other prominent cases dealing with Ireland's other major moral dilemma—abortion. Ireland's membership in the European Union has compelled reconsideration of national social policy and the extent to which it ought to be subjugated to transnational European law. The implications of Irish membership in the EU for family law is highlighted by the legal treatment of abortion. Several high-profile and controversial abortion cases, Society for the Protection of Unborn Children Ireland Ltd. (S.P.U.C.) v. Grogan, Attorney General v. X, and Attorney General (ex rel. Society for the Protection of the Unborn Child (Ireland) Ltd.) v. Open Door Counselling Ltd. illustrate the degree to which Irish citizens are coming to rely on European judicial instruments to accomplish their social aims.

In S.P.U.C. v. Grogan, the court addressed the question of whether a student organization could provide names, addresses, and phone numbers of organizations abroad that provided abortion services without its running afoul of the constitutional provision, Article 40.3.3, which protects the life of the unborn. The students argued that, under the Treaty of Rome, Irish citizens, as EU citizens, had the right "to travel abroad to avail of services lawfully available in any other member states of the European Community and that there was a collateral right to receive information in relation to such serv-

127. In 1973, Ireland joined the European Community (now the European Union) and, by doing so, pledged to uphold the laws of the Community even where they were to take precedence over national law. Ireland amended its Constitution (by public referendum, as mandated by the Constitution) to state: "no provision of this constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Community, or institutions thereof, from having the force of law in the State." IR. CONST. art. 29.4.5 (amended January 5, 1973).


131. See Grogan, [1989] I.R. 753 (Ir. H. Ct.), available in LEXIS, Irelnd Library, Cases File. Article 40.3.3 states "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." IR. CONST. art. 40.3.3. Article 40.3.3 has been subsequently amended twice. In 1983 the Eighth Amendment added the following sentence: "This subsection shall not limit freedom to travel between the State and another state." Id. See note 138 and accompanying text, infra, for a description of the second addition to this subsection.
ices.” The High Court deferred the decision and asked the European Court of Justice (ECJ) to answer whether "medical termination of pregnancy, performed in accordance with the law of the state in which it is carried out, constituted a service within the meaning of Article 60 of the EEC Treaty." In addition, the court asked the ECJ to determine whether it was contrary to Community law for a member state, in which medical termination of pregnancy is forbidden, to prohibit persons from distributing information about the identity and location of clinics in another member state where voluntary termination of pregnancy is lawfully carried out, and the means of communicating with those clinics, particularly where the clinics in question have no involvement in the distribution of the said information.

While the ECJ was entertaining the case, the S.P.U.C. appealed to the Irish Supreme Court, which reversed the High Court's interlocutory order pending the conclusion of the ECJ case and indicated that it would have the final say on the case:

Any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions. In the last analysis only this Court can decide finally what are the effects of the interaction of the eighth amendment of the Constitution [giving a right to life of the unborn, Article 40.3.3] and the third amendment of the Constitution [governing Ireland's relationship with the European Union and stating that all laws, acts or measures adopted by the EU have the force of law in Ireland, Article 29.4.3].

The ECJ rendered an opinion that allowed the court to skirt the most controversial of issues, holding that abortion was in fact a service protected by the Treaty of Rome, but that the Irish students lacked standing to bring the case since they did not have an economic relationship with the English abortion services providers.

Although the defendants in the Grogan case are still seeking redress, the significance of Grogan has largely been obviated in light

134. Id.
of the subsequent passage of the Fourteenth Amendment to the Constitution\textsuperscript{138} and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act of 1995.\textsuperscript{139} Nevertheless, the broader significance lies in the fact that through the Grogan case Irish citizens sought to gain outside legal justification for their actions through the instrumentality of the European Union.

In a related case, \textit{S.P.U.C. v. Open Door Counselling}, the distribution of abortion information was again found to be unconstitutional.\textsuperscript{140} The case was based on a fact pattern similar to Grogan, the publication in Ireland of England-based abortion service information, in which the salient difference was that the information was distributed to a single party during private consultation rather than wholesale to a university population. \textit{Open Door Counselling} pursued the matter in the European Court for Human Rights; the court held that the broad injunction against access to information was unnecessary in a democratic society to protect the morals of its citizens and concluded that the injunction was invalid.\textsuperscript{141} The court argued that, even though member states’ laws involving morals are to be given broad deference, it found that this deference is not absolute. Since the restriction on information forced women seeking abortions to obtain less reliable information about medical procedures, the injunction did not serve its purpose of protecting the unborn as much as it undermined the ability of women to procure safe sources of medical information. The injunction also restricted the free exchange of information across member states. In short, Ireland’s injunction could not stand.\textsuperscript{142}

One of the most significant cases causing the Irish to consider the shortcomings of their legal system in dealing with family law was the case in 1992 of \textit{X},\textsuperscript{143} which dealt with the inability of a fourteen-

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\textsuperscript{138} The Fourteenth Amendment, which amended the Constitution on December 23, 1992, appended the following provision to Art. 40.3.3: “[t]his subsection shall not limit freedom to obtain or make available, in the State, subject to such condition as may be laid down by law, information relating to services lawfully available in another state.” \textit{IR. CONST.} art. 40.3.3, \textit{amended by IR. CONST. amend. XIV.}

\textsuperscript{139} See Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, No. 5 (1995).


\textsuperscript{142} See \textit{id.}

year-old rape victim to receive an abortion in England, despite the fact that she was suicidal. The Supreme Court of Ireland, although initially prohibiting her from travelling to England for the abortion and insisting that Ireland retained the right to violate EC law when it impinged on what Ireland considered a moral right, reversed itself after widespread Irish and international outcry.\textsuperscript{144} Moreover, the Court, ignoring the international implications of the case, “decided the case as if X were seeking an abortion within Ireland. It held that abortion is permissible where there is a real and substantial threat to the life of the mother that can be avoided only through abortion.”\textsuperscript{145} This decision, considered rash by some pro-life proponents, represents a drastic departure from traditional Irish family law and indicates the degree to which the pressures of the citizenry influenced what amounted to the court’s change of heart.

