The Law Commission and The Scottish Law Commission

(LAW COM. No. 34)

(SCOT. LAW COM. No. 16)

HAGUE CONVENTION ON RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS

REPORT ON A REFERENCE UNDER SECTION 3 (1) (*e*)
OF THE LAW COMMISSIONS ACT 1965

Presented to Parliament by the Lord High Chancellor,
the Secretary of State for Scotland and the Lord Advocate
by Command of Her Majesty
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THE LAW COMMISSION

and

THE SCOTTISH LAW COMMISSION

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the Right Honourable Gordon Campbell, M.C., M.P., Her Majesty's Secretary of State for Scotland, and

the Right Honourable Norman Wylie, V.R.D., Q.C., M.P., Her Majesty's Advocate

SECTION 1 INTRODUCTION

1. In October 1968 the Hague Conference on Private International Law adopted a Draft Convention on the Recognition of Divorces and Legal Separations. This Convention, which was intended to replace the 1902 Convention which had proved to be generally unacceptable,[1] sets out the grounds on which States adhering to the Convention would recognise each other's decrees of divorce and judicial separation. The Convention does not come into operation until sixty days after the deposit of the third instrument of ratification by a State represented at the Conference.[2] In April 1970 we were asked to advise on the legislation which will be requisite if H.M. Government ratifies the Convention, which, on the 19th May, it announced its intention of doing. Accordingly, it is necessary to examine what decisions must be made in connection with the ratification of the Convention and what legislation will be required to bring the law into line with the Convention.

2. Apart from this introductory section, this Report contains seven sections. Section II contains a brief description of the present laws of England and of Scotland relative to the recognition of foreign divorces. Section III is a summary of the principal provisions of the draft Convention. Section IV considers the legislative provisions needed on ratification of the Convention. Section V discusses changes in the law relating to recognition of foreign decrees which, it is thought, would be a desirable concomitant of ratification. Section VI considers what declarations and reservations, if any, ought to be notified to the Ministry of Foreign Affairs of the Netherlands on signature, ratification or at other times. Section VII contains recommendations regarding mutual recognition of decrees within the British Isles. Finally, Section VIII contains a summary of the conclusions of this Report. Attached to this Report is a copy of the Convention (Appendix A) and a Draft Bill (Appendix B) giving effect to our recommendations.

[1] The United Kingdom was not a party to the 1902 Convention.

[2] The States represented were: Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, German Federal Republic, Greece, Ireland, Israel, Italy, Japan, Yugoslavia, Luxemburg, Holland, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom.

SECTION II PRESENT LAW

3. Under existing law, English courts recognise a foreign divorce in the following circumstances:

(1) Where the divorce is obtained in the territory[3] where the husband[4] is domiciled in the sense of the law of England.[5]

(2) Where the divorce, though obtained in a territory in which the husband is not domiciled, is valid in the territory[3] of his domicile.[6]

(3) Where the divorce is obtained in circumstances in which, *mutatis mutandis*, the English court would have jurisdiction to make a decree,[7] *i.e.*, under the Matrimonial Causes Act 1965, section 40 (on the basis of (i) the wife petitioner's ordinary residence in England for three years, and (ii) the husband's domicile in England immediately before his desertion of the wife petitioner or his deportation).

(4) Where the decree is made in a territory with which the petitioner[8] or the respondent[9] has a real and substantial connection.

(5) Possibly, where the decree, though made in the territory with which the petitioner has no real and substantial connection, is recognised by the law of the territory with which the petitioner has a real and substantial connection.[10] The question whether this principle would apply where the connection is that of the respondent has not yet been considered by the courts.

(6) Where the decree is made in a territory under powers conferred by the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950 (which enable the courts of such territory to grant in certain circumstances a decree of divorce to British subjects resident in such territory).

4. The Scottish courts recognise a foreign divorce in the following circumstances:

(1) Where the divorce is obtained in the territory in which the husband is domiciled in the sense of the law of Scotland.[11]

(2) Where the decree, though made in the territory in which the husband is not domiciled is valid in the territory of the husband's domicile.[12]

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[3] "Territory" is used in the sense of territorial unit or separate jurisdiction in the case of a State having several jurisdictional areas administering different matrimonial laws.

[4] In English law the principle governing recognition of foreign divorces is that English courts will recognise a divorce granted by the court of the domicile of *both* parties: *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517; *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641; *Har-Shefi* v. *Har-Shefi* [1953] P. 161, C.A.; since the wife on marriage acquires her husband's domicile, it is in effect the husband's domicile which determines whether a foreign decree is to be recognised.

[5] *Re Martin* [1900] P. 211, C.A.; *Re Askew* [1930] 2 Ch. 259.

[6] *Armitage* v. *A. G.* [1906] P. 135; *Mountbatten* v. *Mountbatten* [1959] P. 43; *Abate* v. *Abate* [1961] P. 29; *Middleton* v. *Middleton* [1967] P. 62.

[7] *Travers* v. *Holley* [1953] P. 246, C.A., approved in *Indyka* v. *Indyka* [1969] 1 A.C. 33 by Lords Morris, Pearce and Pearson.

[8] *Indyka* v. *Indyka* [1969] 1 A.C. 33.

[9] *Mayfield* v. *Mayfield* [1969] P. 119.

[10] *Mather* v. *Mahoney* [1968] 1 W.L.R. 1773, but this decision conflicts with Lord Pearce's view in *Indyka* v. *Indyka supra*, at p. 90 and was doubted in *Davidson* v. *Davidson* (1969) 113 S.J. 813.

[11] *Calder* 1901 8 S.L.T. 330; *Crabtree* v. *Crabtree* 1929 S.L.T. 675; *Scott* v. *Scott* 1937 S.L.T. 632; *Borland* v. *Borland* 1947 S.L.T. 242; *Van Mehren* v. *Van Mehren* 1948 S.L.T. (Notes) 61; *Sim* v. *Sim & Ors.* 1968 S.L.T. (Notes) 15.

[12] *M'Kay* v. *Walls & Ors.* 1951 S.L.T. (Notes) 6.

(3) It is possible that the Scottish courts would recognise a divorce granted in a foreign country in proceedings by a wife whose husband committed a matrimonial offence while domiciled in that foreign country and thereafter abandoned his domicile there.[13]

(4) It is not clear whether the Scottish courts would follow the principle, adopted in England by *Travers* v. *Holley*,[14] that a foreign decree will be recognised if the jurisdictional basis on which it was granted was similar to that adopted here. In the only reported case[15] in which it was discussed, the basis of the foreign court's jurisdiction could hardly be said to have been similar to that upon which the Scottish court assumes jurisdiction. Hence, the Scottish court's refusal to recognise it is inconclusive. It may be that the approval by various members of the House of Lords in *Indyka* v. *Indyka*[8] of the principle of *Travers* v. *Holley*[14] may cause the Scottish court to adopt the same principle.

(5) While there is no authority upon the question whether the test of " real and substantial connection " established in *Indyka* v. *Indyka*[8] applies to Scotland, the reasoning of their Lordships might well be adopted by the Court of Session.

(6) Where the decree is made in a territory under powers conferred by the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950 (which, as we have seen, enable the courts of such territory to grant in certain circumstances a decree of divorce to British subjects resident in such territory).

5. Domicile, at least for persons of full age, has the same meaning in both the Scottish and English systems of law; in neither system is a wife conceded a domicile distinct from that of her husband for any purpose, including that of recognition of foreign divorce decrees. It is immaterial that under the law of the State of the divorce a wife is conceded a separate domicile and under its rules is domiciled within its territory.

6. English[16] and Scottish[17] courts recognise a foreign decree of judicial separation granted in a territory in which the husband is domiciled but it is uncertain whether and to what extent recognition would be given on other grounds, *e.g.*, where it is granted in a territory where the parties are resident.[18]

SECTION III THE CONVENTION

7. Under the Convention the States which ratify it must, subject to fulfilment of one or more of the prescribed conditions summarised in this paragraph and subject to certain qualifications discussed below, recognise divorces or legal separations obtained in another Contracting State. When a State has two or more territories administering different systems of matrimonial jurisdiction, the requisite conditions must be fulfilled as regards the territory in which the divorce or legal separation was obtained.[19] For convenience, this

[13] *Indyka* v. *Indyka* [1969] 1 A.C. 33, *per* Lord Reid at pp. 66–67.
[14] [1953] P. 246, C.A.
[15] *Warden* v. *Warden* 1951 S.C. 508, where a Nevada court had assumed jurisdiction on the basis of residence for only ninety days within the territory.
[16] *Tursi* v. *Tursi* [1958] P. 54.
[17] *Jelfs* v. *Jelfs* 1939 S.L.T. 286, 290; *Murray* v. *Murray* 1956 S.C. 376.
[18] See the point discussed in Dicey and Morris, *Conflict of Laws*, 8th ed. p. 337 (English law) and Anton, *Private International Law*, (1967) pp. 338–340 (Scots law).
[19] See Article 13.