These abortion cases reveal a growing willingness on the part of the Irish to pursue legal battles in the international arena, even when they affect those moral rights that many Irish hold as uniquely Irish. As some commentators have observed, the fact that Ireland is an island community and one marked by massive emigration has forced the country to look beyond its shores for inspiration and for validation.\textsuperscript{146} The Irish are increasingly becoming aware of their role in the European community as well:

We can’t go on forever declaring ourselves a nation apart when anything goes right, and a victim of external influences when anything goes wrong. We do have some significant say in our future: and we are responsible for making our voice heard. Too easily we forget that the European Community has a democratic parliament with representatives elected by us. If we don’t like the way things are going, we elect somebody else to speak on our behalf.\textsuperscript{147}

With regard to divorce, there have not been any cases of import that have come before European courts, largely because of the continued liberalization of the judicial separation mechanism and other related laws.\textsuperscript{148} There has also been a correspondingly growing consensus within Ireland that marital breakdown is just a fact of life and that no set of laws will ever help to insure that it will never occur. The realization that the divorce prohibition was becoming increasingly obsolete as an attempt to safeguard the family prompted many

144. See id., cited in Cole, supra note 135, at 131.
145. Id. at 133.
146. See KEARNEY, supra note 3, at 21.
147. Id. at 11.
148. See supra notes 100-15 and accompanying text.
Irish to rethink its usefulness, and prompted many legislators to devise methods of alleviating some of the hardship that the prohibition engenders, if not to work for the elimination of the provision altogether.¹⁴⁹

D. The Renewed Push for Divorce

In 1992, the government, in its White Paper entitled Marital Breakdown: A Review and Proposed Changes,¹⁵⁰ addressed a number of possible solutions to the divorce problem: regularizing governmental oversight of maintenance cases, strengthening the adjudication and monitoring of domestic and EU maintenance decrees, passing legislation ensuring each spouse a part of the proceeds from the ownership of the marital home, reexamining the scope of nullity law, granting domestic courts the ability to determine maintenance and other financial questions from spouses who have been granted foreign divorces and separation decrees, expanding the family court system, investigating the possibility of increased mediation options, and finally, as the pièce de résistance, proceeding with another divorce referendum.¹⁵¹ The government proposed a non-exhaustive list of five alternate constructions of divorce legislation, ranging from the straightforward delegation of rulemaking authority on divorce to the Oireachtas to the more complex enumeration of a series of grounds, including separation for a number of specified years.¹⁵² The government conceded in its recommendations that the specifics of the resulting legislation depended on the exact wording of a constitutional amendment granting divorce, but recommended that the structure of the Judicial Separation and Family Law Reform Act of 1989 be used as a guide.¹⁵³ No discussion of the specifics of pension benefits and no proposals to alter the social welfare laws to meet the needs of divorcees and children from divorces were incorporated into the White Paper; presumably, the government felt that these issues were best left to the discretion of the legislature.¹⁵⁴ The White Paper did ac-

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¹⁵⁰. See MINISTER FOR JUSTICE, supra note 100.

¹⁵¹. See id. at 13-15.

¹⁵². See id. at 89-95. The five options that the government proposed are contained in Chapter 11 of the White Paper, entitled “Divorce: Possible Approaches to a Constitutional Amendment.” See id. For a practitioner’s analysis of the White Paper’s recommendations, see Peter Ward, The Path to Divorce?, IR. L. TIMES, Feb. 1994, at 29.

¹⁵³. See MINISTER FOR JUSTICE, supra note 100, at 89-95.

¹⁵⁴. See Ward, supra note 152, at 30.
knowledge as an aside, however, that maintenance levels for wives who have been judicially separated from their husbands was an issue of much contentious debate and should be reexamined in light of a successful divorce referendum.\textsuperscript{155} The White Paper also recommended expanding the judicial mandate of the Circuit court by allowing it to grant nullity decrees, a function heretofore restricted to the High Court.\textsuperscript{156}

The Domicile and Recognition of Foreign Divorces Act of 1986, the Status of Children Act of 1987, and the Judicial Separation and Family Law Reform Act of 1989 helped pave the way for the eventual and simplified passage of divorce legislation; in a similar fashion the Matrimonial Home Bill of 1993 was shepherded through passage in the hopes of easing the transition into an era of divorce law for Ireland. The Matrimonial Home Bill proposed that in cases of matrimonial breakdown and resulting judicial separation, the spouses should be considered as joint tenants of the matrimonial home and that the house and personal property should therefore be divided equally between them.\textsuperscript{157} Unfortunately for the divorce reformers, the Matrimonial Home Bill was found unconstitutional by the Supreme Court, as it was said to confer on the State a disproportionate amount of control and intervention into the rights of the family, i.e. those rights that are to be so carefully guarded by the State pursuant to Article 41 of the Constitution.\textsuperscript{158}

It is ironic that the Matrimonial Home Bill was passed in part to limit the range of the injustices that could be exacted under Article 41. In a revealing case, \textit{L v. L},\textsuperscript{159} a Catholic man had married a Ger-
man Lutheran in Germany in a Roman Catholic marriage ceremony. The couple had returned to Ireland, where he purchased a large farm and dilapidated eighteenth-century Georgian manor house. The wife helped with the farming and played a pivotal role in restoring the house to pristine condition. Almost from the start, the marriage relationship was a physically abusive one; the couple received a judicial separation in 1988, and the wife sought a declaration under the Married Women’s Status Act of 1957 in order to receive a share of the farm in its furniture, fixtures, and fittings. The High Court granted the wife judicial separation and maintenance; on the issue of a part in the home ownership, the wife needed to prove that by her contributions to the property she relieved the husband of all or part of the financial burden of acquiring the property. The court found that the wife did not meet this burden, finding that “a wife’s work in the home and in the care of the children or in the maintenance and enhancement of the property did not result in any beneficial ownership of the property.” Nevertheless, since the Constitution in Article 41.2 encouraged wives to forego such financial contributions and realize their careers in the home, the wife in this case was entitled to 50% of the house. Justice Barr reasoned:

[because] her role as full-time wife and mother precludes her from contributing directly or indirectly in money or money’s worth from independent employment or avocation towards the acquisition by the husband of the family home and contents, her work as homemaker and in caring for the family shall be taken into account in calculating her contribution towards that acquisition—particularly as such work is of real monetary value.

The crucial significance of this case is that it was the first to deem a housewife entitled to a beneficial interest in the family home based on her constitutional rights as outlined in Article 41. This arguably gave for the first time “full expression to the very special posi-


160. The Married Women’s Status Act of 1957 consolidated the laws dealing with the status of married women and codified the status of a married woman as the same as an unmarried woman when considering the disposition and ownership of property. Property disputes involving married women were governed by section 12 of the Act. Note that section 12 has been replaced by section 36 of the Family Law Act of 1995. See WALLS AND BERGIN, supra note 102, at 67.


tion which the family occupies in the Constitution."\textsuperscript{164}

The husband appealed to the Supreme Court, which accordingly reversed the holding of the High Court, arguing that the High Court had actually not upheld the right of the housewife as outlined in Article 41 as much as it had created out of that right a new right to beneficial interest in property and that this derivative right was nothing short of a usurpation by the court of the legislative function.\textsuperscript{165} This turn of events left the law in as much confusion as it was prior to litigation. The Supreme Court decision perpetuated a disconcerting state of affairs in a system that lauds and sets apart the institution of marriage and of the family and the role of the woman in the home. In the minds of the Supreme Court justices, there was no concomitant acknowledgement of the woman's contribution in the home. The Family Law Act of 1995 attempted to set this problem to rest once and for all. The Act gave to the courts extended powers over ancillary orders following judicial separation decrees. Especially significant are greater powers granted to resolve money and property disputes.\textsuperscript{166}

E. The 1995 Divorce Referendum

Owing to the growing awareness of the lasting sociological problems associated with marital breakdown, and as a result of the continued lobbying by divorce proponents, by 1995 government officials believed the time was propitious to seek yet another divorce referendum. Anti-divorce lobbyists geared up once more for what proved to be another hard battle. Many criticized the government for siding with the divorce proponents; in the words of one journalist-critic,

\begin{quote}
[F]rom the point of view of family stability, Ireland is in an enviable position, and vulnerable children are at incomparably lower risk of being grievously hurt. But these factors . . . seemingly count for nothing among blinkered political legislators obsessed with bringing Ireland into the mainstream of modern culture and morality, however degenerate, depraved and . . . deeply harmful to society.\textsuperscript{167}
\end{quote}

But the anti-divorce campaigners had been undermined by the weakened state of their main support, the Roman Catholic Church,

\begin{flushright}
\textsuperscript{164} \textit{Id.} at 231. \\
\textsuperscript{165} \textit{See} O'Doherty, \textit{supra} note 159, at 9. \\
\textsuperscript{166} Family Law Act, § 36(2) (1995). \\
\textsuperscript{167} Desmond Rushe, \textit{Ireland's Forgotten Empire}, \textit{HUMAN LIFE REV.}, Summer 1994, at 75, 82. Desmond Rushe was a longtime theater critic and columnist for the \textit{Irish Independent} newspaper.
\end{flushright}
which had been forced to spend much of its energy responding to a series of unseemly sex scandals. The most prominent of these were the 1993 disclosure of Bishop Casey of Galway’s mistress and his eighteen-year-old child, and the 1995 numerous court proceedings against Brendan Smyth, a Catholic priest who had molested at least thirty-six children during his forty-year career, with the knowledge of his Church superiors.168 Numerous other clergy child-molestation cases emerged during this time, along with the revelation that many of the offending priests were removed from Ireland by the Catholic Church and sent over to America with no mention of their “records.”169 After the death of Father Michael Cleary, a Dublin priest and well-known defender of Pope John Paul II’s ultra-conservative agenda, his housekeeper of many years admitted that she and the priest had been married privately and were the parents of two grown children.170

The Bishops’ lobby was, understandably, not as successful as it had been in 1986, because in the eyes of the public the moral authority with which the Church in Ireland purported to speak had been so thoroughly discredited. Their attempts to lobby forcefully were met with cutting and perceptive jibes such as “[L]et the Bishops look after their own families [referring to Bishop Casey’s clandestine marriage and children].”171 The “No” side maintained that divorce would have an adverse effect on children;172 in light of Brendan Smyth and other child-abusing priests these admonitions tended to ring hollow. The disaffection that many Roman Catholics felt for their church was tellingly revealed by the significant drop in regular mass attendance.173

The weakened Catholic Church and the concomitant weakness of the “No” campaign was inversely proportional to the vigor of the “Yes” campaign; the rising number of separation decrees granted in-

173. Weekly mass attendance in 1974 stood at 91%; by November, 1995 regular attendance had dropped to 64%, according to one poll. See Wallace, supra note 170, at 31.
dicated the degree to which couples were finding ways to split up despite the ban on divorce. Statistics comparing 1986 marital status with that of 1991 reveal an increase in all areas of divorce, separation, and desertion. For example, an examination of the marital status of once-married women in 1986 and 1991 reveals the following:

<table>
<thead>
<tr>
<th>Marital Status of Women</th>
<th>1986</th>
<th>1991</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married</td>
<td>653,586</td>
<td>667,051</td>
</tr>
<tr>
<td>Separated</td>
<td>22,607</td>
<td>33,793</td>
</tr>
<tr>
<td>Deserted</td>
<td>9,038</td>
<td>16,904</td>
</tr>
<tr>
<td>Marriage annulled</td>
<td>540</td>
<td>722</td>
</tr>
<tr>
<td>Legally separated</td>
<td>3,888</td>
<td>5,974</td>
</tr>
<tr>
<td>Other separated</td>
<td>6,792</td>
<td>7,195</td>
</tr>
<tr>
<td>Divorced in another country</td>
<td>2,169</td>
<td>2,998</td>
</tr>
<tr>
<td>TOTAL</td>
<td>676,193</td>
<td>700,844</td>
</tr>
<tr>
<td>Separated as % of TOTAL</td>
<td>3.3</td>
<td>4.8</td>
</tr>
</tbody>
</table>

Another arrow in the “Yes” campaign’s quiver was the growing liberalization of the Irish in general, with liberalizing trends seen in Ireland’s membership in the EU, the influence of global media, the decline of the family farm, and even the liberalization of church policy following Vatican II.\(^\text{175}\) Where once there was consensus on moral issues, now there was contention.\(^\text{176}\) Politicians, once able during the 1960s and 1970s to turn a blind eye to social and moral tensions, were

\(^{174}\) FAHEY AND LYONS, supra note 68.  
\(^{175}\) See Brian Girvin, Social Change and Political Culture in the Republic of Ireland, 46 PARL. AFF. 380, 384 (July 1993).  
\(^{176}\) See id. at 385.
no longer able to enjoy such a luxury.\textsuperscript{177} As a consequence of these factors, the government felt confident enough of the outcome to call for a referendum on a constitutional amendment allowing divorce, to be held November 24, 1995.\textsuperscript{178}

The government was much more active in the 1995 divorce campaign than it had been in 1986, as were the major political parties. As Mary O'Rourke, deputy leader of Fianna Fail (the political party considered to be the inheritors of de Valera's political conservatism) explained: "In 1986, we generally took a neutral line—which became on odd occasions hostile. This time, the leadership line [of the party] is in favour. There will be personal decisions at a local level, of course. But it is a distinct difference."\textsuperscript{179} This sentiment was in fact the one held by all Irish political parties.\textsuperscript{180} Voters opposing the referendum complained, and validly so, that the political powers were ignoring the interests of a sizeable population.\textsuperscript{181}

In preparation for its renewed divorce campaign, the govern-

\textsuperscript{177} See id. at 389.