State or territory will hereafter be referred to as " the State of origin "—the expression used in the Convention. The prescribed conditions are:

(1) at the date of institution of the proceedings, the *respondent* was habitually resident or was domiciled[20] in the State of origin (Articles 2(1) and 3); or

(2) at the date of the institution of the proceedings, the *petitioner* was habitually resident or was domiciled in the State of origin and either

(*a*) he was habitually resident or domiciled in the State of origin for not less than one year immediately prior to the institution of proceedings (Articles 2(2) (*a*) and 3); or

(*b*) *the parties* last habitually resided together[21] in the State of origin (Article 2(2) (*b*)); or

(3) at the date of the institution of the proceedings *both parties* were nationals of the State of origin (Article 2(3)); or

(4) at the date of institution of the proceedings the *petitioner* was a national of the State of origin and either

(*a*) he was habitually resident or domiciled in the State of origin (Article 2(4) (*a*)); or

(*b*) he was habitually resident or domiciled in the State of origin for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings (Articles 2(4) (*b*) and 3); or

(*c*) he was present at the institution of proceedings in the State of origin and *the parties* last habitually resided together in a State which did not provide for divorce (Article 2(5)); or

(5) if the *respondent* cross-petitioned and a decree was granted either on the petition or the cross-petition, and any of rules (1) to (4) above was satisfied as regards the parties to either the petition or the cross-petition (Article 4);

(6) when a legal separation, which falls to be recognised under rules (1) to (5), is converted into a divorce in the State of origin, the divorce must be recognised whether or not, at the institution of the proceedings for the divorce, the conditions in rules (1) to (4) still applied (Article 5).

Although these criteria are phrased in terms appropriate to judicial proceedings, Article 1 makes it clear that the Convention is not limited to decrees granted in such proceedings, but extends to decrees " which follow judicial

[20] The effect of Article 3 of the Convention is that the expression " habitual residence " used in Article 2 is deemed to include " domicile " where the territory in which the divorce or legal separation was obtained uses the concept of domicile as a test of jurisdiction, except that Article 3 does not extend to a wife's domicile where such domicile is dependent on that of her husband. Where it is relevant, a person's domicile is to be ascertained as it is ascertained in the territory in question. This subject is further discussed in paras. 9 and 21 below.

[21] Though Article 3 provides that the expression " habitual residence " in Article 2 shall, if the State of origin uses domicile as a test of jurisdiction, be deemed to include " domicile ", we think that the expression " habitually resided together " in Article 2 cannot be given this wider construction.

or other proceedings officially recognised in that State and which are legally effective there ". On the other hand, as Article 1 also makes clear, it does not apply to findings of fault or ancillary orders.

SECTION IV LEGISLATIVE PROVISIONS NEEDED ON RATIFICATION

8. Legislation will be required to set out the grounds on which we will recognise divorces and legal separations granted in Contracting States and the extent of the recognition. The present tests on the basis of which foreign divorces and legal separations are recognised in England and Scotland will need to be extended to cover the recognition of divorces and legal separations obtained in a Contracting State which comply with the jurisdictional tests in Articles 2 to 5 of the Convention which are set out in paragraph 7 of this Report. These tests make use of three concepts which have not, or have not until recently,[22] been applied as such in connection with the recognition of foreign decrees of divorce or legal separation, namely the concepts of habitual residence, nationality and *domicile as that concept is understood in the State of origin.*

9. Habitual residence is the primary ground of jurisdiction under the Convention. It is not therein defined, but the concept is not unknown in United Kingdom legislation, since it appears in other legislation implementing Hague Conventions, namely, the Administration of Justice Act 1956,[23] the Wills Act 1963[24] and the Adoption Act 1968.[25] The concept was given international currency by the Hague Conference on Private International Law when it was found impossible to reach agreement on a common definition of domicile. It was intended to substitute for domicile, overloaded with legal technicalities in many systems, a concept focussing attention simply on the nature of the residence. Nor does the Convention define the concept of nationality; it leaves this to the accepted view that a person's nationality is a matter for the law of any State which claims him as a national. The Convention has no general rules[26] dealing with cases of dual and multiple nationality. It follows, therefore, that Articles 2 to 5 are applicable according to their terms despite the fact that the party in question possesses another nationality. The test of " domicile " enters the Convention only indirectly in Article 3. This extends the meaning of " habitual residence ", as used in Article 2, to include domicile as that term is used in the State of origin. Article 3 is qualified, however, in that it does not apply to the domicile of dependence of a wife. Its effect, therefore, is that decrees which are based on the domicile of a husband or on the independent domicile of a wife (in either case in terms

[22] See *Indyka* v. *Indyka* [1969] 1 A.C. 33, especially *per* Lord Wilberforce at pp. 104–105, where nationality is regarded as a factor reinforcing the connection of a person with a country with a view to establishing whether he has a " real and substantial connection with that country ": *Angelo* v. *Angelo* [1968] 1 W.L.R. 401; *Brown* v. *Brown* [1968] P. 518; *Mayfield* v. *Mayfield* [1969] P. 119.

[23] s. 4.

[24] s. 1.

[25] s. 11.

[26] Articles 7 and 19(1), however, deal with the situation where a person is a national simultaneously of a State which does not provide for divorce and one which does.

of the rules relating to domicile of the State of origin) are entitled to recognition under the Convention under the same conditions as decrees based jurisdictionally upon his or her habitual residence.

10. Article 6, paragraph 1 provides that:

> " Where the respondent has appeared in the proceedings, the authorities of the State in which recognition is sought shall be bound by the findings of fact on which jurisdiction was assumed. "[27]

In such a case the respondent, having appeared, has had an opportunity of tendering evidence; accordingly, the view has been taken that in the public interest, the facts on the basis of which a court in another country exercised jurisdiction should not be re-opened. Ratification of the Convention would require legislation to give effect to this principle. We consider later in this Report whether the principle should be extended.[28] On the other hand, since paragraphs (2) and (3) of Article 6 (which say, in effect, that the recognising State shall not go into the merits or refuse recognition because it would not have granted a decree or would have applied a different law) are consistent with the present laws of England and Scotland, no legislation is required to give effect to them.

11. Articles 7 to 10 prescribe certain circumstances in which recognition may be refused notwithstanding fulfilment of the foregoing conditions. It will be necessary to decide whether to take advantage of these Articles which are permissive, not mandatory. Article 7 entitles a Contracting State to refuse recognition to a divorce if, when it was obtained, both parties were nationals of States which did not provide for divorce. We do not think that our law should avail itself of this liberty which is not in accordance with existing law and which would entitle our courts to refuse to recognise divorces granted abroad in circumstances where we assume divorce jurisdiction under our own law. On the other hand, Articles 8, 9 and 10 are consistent with our existing law. Article 10 says that recognition may be refused if recognition would be manifestly contrary to the public policy of the recognising State and Article 8 deals with two specific aspects of this, namely, where adequate steps were not taken to give notice to the respondent or where he was not afforded a sufficient opportunity to state his case. We consider that legislative effect should be given to these Articles in order specifically to preserve the power, which our courts have exercised in the past, of refusal to recognise decrees obtained in a manner that contravenes the principles of natural justice. While we believe that legislation in the terms of Article 8 alone would cover most of the circumstances in which recognition has in the past been refused on the gound of public policy, we have, after some hesitation, come to the conclusion that the basis of Article 10 should also be expressly incorporated in the statute, lest cases should arise in which our courts would be forced to recognise a foreign decree in circumstances in which it would seem unconscionable to do so.

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[27] A similar provision appeared in the Hague Convention on the Adoption of Children concluded on 15 November 1965, and effect was given to that provision by section 7(5) of the Adoption Act 1968.

[28] See paras. 31–34.