\textsuperscript{178} The strictly-worded amendment was crafted in response to the public's fear of instituting a "quickie" divorce scheme and was designed to be more likely to overcome the objections of those who might otherwise fear the introduction of divorce. The amended Art. 41.3.2 was to read as follows:

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

\begin{itemize}
  \item[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 five years,
  \item[ii)]there is no reasonable prospect of a reconciliation between the spouses,
  \item[iii)]such provision as the court considers proper having regard to 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
  \item[iv)]any further conditions prescribed by law are complied with.
\end{itemize}


\textsuperscript{179} Ryan, supra note 170, at 22.

\textsuperscript{180} See Wallace, supra note 170, at 31.

\textsuperscript{181} See Ryan, supra note 170, at 22; see also discussion of Des Hanafin case, infra notes 202-215 and accompanying text.

Some critics pointed their fingers at prominent politicians such as Dick Spring (Labour T.D. and Tanaiste (Deputy Prime Minister; pronounced tawn-ush-eh)) and Bertie Ahern (Fianna Fail Party leader) for promoting not just social and legislative goals but also personal interests. Dick Spring is married to an American divorcée; and Bertie Ahern makes no secret of the fact that he has been long separated from his wife and has established a long-term relationship of over ten years with Celia Larkin. See Alan Murdoch, You Can Divorce, But Why Hurry?: Irish Marriage Will Survive Change in Law, INDEPENDENT (London), Feb. 23, 1997, at 10; see also Bertie's Girl Movin' On Up, IR. VOICE, Jul. 9-15, 1997, at 2.
ment commissioned a study of divorce and of the legislative elements that would need to be involved in the implementation of any divorce referendum. Its study, *The Right to Remarry: A Government Information Paper on the Divorce Referendum*, published only two months before the scheduled referendum, argued strongly for the amendment of the Constitution in favor of divorce. Having learned from the mistakes made in the 1986 campaign, the government sought not only to inform the public about policies that would be implemented if divorce were introduced in Ireland, but also to remind voters of provisions already in force at the time to assist individuals and families in dealing with the consequences of marital breakdown. In fact, eighteen specific pieces of legislation were already in place that alleviated many of the problems associated with divorce and answered questions that had troubled voters in the 1986 referendum. As part of the government’s efforts to secure support for divorce, it launched a sophisticated advertising campaign. For its expenditures on this component of its campaign, the government came under criticism for its excess.

Proponents of divorce resurrected some of the time-honed arguments in favor of divorce that were used in 1986, such as the need to give deserted spouses a second chance; the need to respect minority (especially Protestant) rights; the need to insure that second relationships are given legal recognition; and the need to eliminate the legal and moral ambiguities within which large numbers of Irish found themselves. Those in both the “Yes” and “No” camps agreed that marital breakdown was a severe Irish social problem. Leaders of the “Yes” camp reminded voters that divorce is the product of breakdown, not the cause of it.

Opponents acknowledged that divorce may not cause marital breakdown, at least not in Ireland where it was not allowed, but they


183. See id. at 5.


186. The government purportedly spent over £500,000 (approx. US $800,000) on its pro-divorce information campaign; a small percentage of this money was reserved for anti-divorce messages (approx. £70,000, or US $112,000). *See Government Unveils Divorce Plans* (visited Sept. 28, 1997) <http://www.iol.ie/resource/ip/noi/sep17-95/divorce.html>; see also text accompanying notes 199-200, infra.

believed that were divorce to be made available it would lead only to further breakdown; it would "undermine, destabilise, and devalue marriage, contrary to the constitutional guarantee by the State to protect the family and the institution of marriage." 188 Furthermore, children would be severely damaged as a result of divorce, and wives would be beggared. 189

Over the course of the campaign, support for the referendum varied greatly. Early on, polls showed a two-to-one majority favoring divorce. 190 But as the weeks passed, several members of Parliament raised their voices in protest, despite the official support by all parties of the proposed amendment. 191 Although the liberal and upscale suburbs of south Dublin were united in their support for the measure, such concentrated support was not to be found in rural Ireland, where voters were not particularly enamored of the liberal causes of sophisticated Dublin. 192 By the eve of the referendum the support for and against the measure was evenly split. 193

When the votes of the November 24 Referendum were tallied the results were 818,112 "for" and 810,592 "against" with a 7,520 majority in favor. With such a close vote, a petition for a recount was inevitable; the new count found 818,889 "for" and 809,726 "against," or a majority of 8,163 votes, a mere 0.6% difference—the narrowest margin of any of the constitutional amendment referenda to date. 194 The largest concentration of "Yes" votes was in Dublin and environs; in the Dublin area "Yes" votes were not limited to the affluent, lib-

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189. See Duncan, supra note 186, at 127. A simple recitation of the arguments for and against divorce fails to describe the passion and virulence with which the campaign was waged. As noted previously the pro-divorce side cashed in on the degenerate behavior of priests. Anti-divorce groups and individuals could also hit below the belt. “You’re all a shower of wife-swapping sodomites,” shouted an anti-divorce militant called Una Bean Mhic Mathuna to her opponents at the Dublin area vote count. Earlier in the campaign, the pro-amendment Fine Gael politician Alan Shatter [prominent family lawyer and author of the definitive text on Irish family law] received a letter telling him that Ireland “does not need Jewish parasites like you to advise the people how to live their lives . . . . Get out, you Jewish scum.” Tonkin, supra note 169, at 22.