12. Article 9 provides that Contracting States may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the parties and that decision was either of the recognising State or entitled to recognition in that State. This principle would need to be stated in any legislation. It should be noted that its ambit is somewhat narrow since it applies only when the decision which was incompatible with the decree of divorce or legal separation was prior to that decree. In other words, if a divorce was granted in a country where the parties were habitually resident we should have to recognise it notwithstanding a later inconsistent decree of the court of the domicile (notwithstanding that according to our law, the law of the domicile governs status). On the other hand, if the court of the domicile annulled the marriage prior to the divorce in the country of residence, we would not be required to recognise the divorce. In any legislation the principle should be stated in a way which would make it clearer than the Convention does what decisions are to be regarded as " incompatible " with the foreign decree.

13. It is provided by Article 11 that a State which is obliged to recognise a divorce under the Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognise that divorce. The expression " another State " is a wide one and would include the State of which a spouse was a national or domiciliary. Article 11 is inconsistent, therefore, with the decision of the Divisional Court in *R.* v. *Brentwood Superintendent Registrar of Marriages*.[29] In that case a Registrar of Marriages had refused to issue a licence to marry to a couple, both domiciled in Switzerland where they intended to make their matrimonial home, on the ground that by Swiss law the prospective husband lacked the capacity to marry. He had been divorced in Switzerland, but he was a national of Italy, a country which does not recognise the divorces granted to its nationals abroad. The Registrar's refusal to issue a licence was upheld by the Court. The terms of the Kilbrandon Report on the Marriage Law of Scotland[30] suggest that the same approach would be taken in Scotland. It follows that legislation is necessary to secure that our own law is made consistent with the terms of the Convention. The possibility of making a reservation on this matter is not available to the United Kingdom; the reservation permitted by Article 20 applies only to " Contracting States whose law does not provide for divorce ".

14. Article 12 provides that proceedings for divorce or legal separation may be suspended when proceedings relating to the matrimonial status of either party are pending in another Contracting State. Since the English and Scottish courts already have the power to do that, no legislative provision in this respect would be needed. Articles 13 to 16 clarify the effect of the Convention in situations where a State has two or more legal systems of territorial or of personal application. The legislation will need to give effect to these provisions.

15. The legislation will also need to specify the extent of the recognition to be afforded; in accordance with Article 1 of the Convention this should not extend to findings of fault or ancillary orders for maintenance, custody

[29] [1968] 2 Q.B. 956.
[30] (1969) Cmnd. 4011, p. 27, Case (*f*).

or the like. It will also be necessary to give effect to any reservations and declarations which the United Kingdom should make at the time of ratification. This matter is discussed in Section VI.

SECTION V ADDITIONAL LEGISLATIVE PROVISIONS RECOMMENDED

16. It seems proper to consider whether, apart from the legislative provisions strictly required in connection with ratification, any further changes might appropriately and conveniently be made at the same time to the law relating to the recognition of divorces and of separations. Article 17 declares that the Convention does not preclude the application of rules more favourable to recognition.

17. Article 1 of the Convention requires the recognition of the divorces and legal separations specified therein only where they have been obtained in another *Contracting State*. The same principle is reflected in Article 23, paragraph (3) which allows a State to decline to recognise a divorce obtained in a Contracting State with a plurality of legal systems if, at the date on which recognition is sought, the Convention is not applicable to the particular system under which the divorce or legal separation was obtained. We should consider, therefore, whether, in giving effect to the Convention, our law should limit recognition to Contracting States, or the relevant legal systems thereof, or apply the same rules to all foreign States and their constituent systems.

18. The main arguments for limiting the application of legislation giving effect to the Convention to States or systems which themselves apply the Convention are the following:

(*a*) The Convention applies to virtually any form of divorce or legal separation provided it follows "judicial or other proceedings officially recognised in [the State of origin] and which are legally effective there" (Article 1). There may be forms of divorce emanating from some state or system which it might be thought undesirable to recognise.

(*b*) It may be advisable to retain a bargaining position for use if a particular foreign system adopts a restrictive attitude to the recognition of United Kingdom divorces.

Neither of these objections is of great weight. As regards the first, our courts recognise any divorce, whatever the form, method or grounds, provided that the court in the State of origin has jurisdiction in our eyes.[31] It would be a retrograde step to resile from this. Any residual problems may be met by invoking the doctrine of public policy, a doctrine the application of which is permitted by Article 10 of the Convention. As regards the second, we stand a better chance of extending the area of recognition for our decrees if we set an example by recognising those of other countries, rather than by refusing to afford recognition except on a reciprocal basis.

19. The following arguments demonstrate the desirability of generalising the application of the rules prescribed by the Convention:

[31] *Nachimson* v. *Nachimson* [1930] P. 217, C.A.; *Russ* v. *Russ* [1964] P. 315, C.A.; *Makouipour* v. *Makouipour* 1967 S.L.T. 101.

(*a*) The United Kingdom's ratification of the Convention is an implied acceptance that the rules in the Convention are satisfactory and, if they are satisfactory, they should apply equally to countries which adopt the Convention and those which do not.

(*b*) To have one set of rules applicable to all countries would be a great simplification in the sphere of international recognition of decrees and would avoid the anomalous situation whereby, on the same jurisdictional facts, a divorce would be recognised if obtained in country A, but would not be recognised if obtained in country B.

(*c*) Since states will adopt the Convention at different times, some perhaps relation to some of their territories only, and others may withdraw from the Convention, it would be necessary to keep abreast of this changing pattern by subordinate legislation. This would complicate the tasks of those concerned both with the making and the application of the laws.

We conclude, therefore, that it would be more satisfactory to have one set of rules applicable to all countries, whether or not the Convention applies to them. We think, too, that the Convention rules of recognition should be adopted and made part of English and Scottish law without waiting for the Convention itself to come into force under Article 27.

20. It is a basic rule of the present laws of England and Scotland that a divorce or a legal separation will be recognised when obtained in the country of the husband's domicile in the sense of English and Scots law.[32] To this there is a rider that a divorce, though granted elsewhere, will be recognised if recognised in the country of the domicile in that sense.[33] The Convention does not preclude retention of the rule and its rider as additions to the Convention rules. Despite the fact that the Convention rules require recognition of decrees based on domicile in the sense of the law of the State of origin or based on concepts which to a considerable extent overlap our concept of domicile, namely, habitual residence and nationality, we recommend that the present rule and its rider should be retained. We do so for the following reasons:

(*a*) On principle, and apart from the terms of international agreements, the selection and definition of the factors which entitle a foreign court to exercise jurisdiction are to be decided by the law of the forum. The question at issue is one of the appropriateness, in the eyes of our law, of an assumption of jurisdiction by a foreign court.

(*b*) Where the Convention rules of recognition involving domicile are relied upon, it may be necessary for the party seeking recognition to call expert evidence on the law of the foreign country in question. This adds to the expense of the proceedings.

(*c*) The established rules are widely known and operate smoothly.

21. We have referred above to the fact that the Convention deems the expression "habitual residence" in Article 2 to include "domicile" where the State of origin uses the concept of domicile as a test of jurisdiction in matters of

[32] See paras. 3(1), 4(1) and 5 above.
[33] See paras. 3(2), 4(2) and 5 above.

divorce and separation, but that it does not apply this principle to the domicile of dependence of a wife (Article 3). This exception was made because a majority of delegates at The Hague considered that the domicile of dependence of married women was an aspect of discrimination between the sexes and inconsistent with Article 17(2) of the Universal Declaration on Human Rights. The exception, however, should seldom in practice entail the non-recognition of divorces based on the domiciliary principle which would otherwise fall to be recognised under the first paragraph of Article 3 of the Convention. If, in any country where the wife's domicile is dependent on that of her husband, a wife petitions on the basis of her own domicile as a ground of jurisdiction, the husband would necessarily be domiciled in the State of origin and the divorce would fall to be recognised under Article 2(1). A situation may be envisaged, however, in which the proviso to Article 3 would deny the recognition of a decree which, apart from the proviso, would be entitled to recognition. Where jurisdiction is exercised on the basis of the petitioning husband's domicile, but where he neither fulfils the two further conditions specified in paragraphs (*a*) and (*b*) of Article 2(2), nor is a national of the State of origin, the proviso to Article 3 would preclude the recognition of the divorce under Article 2(1) on the basis of the respondent wife's domicile. Since it is open to the United Kingdom to adopt wider grounds of jurisdiction than those which the Convention specifies, and since we ourselves at present recognise the wife's domicile of dependence, we do not think that we ought to exclude its recognition in relation to other countries which do likewise. In any event if, as recommended below,[34] we decide to recognise decrees if either party was domiciled in the State of origin the proviso will become meaningless.