191. See id.

192. See Boyd Tonkin, supra note 168, at 23.

193. See id.

eral southern suburbs, but came from all areas of the city, whose eleven constituencies comprise almost half the nation’s population. After Dublin (including adjacent Dun Laoghaire), the other area high in “Yes” votes was in the counties surrounding the capital. This area corresponds roughly with the Pale, the old area of English settlement. Included in this area are the counties of Kildare, which returned a 57.65% affirmative vote; Louth on the north, a 51.75% vote; Wicklow on the south, a 58.99% vote. The statistics for Dublin and the Four Provinces of Ireland are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Dublin</th>
<th>Rest of Leinster</th>
<th>Munster</th>
<th>Connacht</th>
<th>Ulster</th>
</tr>
</thead>
<tbody>
<tr>
<td>Verdict</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Majority (%)</td>
<td>(27.11)</td>
<td>(1.16)</td>
<td>(12.23)</td>
<td>(18.90)</td>
<td>(21.71)</td>
</tr>
<tr>
<td>Electorate</td>
<td>746,671</td>
<td>609,423</td>
<td>759,405</td>
<td>341,428</td>
<td>180,974</td>
</tr>
<tr>
<td>Total Poll</td>
<td>482,044</td>
<td>377,690</td>
<td>476,906</td>
<td>198,136</td>
<td>99,154</td>
</tr>
<tr>
<td>Turnout (%)</td>
<td>64.56</td>
<td>61.98</td>
<td>62.80</td>
<td>58.03</td>
<td>54.79</td>
</tr>
<tr>
<td>Spoilt vote</td>
<td>1218</td>
<td>1345</td>
<td>1678</td>
<td>748</td>
<td>369</td>
</tr>
<tr>
<td>Valid Poll</td>
<td>480,826</td>
<td>376,345</td>
<td>475,228</td>
<td>197,388</td>
<td>98,785</td>
</tr>
<tr>
<td>Yes (%)</td>
<td>(63.56)</td>
<td>(49.42)</td>
<td>(43.88)</td>
<td>(40.55)</td>
<td>(39.14)</td>
</tr>
<tr>
<td>No (%)</td>
<td>(36.44)</td>
<td>(50.58)</td>
<td>(56.12)</td>
<td>(59.45)</td>
<td>(60.86)</td>
</tr>
</tbody>
</table>

Several simultaneously occurring social changes may account for the referendum results. The voting population of Ireland is becoming younger and more urban. In addition, this population is no longer uncritically deferential to the Catholic Church, on divorce or other matters. One poll found that even of those voting “no,” only 7% cited the Church’s teaching as the basis of their opposition. Additionally, the fact that all political parties supported divorce for the first time in the history of the Republic may have been decisive. The unanimity of the political parties on this moral issue may indicate the advent of a political discourse more European in outlook: “Whereas previously, Irish parties were distinguished almost exclusively by traditional cleavages based on the sides taken in the Irish Civil War, they are now beginning to reflect alternative societal changes.”

What some have called the “Robinson factor” also played a role in the debate: as a young professional, lawyer, professor, mother, former Seanad member, and President who is Catholic but married to a Protestant, Mary Robinson in lifestyle, belief, and political views embodied the essence of the modern and increasingly Euro-conscious Irish identity. Her pro-divorce enthusiasm was almost contagious.

For those sympathetic to the anti-divorce lobby, the spread of this contagious enthusiasm was indeed akin to the spread of a disease propagated by the government. The Irish government’s involvement with the “Yes” campaign prompted one concerned citizen to file suit against the government immediately prior to the Referendum. The Supreme Court in *The Matter of Bunreacht Na hÉireann; Patricia McKenna v. An Taoiseach, An Tanaiste and Others* held that the government was “acting in accordance with its rights in giving factual information with regard to the proposal which was the subject of the referendum, in expressing its views thereon and in urging the acceptance of such views,” but that the government’s actions, in spending public funds for the “Yes” campaign, “amounted to an interference with the democratic and constitution process for the amendment of the Constitution and infringed the concept of equality which was fundamental to the democratic nature of the State.” The govern-

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198. See Adshead, *supra* note 195, at 140.
199. *Id.*
200. See *id.*
202. *Id.*
ment was thus compelled to discontinue its advertising campaign favoring divorce; but by the late date at which this order was given by the court, a mere week before the scheduled referendum, most voters had decided how they would vote.

The battle over the divorce referendum, however, did not end with the vote in November, nor did it end with the nationwide recount that was petitioned for by the ultra-conservative group, Muintir na hÉireann (People of Ireland). Former Senator and chairman of the Anti-Divorce Campaign Des Hanafin claimed that the governmental "interference" in the "Yes" campaign swung the divorce referendum in its favor and that, despite the Supreme Court's order for the government to cease its lobbying, the lobbying continued on the Internet. Hanafin filed an official complaint within the required seven-day window following the publication of the official tally in the *Iris Oifigiúil* (Official Gazette); however, the Divisional High Court rejected Hanafin's claim, stating that it found "the allegation that the Government's unconstitutionally funded campaign had a significantly persuasive influence on the electorate . . . speculative and unsatisfactory." According to the provisions of the Referendum Act of 1994, the High Court's valid adjudication of this constitutional issue is final, recourse to the Supreme Court following a High Court judgment is precluded by this special provision within the Act. Article 34.4.3 of the Constitution states that there is always a right to appeal to the Supreme Court on issues of law except for "such exceptions and subject to such regulations as may be prescribed by law." Hanafin argued, however, that he held a special right to appeal to the Supreme Court, regardless of the special jurisdiction of the High Court outlined in the Act. Since there was no preclusion of appeal stated

203. See Result: Divorce Carried, supra note 194.


205. See *The Referendum on Divorce*, supra note 185.

206. See Referendum Act of 1994, § 40(2), which outlines the publication in the Official Gazette, while § 42(2) stipulates the seven-day window; see also Geraldine Kennedy, *Petition Against Validity of Poll Result Likely to Go to High Court*, IR. TIMES, Nov. 27, 1995, at 1.


208. See Referendum Act of 1994, § 42(1).

209. IR. CONST. art. 34.4.3. For a discussion on the appellate jurisdiction of courts in civil cases in Ireland, see generally RAYMOND BYRNE, THE IRISH LEGAL SYSTEM 231 (3d ed., 1996); see also JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 234 (1992).
expressly within the body of the Referendum Act of 1994, Hanafin concluded, his right to appeal should be sustained. Within the body of his appeal, Hanafin argued that the High Court had erroneously interpreted provisions of the Referendum Act, in particular by too narrowly interpreting section 43(1)(b) and (d), especially the language in this section which enables a legal challenge to a provisional referendum certification due to interference with, or irregularities in, the way the referendum is conducted. Hanafin maintained that because of these shortcomings in the Referendum, a new referendum should be conducted. Because of the lack of clear legislative guidance in the Referendum Act of 1994 regarding a petition against the validity of a referendum, Hanafin’s case was considered appropriate as a case of first impression to be referred to the Supreme Court by the High Court.