22. The Convention contains no head of recognition equivalent to the rule in the English case of *Travers* v. *Holley*.[35] Under that rule a foreign divorce will be recognised when its jurisdictional basis is similar to one on which the English courts themselves assume jurisdiction. It is uncertain whether a similar rule exists in Scots law.[36] Whether it exists there or not, the question is whether, if the Convention's grounds of recognition are adopted, the rule in *Travers* v. *Holley*[35] should be retained in England and whether a similar rule should be enacted for Scotland. We think that neither of these courses should be followed.

23. The merit of the rule in *Travers* v. *Holley*[35] was that it admitted of extended grounds of recognition at a time when the courts, apart from statute, would not recognise a divorce granted in another country unless the husband was domiciled there or the divorce would be recognised by the country of his domicile. The adoption of the Convention, however, would entail a wide extension of existing grounds of recognition and reduce the importance of the rule. It has been invoked chiefly to secure the recognition of foreign decrees where the petitioning wife was ordinarily resident in the State of origin for three years and the husband was domiciled elsewhere.[37] Such divorces

[34] Paras. 26–29.
[35] [1953] P. 246, C.A.
[36] See para. 4(4).
[37] Our parallel grounds for the assumption of jurisdiction being those adopted by the Matrimonial Causes Act 1965, s. 40(1) (b), for England and the Law Reform (Miscellaneous Provisions) Act 1949, s. 2(1), for Scotland.

would in future fall to be recognised under the Convention on the ground of the wife's habitual residence for one year in the State of origin.[38] The *Travers* v. *Holley*[35] principle might also serve as a basis for the recognition of foreign decrees where the petitioning wife has been deserted by the husband, and where, immediately prior thereto, the husband was domiciled in the State of origin.[39] Under the Convention, however, such decrees will usually fall to be recognised upon one or more of the grounds specified in Article 2(2). Recognition may be withheld only when the wife has been habitually resident in the State of origin for a period of less than a year and the spouses are not connected with that State either by nationality or by the fact that they last habitually resided there together. It is arguable that in such a situation the case for recognition is weak.

24. A similar answer may be made to arguments that the rule in *Travers* v. *Holley*[35] should be retained in view of possible changes in the present rules for the assumption of jurisdiction in the United Kingdom. If any new rules were such that they would not attract recognition under the Convention, this could only be because the ties of the parties with the State of origin were weak. We do not think that any extension of the rules of recognition should be automatic, but that as and when a change takes place in our grounds of jurisdiction in divorce, it should be considered whether it would be appropriate to make a corresponding extension to our rules for the recognition of foreign divorces.[40]

25. We recommend that the principle of "real and substantial connection" stated in *Indyka* v. *Indyka*[41] should not be retained. It is inherently vague and the source of much uncertainty where certainty is desirable;[42] the difficulties inherent in its application are well illustrated in the cases which have been reported since *Indyka*[41] was decided in March 1967.[43] We think that it is an unsatisfactory test for these reasons and that it should be abolished. Such abolition will not cause hardship as the gap caused by the removal of this ground of recognition will be adequately filled by the Convention rules of recognition, which substantially cover the cases falling within the *Indyka*[41] principle—and indeed some others—and which have the considerable advantage of being less vague. We, therefore, recommend that the test of "real and substantial connection" as a ground of recognition of foreign divorces should be abolished.

26. As has been stated,[44] it is possible that the Scottish courts would recognise a divorce granted to a wife in a foreign country in which the husband was

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[38] Article 2(2) (*a*).

[39] See Matrimonial Causes Act 1965, s. 40(1) (a), and such Scottish cases as *Hannah* v. *Hannah* 1926 S.L.T. 370, *Lack* v. *Lack* 1926 S.L.T. 656. See also *Clark* v. *Clark* 1967 S.L.T. 319, where the Scottish court applied the same principle in the case of a husband who committed a matrimonial offence before abandoning his Scottish domicile.

[40] Cf. *Indyka* v. *Indyka* [1969] 1 A.C. 33, *per* Lord Reid at p. 59 and Lord Wilberforce at p. 106.

[41] [1969] 1 A.C. 33; see paras. 3(4) and 4(5).

[42] We are informed by the Registrars-General of England and Scotland that they have to decide in about 2,500 and 300 cases a year respectively whether a marriage following a foreign divorce should be allowed.

[43] *Angelo* v. *Angelo* [1968] 1 W.L.R. 401; *Peters* v. *Peters* [1968] P. 275; *Brown* v. *Brown* [1968] P. 518; *Mather* v. *Mahoney* [1968] 1 W.L.R. 1773; *Blair* v. *Blair* [1969] 1 W.L.R. 221; *Mayfield* v. *Mayfield* [1969] P. 119; *Alexander* v. *Alexander* (1969) 113 Sol.J. 344; *Davidson* v. *Davidson* (1969) 113 Sol.J. 813; *Bromley* v. *Bromley* (1969) 113 Sol.J. 836; *Welsby* v. *Welsby* [1970] 1 W.L.R. 877; *Munt* v. *Munt* [1970] 2 All E.R. 516.

[44] See para. 4(3).

domiciled at the time when he committed a matrimonial offence, but in which he is no longer domiciled at the time of the wife's proceedings for divorce. We think that this rule, which (if it exists) can arise for application only on rare occasions, is unnecessary in view of the extended grounds of recognition under the Convention and we recommend its abolition.

27. It remains to be considered whether the rules of recognition laid down in the Covention should be adopted as they appear in the Convention or whether it may be desirable to express them more widely, as permitted by the Convention itself.[45] The rules of recognition in the Convention[46] are very complex—and we have examined them with a view to determining whether they could be simplified without detriment to the principles embodied in them. Broadly speaking, these rules[46] lay down the following jurisdictional criteria for the decree to be recognised:

(*a*) it is sufficient if the respondent is habitually resident or domiciled[47] in the country where the decree is obtained, whereas in the case of the petitioner habitual residence or domicile must be accompanied by a reinforcing factor;

(*b*) the nationality of both the petitioner and the respondent is sufficient; the nationality of the petitioner alone is not sufficient unless it is accompanied by a reinforcing factor of habitual residence or domicile; the nationality of the respondent is never sufficient, either with or without such reinforcing factor.

28. The purpose of the reinforcing factors is to ensure that, in the cases where they are required, there is a still closer connection with the State of origin than is implied by the possession merely of the basic jurisdictional criteria of domicile, habitual residence or nationality. If there is a unifying thread linking the situations where such factors are required, it is probably to be found in the desire to prevent forum-shopping and the enforced recognition of divorces in circumstances which do not justify recognition. If, for example, the nationality of one party alone were a test of recognition, a foreign couple might sever all effective connection with their country of origin and become resident and domiciled in England; nevertheless, so long as one of them retained his nationality in a country where divorce is easy and jurisdiction is assumed on the basis of nationality, he would be able to obtain a divorce there which our courts would be bound to recognise.

29. We are fully conscious of the arguments against widening the grounds of recognition stated in the Convention, but have come to the conclusion that it would, on balance, be right to admit the recognition of foreign decrees of divorce based on the domicile, habitual residence or nationality of either spouse. We do so for the following reasons:

(*a*) While we share the view that forum-shopping should be discouraged, we wonder whether the stage of recognition is the appropriate stage to seek to forward that aim. A divorce has already been granted and the forum-shopping, if any, has already taken place. In this situation the

[45] See Article 17; para. 16 above.
[46] See para. 7.
[47] *i.e.*, in the sense used by the law of the country where the decree is obtained: see para. 9.

relevant problem strikes us as being one of preventing limping marriages. Against the desirability of recognising only divorces where the parties have a real social connection with the country of the forum, there must be weighed the need to avoid situations where the parties are regarded as being married in one country and not married in another.

(*b*) The rules which provide for reinforcing factors where the basic ground of jurisdiction is the domicile of the petitioner in the sense of the foreign law[48] are in terms stricter than the existing rules for the application of the United Kingdom concept of domicile but, for practical purposes, add very little to the basic jurisdictional requirement. We think that any results which these rules might achieve would be outweighed by the advantages flowing from a simpler jurisdictional test. Although quite the same argument does not apply to the test of habitual residence, we think that it would be wrong to adopt a different approach with regard to a connecting factor which is so similar in its nature. There are great advantages in having tests which are simply framed and easy to apply, particularly since the question whether a divorce is effective in this country may in practice fall to be decided at an administrative rather than a judicial level.