On hearing the case, the Supreme Court found that Hanafin had failed to meet his burden of proof “on the balance of probabilities” to show that

(1) “the nature and extent of the obstruction of or interference with or other hindrance or mistake or other irregularity” [read, “constitutional wrongdoing”], and

(2) “that such ‘constitutional wrongdoing’ materially affected the result of the referendum as a whole.”

210. See David Gwynn Morgan, Success for Divorce Poll Appeal Looks Unlikely: Proving That the Government’s Expenditure Caused the Yes Majority is Going to be Difficult if the Supreme Court Approaches the Issue Literally, IR. TIMES, Apr. 30, 1996, at 12.

211. See Referendum Act, 1994, § 43(1).

212. See In the Matter of the Fifteenth Amendment of the Constitution (no. 2) Bill and in the matter of a Referendum Petition pursuant to § 42 of the Referendum Act 1994; D Hanafin v. Minister for the Environment, the Government of Ireland, the Attorney General and the Referendum Returning Officer, and the Director of Public Prosecutions (Notice Party), [1996] 2 I.L.R.M. 161 (Ir. S.C.), available in LEXIS, Ireland Library, Cases File. In the case the Supreme Court was asked to determine, inter alia, whether the government’s “Yes” vote campaign was unconstitutional in that it “altered the nature of that campaign from a permissible communication of information to an impermissible interference with the free will of the electorate,” and whether this constituted “interference” within the meaning of the Referendum Act. See id. at 161.

213. See id. Since the Referendum Act did not provide for any mechanism to allow for the freely given votes of the people in a referendum after they had been tallied to be overturned judicially, the Court entertained a hearing to consider whether Hanafin would be given the right to appeal. See Christine Newman, AG seeks Dismissal of Hanafin’s High Court Challenge to Divorce Poll, IR. TIMES, Jan. 13, 1996, at 8. Hanafin argued that nowhere in the Referendum Act of 1994 was it clearly, expressly, and unambiguously stated that there was no right to appeal to the Supreme Court on a referendum petition. See Hanafin Can Appeal to Supreme Court, IR. TIMES, Mar. 2, 1996, at 4.

Justice Blaney stated that the Divisional (High) Court had properly decided the case and that accordingly no appeal to the Supreme Court was warranted. All other Justices agreed. Immediately following this unanimous decision, the results of the divorce referendum were formally signed by the High Court in June 1996, pursuant to the regulations set out in section 57 of the Referendum Act of 1994.

F. The Family (Divorce) Law of 1996

With these hurdles out of the way, the long-awaited divorce legislation was at last able to be introduced for passage through the Dáil and Seanad. By late June 1996, the Divorce bill was published and throughout the summer and early autumn was reviewed and debated by the Oireachtas. During the debates some members expressed long-held reservations about divorce in general, yet there was no express opposition to the bill on the floor of the Oireachtas.

In the main, the bill was quite restrictive in the conditions couples seeking divorce were required to fulfill before their cases could

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(Ir. S.C.), available in LEXIS, Irelnd Library, Cases File.

215. Justice Blaney stated that the evidence that the Divisional [High] Court chose to admit was fully within its discretion, and that the evidence did not prove that the government's conduct altered the outcome of the referendum. See id.

216. See id. Des Hanafin, having won back his seat in the Seanad in August 1997, has stated that he plans on becoming active in the attempt to overturn the divorce decision legislatively. O'Regan and Walsh, supra note 194, at 4. Other No-divorce campaigners are also committed to seeing the Divorce laws overturned. As Dr. Gerard Casey, vice-chairman of the No-Divorce Campaign, vowed, "We have not yet begun to fight. We will torment people for the next 40, 50, 60 years." Geraldine Kennedy, No-Divorce Campaign to Seek New Referendum, IR. TIMES, Jun. 14, 1996, at 9.

217. See Referendum Act (1994) § 57; see also Christine Newman, Result of Divorce Referendum is Formally Signed By High Court, IR. TIMES, Jun. 15, 1996, at 4. The resulting 15th Amendment to the Irish Constitution modified Article 41.3.2, which now states, in its entirety:

A Court designated by law may grant of 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 five 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.

IR. CONST. art. 41.3.2, amended by IR. CONST. amend. XV.

218. See Carol Coulter, "No-fault" Divorce Basis Not Debated: The Divorce Bill, Published This Week, Includes Both Conservative and Liberal Elements, IR. TIMES, Jun. 21, 1996, at 14.


220. See id.
be heard. This was understandable, given that the constitutional mandate to uphold the family in Article 41 remained in place. Some conservative critics of the bill were quick to note that any standard that was more liberal than strictly fault-based divorce was far too liberal for them. The bill as passed closely resembled the Judicial Separation and Foreign Divorces Recognition Act of 1989, with the only major alteration being the permission of separated persons to remarry. Although divorce as defined in the legislation was to be no fault, issues of fault would necessarily be involved in the determination of property and maintenance orders associated with the divorce action, since the court was to base its assessment of monetary relief regarding property and maintenance on an evaluation of, among other things, the "conduct of the spouses." The Dáil passed the bill perfunctorily and without a vote, and after passage through the Seanad, and being signed by President Robinson, the law went into effect on February 27, 1997.

The Act was largely an unaltered version of the bill that was initially presented to the Dáil. The Act encouraged persons to settle marital difficulties first through counseling, then mediation, and only finally through separation and divorce proceedings. Solicitors who represent the parties in divorce proceedings must certify in writing to the court that the parties had been informed of the benefits of reconciliation, counselling, mediation and judicial separation. Solicitors are even encouraged to try their hand at assisting in the reconciliation process.

"Quickie divorces," as the popular Irish press referred to divorces without a preliminary separation period, were prohibited by the strict time provisions outlined in the Act. Section Five of the Act stated that the court would consider divorce actions only when the

223. See Divorce Bill to Go to Seanad After Passing Final Stage Without a Vote, IR. TIMES, Sept. 26, 1996, at 8.
225. See id., § 6(4)(a).
226. See id., § 7.
227. See id., § 7.
spouses had satisfied all the following prerequisites:

(a) 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 five years,

(b) there is no reasonable prospect of a reconciliation between the spouses, and such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.223

A feature of the Act noted by some observers is its provision for joint custody of children in section 10(2),230 this addresses the concern of some that mothers would be the sole custodians and that fathers would thus be permanently deprived of their custodial rights.231

Despite the easy passage of the bill, implementation of the Act was cause for concern. Particular worries were the high cost of divorce;232 the flood of anticipated divorce cases;233 the lack of adequate facilities for mediation;234 and the burden placed on the courts,235


230. Section 10(2) states that a decree of divorce will not affect the right of the child’s parents to joint custody. See Family (Divorce) Act, 1996, § 10(2).