(*c*) In considering the recognition of divorces whose jurisdictional basis is nationality it seems appropriate to distinguish sharply, as the Convention does, between the nationality of the petitioner and that of the respondent. The nationality of the petitioner suffices as a ground of recognition under the Convention, but only where there is a reinforcing factor of some kind. The reinforcing factors, however, are so attenuated in Articles 2(4) (*b*) and 2(5) that, in the general interest of having simple and practical rules of law, we suggest that they might be altogether abandoned. The nationality of the respondent is not a compulsory basis for recognition under the Convention. Nor is it a ground of jurisdiction that we particularly like or whose general adoption we would advocate. But it is adopted in many countries, both within and without those participating in the work of the Hague Convention, and the failure to recognise divorces based upon the respondent's nationality would lead to limping marriages. It is arguable that, where two people marry, possessing and retaining different nationalities, both should realise that the national law of the other may be relevant in relation to their status. Moreover, since *Indyka* v. *Indyka*, there has been some judicial support for the view that the nationality of the respondent spouse is a sufficient ground of jurisdiction.[49] Failure, therefore, to recognise divorces based upon it might have the effect of depriving of recognition certain decrees

[48] See para. 9.

[49] *Indyka* v. *Indyka* [1969] 1 A.C. 33. Lord Pearce (at p. 90) thought that the nationality of one party was sufficient but it is not clear what Lords Wilberforce (at pp. 104–105) and Pearson (at p. 111–112) thought was the extent of the role of nationality in this context. In *Peters* v. *Peters* [1968] P. 275, 280 Wrangham J. appears to have thought that the nationality of one spouse might suffice. In *Mayfield* v. *Mayfield* [1969] P. 119 the President recognised a foreign decree granted on the basis of the respondent's nationality and residence. See also *Angelo* v. *Angelo* [1968] 1 W.L.R. 401 and *Brown* v. *Brown* [1968] P. 51.

which would be entitled to recognition at present. This could make it very difficult to apply the Convention rules to existing decrees. Yet, as pointed out below,[50] unless that is done, the present uncertain legal position flowing from *Indyka* v. *Indyka* will continue for very many years and the uncertain present law will operate side by side with the reformed law.

30. In the result, if our recommendations are accepted, the grounds of recognition of foreign divorces and legal separations would be where:

(1) either party was habitually resident in the State of origin;[51]

(2) either party was a national of the State of origin;[52]

(3) the decree was obtained in a State of origin which uses the concept of domicile as a test of jurisdiction and either party was domiciled there in the sense of that State's law;[53]

(4) the decree was obtained in the country of the husband's domicile in the sense of English and Scots law;[54]

(5) the decree was obtained elsewhere than in the country of the husband's domicile but is recognised in the country of the husband's domicile in the sense of English and Scots law.[55]

Heads (1)–(3) are grounds of recognition under the Convention, but extended in accordance with our recommendations; heads (4) and (5) are existing grounds of recognition which we think should be retained. We recommend that in the general interest of simplicity in the law it should be statutorily declared that the above are the only grounds of recognition. Any future extensions of these grounds would then be effected by amendment of the statute. If the provisional proposals in our Working Paper No. 28 and Memorandum No. 13, that a wife should be allowed a separate domicile for purposes of matrimonial jurisdiction, were adopted, head (4)—and possibly head (5) also—should be extended to apply to the domicile of either husband or wife.

31. We referred in paragraph 10 to the terms of paragraph (1) of Article 6 of the Convention. This paragraph provides that:

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

It would seem appropriate to consider whether the principle which this paragraph embodies should be further extended.

32. Where the respondent has appeared in the proceedings, it seems right that the English and Scottish courts should be bound not merely by the findings of fact on which the court of origin assumed jurisdiction but by all the findings

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[50] Paras. 47–52.
[51] See paras. 28 and 29.
[52] See paras. 28 and 29.
[53] See paras. 7(1) and 20.
[54] See paras. 3(1), 4(3) and 5.
[55] See paras. 3(2), 4(2) and 5.

relevant to jurisdiction, including the inference drawn that a party was habitually resident or domiciled in, or a national of, the country. In this context it may be recalled that, except as regards the attribution to a wife of a domicile of dependence, the English and Scottish courts are bound by the terms of Article 3 to accept the court of origin's characterisation of the concept of domicile. To contest the foreign court's attribution to a person of a domicile in this sense would be to argue that the foreign court has not properly applied its own concept of domicile. We think it undesirable that our courts should be called upon to pronounce upon whether a foreign court has properly applied its own law to the facts of a case. Similarly, since a person's nationality of a State is a matter for the law of that State to determine we think it appropriate that, in proceedings in which the respondent has appeared, a foreign court's determination that a person is a national of its own State should be accepted as conclusive. The same argument does not apply to the concept of habitual residence, since the Convention does not bind Contracting States to accept foreign characterisations of that concept. Habitual residence, however, while a legal concept susceptible of differing interpretations from one system to another in its concrete application to the facts of any case, seems to depend largely upon an assessment by the court of the relevant facts. While there may be cases where a foreign system would attribute to a person a habitual residence in circumstances where our system would not do so, these cases must be relatively rare. Moreover, to disregard a finding that a spouse was habitually resident in the State of origin would merely result in a limping marriage. Hence, we also think it desirable that, when the respondent has appeared in the proceedings, the foreign court's attribution to a person of a habitual residence should be binding here.

33. Different considerations apply where the respondent has not appeared in the foreign proceedings. He may have refrained from doing so on the view that the court in question lacked jurisdiction. He will not have presented evidence as to the facts, or argument upon the inferences to be drawn from those facts or upon the law and, in this situation, it seems wrong to preclude him from doing so if he wishes to dispute that the foreign court's assumption of jurisdiction should be recognised here. Therefore, we think that, in the case of proceedings in which the respondent has not appeared, the foreign tribunal's findings of fact on which it assumed jurisdiction should not be automatically binding here. But we suggest that, where the recognition of a foreign decree of divorce or legal separation in which the respondent has not appeared is sought here, it is unnecessary to require that in every case the facts relating to the jurisdiction of the foreign court should be independently established once again. We, therefore, suggest that, if the courts are satisfied that the foreign court has made certain findings of fact and drawn certain inferences of law or fact from them, they should be entitled to accept as proved those findings and inferences, but should not be bound to do so. Though we have, in this connection, spoken of courts, we also have in mind all persons who are concerned with the validity of foreign decrees; such persons would then act, as they do now, on their assessment of the view which the courts here would take in any given situation.

34. The substance of our recommendations in relation to Article 6 of the Convention is, therefore, as follows:

(*a*) where recognition of a foreign decree of divorce or legal separation granted in proceedings to which the respondent has appeared is sought here, the foreign court's findings, whether they be findings of fact or of inferences of law or fact drawn from such findings of fact, on which the foreign court assumed jurisdiction should be binding; and

(*b*) where recognition of a foreign decree of divorce or legal separation granted in proceedings in which the respondent has not appeared is sought here, the findings of fact and inferences of law or fact drawn from such findings of fact on which jurisdiction was assumed may be accepted as proved but need not be.

35. Other possible changes are best considered in the context of the examination which follows of the declarations and reservations which the Convention permits.

SECTION VI DECLARATIONS AND RESERVATIONS

A. *Declarations*

36. The declarations admissible under the Convention are to be found in Articles 22, 23, 28 and 29.

37. Article 22 provides that Contracting States may at any time declare that "certain categories of persons having their nationality need not be considered their nationals for the purposes of the Convention". A clause enabling the United Kingdom to specify who are its nationals for treaty purposes is often included to limit the obligations of the United Kingdom in relation to those classes of its nationals who, under the present nationality laws, do not have close connection with the United Kingdom. This is a recognition convention, however, and the relevent obligations of the United Kingdom would appear to be materially the same whether or not advantage is taken of Article 22. The effect of making a declaration would merely be to concede a liberty to foreign States to decline to recognise our divorces where the only available criterion under the Convention rules of recognition was nationality and the person concerned belonged to the class of nationals excluded by the declaration. It is difficult to understand what advantage we would gain by conceding such a liberty to foreign States. Our interest is to see that our own divorces are recognised as widely as possible.

38. Article 23 entitles a Contracting State with more than one legal system relating to divorce and legal separation to declare to which of these systems the Convention shall apply. We recommend that the Convention rules should be applied to both England and to Scotland. We would hope, too, that the authorities of Northern Ireland, the Channel Islands and the Isle of Man would agree to legislation which would render it possible to apply the Convention to them. It would be anomalous and inconvenient if a foreign divorce were to be recognised in England and Scotland, but not in Northern Ireland, the Channel Islands or the Isle of Man.