232. On average, an uncontested divorce would cost in the range of £3,000-5,000, subject to an additional 21% Value Added Tax. Contested divorces would cost more, especially if disputes over property or child psychiatrist assessments are involved. See So You Want a Divorce?, IR. TIMES, Feb. 17, 1997, at 6. Lawyers, it has been commented, stand to gain the most out of the Family (Divorce) Act, since solicitors are required to submit certificates to the court on their client’s behalf, such as the certificate stating that reconciliation of the marriage was discussed. Sinead Ni Chuluchain, a family lawyer, stated that unlike England, none of these certificates can be accepted by post. Thus costs for the solicitor’s presence at the courthouse become a significant financial consideration. See David Sharrock, No Stampede in Prospect for Divorce Irish-Style, GUARDIAN (London), Feb. 27, 1997, at 11.

233. Estimates of the number of individuals who might desire to avail themselves of divorce under the new act varied from sixty to eighty thousand. See Kelly, supra note 226, at 2; So You Want a Divorce?, supra note 230, at 6. Even conservative estimates anticipated 10,000 individuals applying for divorce during the first year of the act. See Mark O’Connell, Ireland’s Family Justice is Now in Crisis, LAWYER, Sept. 3, 1996, at 12.

234. Mediation in Ireland is “underdeveloped and underregulated to cope with the demand for these services.” The Advent of Divorce, IR. TIMES (editorial), Feb. 28, 1997, at 13. “Private mediators are unregulated at the moment, and their fees can vary widely. The Institute of Mediators runs a register of trained mediators, but there is no legal obligation [for] people calling themselves mediators to register with it and there is nothing to stop anyone setting up as a mediator, advertising in the Golden Pages and charging whatever they like.” Carol Coulter, Divorce Became Law Yesterday, But Support Services for Those Seeking Divorce, and Information on the Workings of the Family Courts, Remain Sadly Inadequate, IR. TIMES, Feb. 28, 1997, at 12.

235. See Divorce Bill to Go to Seanad, supra note 223, at 8.
which were ill-prepared for the forecast onslaught. The initial fears about an overwhelming number of applications proved to be unwarranted, as the stringent time restrictions in the Act helped to stem the flow of applications to the courts. Furthermore, the concern of applicants that they would be the first test cases may have prompted many to delay their applications until the administrative details were worked out.

There could not have been a more appropriate first divorce case in Ireland than RC v. CC to illustrate the need for such legislation. A man in his late fifties or early sixties, suffering from a terminal illness and in danger of imminent death, petitioned the court for divorce, so that he could marry the woman with whom he had been living for many years and with whom he had a daughter. The children of his first marriage were all adult, some having children of their own. Due to the severity of his illness, he petitioned the High Court to grant him a divorce prior to the official date the divorce legislation was to come into force. The High Court granted his request because it concluded that the effective date set by the Family (Divorce) Act 1996, February 27, 1997, was not constitutionally mandated and was consequently not binding on the court’s ability to adjudicate the constitutional amendment, which was established and valid the day the referendum results were accepted by the government. Thus, the High Court was not obligated to wait for specific terms set forth in enabling legislation. Only a few days after receiving his divorce and remarrying, the plaintiff died.

236. James Nugent, Chair of the Irish Bar Council, argued that more funding and additional judges were needed in order to forestall a "courts deadlock." An overriding problem is the everyday operation of the judicial system: "the recent appointment of 10 new judges will do a lot to help but the management of the courts has always been such a hit-or-miss affair," concluded Nugent. Mark O'Connell, supra note 233, at 12.


240. The legislation came into force on February 27, 1997.

241. RC v. CC, supra note 238, at 403.

242. This occurred only days after the Supreme Court dismissed Des Hanafin's appeal. See supra note 217 and accompanying text.


VI. ANALYSIS

"Divorce entered the Irish legal system . . . not with a bang, but a whimper." This statement summarizes not only the immediate reaction of Irish divorce-seekers to the introduction of divorce in Ireland, but also reflects the extent to which other legislation had largely addressed the broader implications of marital breakdown over the previous two decades. Although the administrative system was not as prepared as it might have been for the keystone provision of divorce, the legal infrastructure and the mechanisms in place to implement the laws had long been constructed. Divorce and the recognition of marital breakdown, arguably the most contentious social debate in Ireland, is the last of several recent issues to be addressed legislatively in an attempt to liberalize Ireland's social agenda, and to remove Ireland, finally, from some of the most stifling constraints of de Valera's national image.

Although de Valera's notion of an idealized social life was held by most citizens of the Irish Free State at the time the Constitution was put in place, opponents vehemently criticized his codification of family life. Many small groups, among them strong feminist groups, lobbied heavily for the scrapping of the 1937 Constitution's provisions regarding women and their place in the home. Many women were appalled at the proposed 1937 Constitution; one active suffragette concluded that de Valera's "ideal is the strictly domestic type of woman who eschews 'politics' as male concerns, the Fascist ideal now working under Mussolini and Hitler." The changing role of women in the social, political, and economic life in Ireland over the last decades has rendered the ideal of the strictly domestic mother/wife embodied in the Constitution impossible to maintain. With active involvement in the political process, women such as former President Mary Robinson and current President Mary McAleese testify to the position that women have come to hold in the formation of new Irish political policy. The male-centered ethos in the Constitution may remain in its continued idealization of woman's domestic role, but

245. Carol Coulter, Introduction of Divorce into Irish Legal System Fails to Open Any Floodgates, supra note 237, at 7.
246. Other examples of this liberalizing trend can be seen in the de-criminalization of homosexual acts between consenting adults and the lawful availability of contraceptives and of abortion information. See Adshead, supra note 195, at 142.
247. See COOGAN, supra note 1, at 496.
the ideology once supporting it has eroded.

Not for women alone has the world of the Constitution changed. As evident in the legal battles throughout the decades since the promulgation of the Constitution, social and political controversies guide the ongoing judicial and legislative dialogue on national issues. One of the principal impediments to free and candid discussion and policy implementation in Ireland is the practice of enshrining in the Constitution policies which in other nations would probably be handled by legislation; forcing social change to occur only through nationwide referenda guarantees that such change will be difficult, which, arguably, was de Valera’s goal. On certain issues, such as family life, de Valera and his compatriots saw no need to build into the Constitution any flexibility, as the Constitution was meant to codify the ideal Ireland. In keeping with a utopian ideal, de Valera attempted to eliminate all rival visions of Ireland by “affirming the absolute rightness of his visions of the ideal state.”

The prohibition of divorce was a logical consequence of upholding the vision of Ireland as a Catholic state. If de Valera feared that any change in attitude toward divorce would be the result of a Protestant-inspired apostasy, he was mistaken; marriages break down in Ireland for the same reasons that they do in any other country, such as the need for dual incomes and related economic needs concomitant with modern life which strain the marital relationship. Thus, Irish politicians after de Valera were left with the uneasy task of squaring an ideal Constitution with the realities of evolving modern Irish life.

An additional complicating factor in the divorce debate is the impact of family law in the Republic of Ireland on Ireland’s northern neighbor. Without divorce legislation in place, reunification debates between Northern Ireland and the Republic would be strained. The new availability of divorce in the Republic of Ireland helps to rebut one of the frequent arguments of Northern Irish Protestants, namely that the South is dominated by a Catholic social agenda. Moderates in the North, like some politicians in the South, hope that divorce legislation will smooth the path toward reunification. For the average Irish man or woman in the South, however, the implications of the divorce legislation to the larger North/South debate was largely irrelevant; they voted for or against the referendum out of concern for its effect on their own lives and the lives of those around them,

249. KRISHAN KUMAR, UTOPIANISM 90 (1991) (discussing Karl Popper’s views on utopias).
250. See Adshead, supra note 195, at 141.
not out of any larger political motive. In the North, the extreme opponents of any union with the Republic, such as the Rev. Ian Paisley, are similarly indifferent to any position taken on divorce by the Southern electorate. It remains to be seen whether or not the presence of divorce in the South will have any effect on the reunification process.

Ireland, long the holdout as the only member of the EU to have no law permitting divorce, now enjoys a political and legislative record more in keeping with European policies and laws. Ireland's self image has changed noticeably during the last half of the twentieth century, particularly with the accession of the country to the EU:

The kind of society set in train in the early sixties and reinforced in the seventies by our accession to the [EU] has created a situation of dependence. We seem to have become totally reliant on others to provide the answers to our many problems. Our own institutions appear to have failed us completely. Someone once wrote "the shape of Irish society (and institutions) fits the Irish people like a badly tailored suit; we do not acknowledge the suit as our own, we do not feel at home in it, but we tolerate it as we have always tolerated everything."

Through legislation such as the constitutional amendment permitting divorce, Ireland has in recent years attempted to make its institutions fit its citizenry more comfortably and match developments in Europe more faithfully. For the first time, Ireland can parallel its unsurpassed economic strength within the EU with a family social policy approaching that of Europe's most progressive countries.

Both opponents and supporters of divorce have pointed to the decline in religious observance as an indication of the spiritual temperature of modern Ireland. This cooling of religious zeal does not entail a complete rejection of Ireland's strong Catholic heritage; there is little doubt that the Church will continue its social, spiritual, and cultural mission in this revised context, as it has in the face of many similar hurdles throughout history. Indicative of the hold of the Church's position is the slim margin of victory of the divorce proponents during the 1995 referendum. Clerical and lay opposition

251. See id.
252. See Albert Menendez, supra note 16, at 8.
254. Ireland's economy has become one of the great success stories in the EU in recent years. See Ireland Shines, ECONOMIST, May 17, 1997, at 16.
255. See Wallace, supra note 170, at 31.
continues, as can be seen in the commitment of Des Hanafin to overturn the constitutional amendment permitting divorce and in the Church's unwavering belief in the indissolubility of marriage. What has been shaken in the divorce debate is the bond, both actual and assumed, between the Catholic Church and the Irish state; no longer can the Church rely on the government to enshrine Church teaching in legislation as a matter of course. With this latest divorce battle behind it, the Church may well regain some portion of its former moral authority, and re-emerge as a focus of Irish social and religious life in the years to come.

A renewed and reinvigorated Church presence in Ireland, however, is unlikely to undo the complete social agenda involving family life that has emerged within the past thirty years. Indeed, it is arguable that the Church would not desire to dismantle all of the legislation put in place on family matters, since many provisions for women and children are humanitarian measures seen to be laudable regardless of one's position on divorce. The changes wrought in family law leading up to both the 1986 and 1995 Referenda accomplished many of the social goals sought by legislators and citizens alike to confront the problem of marital breakdown—a problem recognized and acknowledged as imperative for redress by both proponents and opponents of divorce. The passage of the constitutional amendment permitting divorce was not, therefore, as unexpected or as shocking a development as many observers believed, for many of the societal and legal changes affecting family relations had been put in place well before the 1995 Referendum. With the provision of divorce, spouses of broken marriages have been given the right to remarry. This right stands as a central component in an array of legislative options established over the decades for individuals in broken marriages. Divorce is the capstone on the edifice of modern Irish family law.

VII. CONCLUSION

What now for Ireland? The long-term effects of divorce legislation remain to be seen, as does the course of marital patterns as a result of the availability of divorce. Certainly the fears of those concerned about a flood of divorces did not materialize within the first months of divorce legislation; from February to June 1997, only 244 divorce applications had been processed and only 64 divorces
granted. Will Ireland still be able to fulfill its constitutional obligation to support the institution of marriage? A Commission on the Family established by the government thinks so, and offers hopeful recommendations for the continued vibrancy of the family in its publication *Strengthening Families for Life*.

In this way, the government seeks to pay homage to de Valera's vision of a family-centered nation while admitting the realities of marital breakdown and contemporary social patterns. Ireland is now in a position to offer to those couples whose marriages are irretrievably broken arguably the best option for renewal—divorce and the chance to begin again.

Christine P. James

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256. See Divorce Figures Show 244 Applications, IR. VOICE, Sept. 3-9, 1997, at 4.
257. Cited in WALLS AND BERGIN, supra note 102, at 7.
APPENDIX

THE JURISDICTION OF THE IRISH COURTS AND RELEVANT LEGISLATION REGARDING FAMILY MATTERS

The Irish court system is composed of the District Court (the lowest court); the Circuit Court (8 districts, Cork and Dublin with permanent judges, other jurisdictions with a judge of the High Court riding circuit); the High Court (jurisdiction over the whole country, usually sits in Dublin, can hear constitutional matters); the Special Criminal Court; the Court of Criminal Appeal; and the Supreme Court (court of last resort; can entertain cases concerning legislation’s constitutionality after it has been voted on by the Dáil and Seánad but before the legislation is promulgated; President can refer a piece of legislation of questionable constitutionality to the court for review). 258

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