39. Article 28 deals with accession to the Convention of States which were not represented at the XIth Session of the Hague Conference. It provides that:

"The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession."

If the view is taken that the Convention rules should apply universally, from a purely legal standpoint our policy should be to accept accessions from any state.

40. Under Article 29 the United Kingdom may declare that the Convention "shall extend to all the territories for the international relations of which it is responsible", *i.e.*, colonies, protectorates, protected and associated states. This declaration can be made at the time of ratification or subsequently, but the extension effected by any such declaration will have effect only as regards relations with such States as declare their acceptance of the extension. It will be a matter of policy for H.M. Government, in consultation with the governments of the territories concerned, to decide whether the Convention should be applied to States for whose external relations it is responsible, but we think that a decision on this question should be taken and a declaration made as early as possible and, preferably, at the time of ratification. States subsequently acceding to the Convention are more likely to accept any extension which had by then been declared, than they would be to accept individual extensions at later dates when their attention may be focussed on other, more pressing, business.

B. *Reservations*

41. The permitted reservations to the Convention are specified in Articles 19, 20, 21 and 24.

42. The reservation specified in Article 19, paragraph (1) was inserted at the instance of the Netherlands Delegation and is designed to permit States which invoke it to refuse to recognise a divorce when the State of origin did not apply to the facts of the case what the State of recognition would regard as the proper law. It was intended to deprive sub-paragraph (*b*) of the second paragraph of Article 6 of its effect and, incidentally, to make Article 7 almost superfluous. Neither the law of England nor that of Scotland has regard to the law applied in granting recognition, and it is suggested that we should not take advantage of this permitted reservation. The reservation in Article 19, paragraph (2) was inserted at the instance of the Delegate of the Republic of Ireland and was designed to provide escape clauses on the lines of Article 7 but based on the principle of habitual residence. Again it is suggested that we should not avail ourselves of this reservation.

43. The reservation permitted in Article 20 carries still further the principle contained in Article 7. There is no question of our invoking Article 20 since it applies only to "Contracting States whose law does not provide for divorce".

44. The reservation permitted in Article 21 cannot be invoked by us since the Article applies only to Contracting States whose law does not provide for legal separation.

45. The rules of recognition specified in the Convention are to be applied regardless of the date of the divorce or legal separation, unless a State at the time of ratification reserves the right under Article 24 not to apply the

Convention to a divorce or legal separation obtained before the date on which, in relation to that State, the Convention comes into force.

46. The arguments for utilising this final reservation may be summarised as follows:

(*a*) It is contrary to principle to alter the law retrospectively, because it alters expectations legitimately founded upon the existing law.

(*b*) Retrospective legislation is peculiarly inappropriate to recognition of divorces because a spouse whose connections are basically with the United Kingdom may have refrained from intervening in foreign proceedings knowing that, under the existing law, a decree following those proceedings would not be recognised here.

(*c*) Although the Convention does not apply to the pecuniary obligations of the parties, the recognition of a foreign divorce entails that the divorced person is not a married person (or widower or widow) for the purposes of determining rights, *e.g.*, under wills, marriage contracts or *inter vivos* trusts. Accordingly, to give retrospective recognition to foreign divorces may be to transform overnight the expectations on which parties have relied in planning their affairs.

47. There are, however, a number of arguments pointing in a different direction:

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

(*b*) It is conceded that a few cases of hardship might arise because of the repercussions of retrospective changes upon the law and because some persons may have refrained from defending proceedings abroad in the knowledge that divorces following them would not attract recognition here. Such cases, however, must be rare. The law of recognition of foreign divorces has been radically and retrospectively altered by judicial legislation on two recent occasions in England,[56] but there is no evidence of resulting hardship.

(*c*) If the existing rules of recognition of foreign divorces were crystal clear in their application, the arguments in paragraph 46 might have considerable weight. But they are not clear. Therefore, the reservation would have the effect of leaving uncertain the validity of a considerable number of past divorces.

48. We believe that, given the wide grounds of recognition of foreign divorces approved in *Indyka* v. *Indyka*[57] the cases must be few in which the adoption of the Convention's grounds of recognition would in fact mean that a foreign divorce, hitherto unrecognised in our law, would in future fall to be recognised. Similarly, we think that the cases must be few where a foreign divorce which is

[56] By the decisions in *Travers* v. *Holley*, *supra* fn. 7 and *Indyka* v. *Indyka*, *supra* fn. 8.
[57] [1969] 1 A.C. 33. See the analysis of those grounds in Graveson, *The Conflict of Laws*, 6th ed. p. 325.

now recognised under the *Indyka*[57] decision would not also be recognised under the Convention. We are also persuaded that in those few cases there is little likelihood that a retrospective change in the law would create injustice. The same problem arose in *Indyka*[57] itself and there Lord Reid remarked:[58]

> "Finally, it is well recognised that we ought not to alter what is presently understood to be the law if that involves any real likelihood of injustice to people who have relied on the present position in arranging their affairs. But I have been unable to think of any case and counel have been unable to suggest any case where such injustice would result from what I have invited your Lordships to accept."

49. We have attempted to identify situations where hardship might possibly be caused by the adoption of the Convention rules in relation to foreign decrees made before such rules come into force, so that existing decrees, now not recognised, would be recognised retrospectively and *vice versa*. One such situation is where the estate of a deceased has been distributed on the assumption that his marriage or the marriage of one of the beneficiaries was not dissolved by a foreign divorce which would now attract recognition. It would seem harsh to require the repayment of moneys or property distributed on this assumption. Similar situations might arise under marriage contracts, under *inter vivos* deeds of trust, or under covenants relating to the payment of pensions or annuities. On the other hand, it seems unlikely that retrospective recognition would operate harshly in the domain of status, including legitimacy; although problems might arise if retrospective recognition had the effect of validating a foreign decree notwithstanding the grant of divorce or nullity here on the basis that the foreign decree was invalid.

50. These are real difficulties but they will rarely occur and, so far as identifiable, can be met by saving clauses. For these reasons, we consider that the balance of convenience suggests that the legislation implementing the Convention should operate with retrospective effect. If this approach were adopted, however, safeguards would be required to protect parties who have acquired proprietary rights on the basis of the invalidity or validity of the foreign decree at any time prior to the date when the legislation giving effect to the Convention comes into force. It would also be desirable, in our view, to make it clear that any decision of our courts prior to the coming into force of the legislation should be unaffected. We take the view, that the inclusion of these provisions would require the submission of a reservation under Article 24.

SECTION VII DECREES OF DIVORCE AND JUDICIAL SEPARATION OBTAINED IN THE BRITISH ISLES

51. The recognition in one component part of the United Kingdom of decrees of divorce and judicial separation obtained in another part is outside the terms of the Convention. Nevertheless, since the proposed legislation will regulate the recognition of decrees obtained abroad, this provides an opportune occasion for examining the position with regard to recognition within the United Kingdom and, indeed, within the whole of the British Isles[59] of

[58] At p. 69.

[59] *i.e.*, England and Wales, Scotland, Northern Ireland, the Channel Islands and the Isle of Man.

decrees granted in one of its component parts. The legal systems of the several component parts of the British Isles do not provide for the automatic recognition of decrees pronounced by a court in another such part. Although jurisdictional conflicts rarely arise in practice, the courts of the part in which recognition is sought must be satisfied that the underlying jurisdictional requirements as to domicile, residence and the like, giving the court granting the decree jurisdiction to do so, were in fact present. For example, a decree of divorce granted to a wife by a court in Scotland, on the jurisdictional basis[60] that she was resident in Scotland and had been ordinarily resident there for three years and that the husband was domiciled outside the British Isles, must, of course, be recognised by every court in Scotland, but may be refused recognition by an English court if the latter court finds that the wife was, for instance, resident in Scotland for less than the requisite three years; in those circumstances, the wife's remarriage after obtaining the Scottish divorce would be valid in Scotland but void in England. We consider such a situation (however rarely it may arise) to be unsatisfactory and we think that we should, at the same time as we move towards greater recognition of foreign decrees, move in the same direction within the British Isles. We recommend, therefore, that there should be mutual recognition of decrees of divorce and judicial separation within the British Isles, so that a decree granted anywhere within the British Isles would be valid throughout the British Isles and could not there be questioned except, of course, on appeal from the court granting the decree. We hope that this proposal will be acceptable to the authorities in Northern Ireland, the Channel Islands and the Isle of Man. Even if it is not, we would still recommend that England and Scotland should accord automatic recognition to any decree granted by the courts of the other or by the courts of Northern Ireland, the Channel Islands or the Isle of Man. Since the grounds on which the courts in the various parts of the British Isles assume jurisdiction in divorce and judicial separation are considerably narrower than those recognised in the Convention, there would be no risk of opening the door too wide.

SECTION VIII SUMMARY OF CONCLUSIONS

Necessary Legislation

52. To enable the United Kingdom to adhere to the Convention legislation is required:

(*a*) to give effect to the rules for the recognition of foreign divorces and legal separations set out in Articles 2 to 5 (as qualified by Articles 8, 9 and 10) of the Convention [paragraphs 7–15];

(*b*) to declare that, where the respondent appeared in foreign proceedings resulting in a divorce or legal separation, courts in Great Britain will, in proceedings in which the validity of such foreign divorce or legal separation is material, be bound by the foreign court's findings of fact on which the foreign court assumed jurisdiction [paragraph 10];

[60] Law Reform (Miscellaneous Provisions) Act 1949, s. 2.

(*c*) to secure, in accordance with Article 11, that where courts in Great Britain are obliged to recognise a divorce under the Convention, neither spouse shall be precluded from remarrying on the ground that the law of another State does not recognise the divorce [paragraph 13];

(*d*) stating clearly the time when the Convention rules are to come into operation, and whether or not with retrospective effect and, if with retrospective effect, subject to what qualifications; it is suggested that the Convention should operate in general with retrospective effect but subject to qualifications designed to protect vested rights prior to the time when the legislation comes into force [paragraphs 45–50].

Desirable Legislation

53. Legislation would be desirable:

(*a*) extending the Convention rules of recognition to foreign divorces and legal separations obtained in any country, whether or not the Convention applies to such country [paragraphs 17–19];

(*b*) declaring that the only foreign divorces and legal separations to be recognised will be those covered by the proposed rules of recognition based on the Convention and two further grounds of recognition now available under English and Scots law, namely where:

(i) either party was habitually resident in the State of origin;

(ii) either party was a national of the State of origin;

(iii) the decree was obtained in a State of origin which uses the concept of domicile as a test of jurisdiction and either party was domiciled there in the sense of that State's law;

(iv) the decree was obtained in the country of the husband's domicile in the sense of English and Scots law;

(v) the decree was obtained elsewhere than in the country of the husband's domicile but is recognised in the country of the husband's domicile in the sense of English and Scots law; [paragraphs 20–30]

(*c*) providing that, where recognition is sought in Great Britain for a foreign decree of divorce or legal separation,

(i) where the respondent appeared in the foreign proceedings resulting in such a decree, findings made by the foreign court as to the existence of a party's domicile (as that term is used in the State of origin) or habitual residence in the State of origin, or his nationality of that State, shall be binding and shall be accepted as proof of the said domicile, habitual residence or nationality, as the case may be [paragraphs 31, 32 and 34(*a*)]; and

(ii) where the respondent has not appeared in the foreign proceedings, the foreign court's findings of fact, and inferences

of law or fact drawn from such findings of fact, on which jurisdiction was assumed may, in proceedings in which the validity of the foreign divorce or legal separation is material, be accepted as proved, but need not be [paragraphs 33 and 34(*b*)];

(*d*) abolishing the rule in *Travers* v. *Holley* [paragraphs 22–24];

(*e*) abolishing the tests of " real and substantial connection " established in *Indyka* v. *Indyka* [paragraph 25].

Permitted Declarations

54. The following approach is recommended with regard to the declarations which the Convention allows Contracting States to make:

(*a*) No declarations should be made under Article 22 specifying persons who need not be treated as United Kingdom nationals for the purposes of the Convention [paragraph 37].

(*b*) A declaration should be made applying the Convention both to England and Scotland, and efforts should be made to secure the participation of Northern Ireland, the Channel Islands and the Isle of Man [paragraph 38].

(*c*) The United Kingdom policy, at least from a legal standpoint, should be to accept accessions from any States recognised as such by the United Kingdom [paragraph 39].

(*d*) Steps should be taken to enable the United Kingdom to make a declaration or declarations, preferably at the time of ratification, applying the Convention to British territories outside the United Kingdom [paragraph 40].

Permitted Reservations

55. No advantage should be taken of the reservations available to the United Kingdom under Article 19 [paragraph 42], but an appropriate reservation should be made under Article 24 [paragraphs 45–50]. No other reservations are available to the United Kingdom.

Decrees obtained in the British Isles

56. Legislation would be desirable providing that decrees of divorce and judicial separation granted in one part of the British Isles should be recognised throughout the British Isles [paragraph 51].

Draft Legislation

57. We append a Draft Bill (Appendix B) to give effect to what in our view would be the most desirable type of legislation dealing with the foregoing. The draft legislation is expressed to apply only to England and Wales and Scotland, since our competence is limited to making recommendations regarding legislation for these countries. It would be our hope, however, that as a result of discussions with the authorities in Northern Ireland, the Channel Islands and the Isle of Man either the draft legislation could be amended so as

to apply throughout the British Isles or comparable legislation would be passed in those countries.

(*Signed*) LESLIE SCARMAN, *Chairman, Law Commission.*
CLAUD BICKNELL.
L. C. B. GOWER.
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A. G. BRAND, *Secretary.*
26*th October* 1970.

APPENDIX A

DRAFT CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS

The States signatory to the present Convention.

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

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

ARTICLE 1

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

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

ARTICLE 2

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 3

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

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

ARTICLE 4

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

ARTICLE 5

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

ARTICLE 6

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

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

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

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

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

ARTICLE 7

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

ARTICLE 8

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

ARTICLE 9

Contracting States may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State in

which recognition is sought, or is recognised, or fulfils the conditions required for recognition, in that State.

ARTICLE 10

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

ARTICLE 11

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

ARTICLE 12

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

ARTICLE 13

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

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

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

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

ARTICLE 14

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

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

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

ARTICLE 15

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

ARTICLE 16

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

ARTICLE 17

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

ARTICLE 18

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

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

ARTICLE 19

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

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

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

ARTICLE 20

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

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

ARTICLE 21

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

ARTICLE 22

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

ARTICLE 23

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

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the legal systems to which the Convention applies.

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

ARTICLE 24

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

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

ARTICLE 25

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

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

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

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

ARTICLE 26

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

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

ARTICLE 27

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

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

ARTICLE 28

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

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

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

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

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

ARTICLE 29

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

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

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

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

ARTICLE 30

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

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

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

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

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

ARTICLE 31

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

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

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

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

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

(*e*) the denunciations referred to in Article 30;

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

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

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

Done at The Hague, on the day of , 19 , in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

APPENDIX B

Draft Recognition of Divorces and Legal Separations Bill

ARRANGEMENT OF CLAUSES

Decrees of divorce and judicial separation granted in British Isles

DRAFT

OF A

BILL

TO

Amend the law relating to the recognition of divorces and legal separations.

WHEREAS a Draft Convention relating to the recognition of divorces and legal separations was adopted by the Hague Conference on Private International Law on 26th October 1968.

AND WHEREAS with a view to the ratification by Her Majesty of that Convention, and for other purposes, it is expedient to amend the law relating to the recognition of divorces and legal separations:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

EXPLANATORY NOTES

Long Title and Preamble

It has been thought desirable to insert a Preamble referring to the Hague Convention. As pointed out in the Report, the first object of the Bill is to enable the Convention to be ratified by this country. Its second aim, and perhaps an even more important one, is to restate and amend the whole law relating to the recognition of foreign decrees of divorce and legal separation including those granted in countries for whose foreign relations H.M. Government in the United Kingdom is responsible. Accordingly, the Bill goes further than would be strictly necessary merely in order to ratify the Convention. It provides, for the first time, a code of the grounds of recognition, a matter which hitherto has been left to judge-made law.

Decrees of divorce and judicial separation granted in British Isles

Recognition in Great Britain of divorces and judicial separations granted in the British Isles

1.—Subject to section 8 of this Act, the validity of a decree of divorce or judicial separation granted after the commencement of this Act in any part of the British Isles shall be recognised throughout Great Britain.

Clause 1

1. This clause, unlike clauses 2–6, applies not to foreign divorces and separations in the strict sense but to decrees granted by other jurisdictions within the British Isles which therefore fall outside the ambit of the Hague Convention. As recommended in paragraph 51 of the Report, this clause states that such decrees shall be recognised in Great Britain. The effect is that decrees granted in Scotland will be recognised in England and *vice versa* and that both England and Scotland will recognise decrees of the Northern Irish, Channel Islands or Manx courts. This will avoid the absurdity of recognising truly foreign decrees more readily than we recognise those of courts within the British Isles and will reduce conflicts of jurisdiction between the courts of the various parts of the British Isles such as have occurred in the past. If, as is to be hoped (see paragraph 51 of the Report), the authorities in Northern Ireland, the Channel Islands and the Isle of Man agree to the extension of the legislation to their countries, the final words of the clause will require amendment.

2. The clause applies only to decrees granted after the coming into operation of the Act. It has been thought unsafe to go so far as to apply it to existing decrees since these might already have been denied recognition.

3. The clause is expressed to apply " Subject to section 8 of this Act ". Subsection (1) of section 8 makes it clear that, say, a Scottish divorce will not have to be recognised in England if England does not recognise that there is a marriage to be dissolved because, for example, it had already been annulled or dissolved by an English decree.

4. " British Isles " is defined in clause 9(2). The meaning is the same as that of " the British Islands " as defined in the Interpretation Act 1889 (as amended). It has, however, been thought better not to use the latter expression as it is unfamiliar and is often assumed to include the whole of Ireland.

5. In this clause, in contrast with the others, the expression " judicial separation " is used instead of " legal separation " since throughout the British Isles the former is the familiar technical expression.

Overseas divorces and legal separations

Recognition in Great Britain of overseas divorces and legal separations.

2.—Sections 3 to 6 of this Act shall have effect, subject to section 8 of this Act, as respects the recognition in Great Britain of the validity of overseas divorces and legal separations, that is to say, divorces and legal separations which—

(*a*) have been obtained in any country outside the British Isles; and —

(*b*) are legally effective in that country having been obtained by means of judicial proceedings or other proceedings officially recognised there.

Grounds for recognition.

3.—(1) The validity of an overseas divorce or legal separation shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained—

(*a*) either spouse was habitually resident in that country; or

(*b*) either spouse was a national of that country.

(2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1)(*a*) of this section shall have effect as if the reference to habitual residence included a reference to domicile within the meaning of that law.

(3) In relation to a country comprising territories in which different systems of law are in force in matters of divorce or legal separation, the foregoing provisions of this section (except those relating to nationality) shall have effect as if each territory were a separate country.

Clause 2

1. This clause and those that follow deal with decrees of the type with which the Convention is concerned and lay down the rules for their recognition in England and Wales and in Scotland. Here again, if the authorities in Northern Ireland, the Channel Islands and the Isle of Man agree to the legislation being extended to them, the words " in Great Britain " will need to be amended.

2. In accordance with Article 1 of the Convention, the decrees concerned are divorces and legal separations which—

(*a*) have been obtained in a country outside the British Isles (as defined in clause 9(2)) and

(*b*) are legally effective in that country having been obtained by means of judicial proceedings or other proceedings officially recognised there.

Hence, recognition is extended to extra-judicial decrees so long as there are some " proceedings officially recognised " which are "legally effective ". This accords with the present English and Scottish law.

Clause 3

1. Subsection (1) of this clause applies Article 2 of the Convention but extends it so that the habitual residence or nationality of either spouse satisfies the jurisdictional tests and whether he or she was the petitioner or the respondent. The policy reasons for this extension are set out in paragraphs 27–29 of the Report. An incidental advantage from the drafting viewpoint is that it avoids the necessity to use, as the Convention does, words like " petitioner " and " respondent " which are meaningful only in the context of judicial proceedings. It should be noted that it suffices if either spouse was a national of the State granting the decree notwithstanding that he or she was also a national of another State (see paragraph 9 of the Report). The test of habitual residence or nationality must be satisfied at the date of the institution of the proceedings which led to the divorce or legal separation. These proceedings need not be of a judicial character: see clause 2.

2. Subsection (2) implements Article 3 of the Convention by equating domicile with habitual residence if the country granting the decree uses the concept of domicile, as common law countries do. In contrast, however, with the present law under which it is for the English or Scottish courts to decide whether the person concerned is domiciled in a certain country by applying the concept as we understand it, under Article 3 and this clause we have to apply the concept of domicile " within the meaning of " the law of the country where the decree was granted: see paragraph 9 of the Report. If, however, the parties were domiciled in that country within the meaning of our law the decree would be entitled to recognition under clause 6(*a*).

3. Under Article 3 of the Convention domicile is not equated with habitual residence if it is the domicile of dependence of the wife, *i.e.*, if the wife is regarded as domiciled there because that is the husband's domicile. For reasons stated in paragraph 21 of the Report this subsection does not make this exception.

4. Subsection (3) gives effect to Article 13 of the Convention by making appropriate provision for the case where the overseas country which has granted the decree has two or more territories administering different systems of matrimonial law. For the purpose of subsections (1)(*a*) and (2) each such territory is to be treated as a separate country.

Cross-proceedings and divorces following legal separations.

4.—(1) Where there have been cross-proceedings, the validity of an overseas divorce or legal separation obtained either in the original proceedings or in the cross-proceedings shall be recognised if the requirements of paragraph (*a*) or (*b*) of section 3(1) of this Act are satisfied in relation to the date of the institution either of the original proceedings or of the cross-proceedings.

(2) Where a legal separation the validity of which is entitled to recognition by virtue of the provisions of section 3 of this Act or of subsection (1) of this section is converted, in the country in which it was obtained, into a divorce, the validity of the divorce shall be recognised whether or not it would itself be entitled to recognition by virtue of those provisions.

Proof of facts relevant to recognition.

5.—(1) For the purpose of deciding whether an overseas divorce or legal separation is entitled to recognition by virtue of the foregoing provisions of this Act, any finding of fact made in the proceedings by means of which the divorce or legal separation was obtained and on the basis of which jurisdiction was assumed in those proceedings—

(*a*) shall, if both spouses took part in the proceedings, be binding on any court in Great Britain; and

(*b*) may in other cases, if the court thinks fit, be treated as sufficient evidence of the fact found.

(2) In this section "finding of fact" includes a finding that either spouse was habitually resident or domiciled in, or a national of, the country in which the divorce or legal separation was obtained; and for the purposes of subsection (1)(*a*) of this section, a spouse who has appeared in judicial proceedings shall be treated as having taken part in them.

EXPLANATORY NOTES

Clause 4

1. Subsection (1) implements Article 4 of the Convention. If there have been cross-proceedings it suffices if the jurisdictional tests were satisfied either as regards the original or the cross-proceedings and irrespective of which led to the decree. For example, if the wife applied for a divorce in a country where she was habitually resident and the husband, who was neither resident nor domiciled in, nor a national of, that country, brought cross-proceedings, we should have to recognise his resulting decree even though at the time that his proceedings commenced the wife had ceased to be resident in that country; and the same would apply if the wife had started proceedings when neither she nor her husband had any connection with the country, but he later became habitually resident there and instituted cross-proceedings, even though the decree was granted to her.

2. It will be observed that this subsection can hardly have any application except to divorces or legal separations as a result of judicial proceedings.

3. Subsection (2) implements Article 5 of the Convention. A number of countries have a system whereby a legal separation can be automatically converted into a divorce if it lasts for more than a prescribed period, such as one year. This subsection provides that the resulting divorce is entitled to recognition so long as the legal separation was so entitled, *i.e.*, it makes no difference that the parties may have ceased by the date of the divorce to be resident or domiciled in, or nationals of, the country concerned.

Clause 5

1. Subsection (1) implements Article 6 of the Convention and paragraphs 10 and 31–34 of the Report. Where both parties have taken part in the proceedings, any findings of fact are binding on any court in Great Britain: paragraph (*a*). (Once again, if the legislation is extended to Northern Ireland, the Channel Islands and the Isle of Man, the words " Great Britain " will require amendment.) Where both parties did not take part, the British court is not bound by the finding but is entitled to accept it without insisting that the facts be re-proved *de novo*: paragraph (*b*).

2. Subsection (2) makes it clear that—

(i) a finding that a spouse was habitually resident, or domiciled, in a country or was a national of it (although involving the application of legal tests) counts as a finding of fact: see paragraph 32 of the Report; and

(ii) where the proceedings are of a judicial character entering an appearance counts as taking part therein.

Certain existing rules of recognition to continue in force.

6.—This Act is without predudice to the recognition of the validity of overseas divorces and legal separations—

(*a*) by virtue of any rule of law relating to divorces or legal separations obtained in the country of the spouses' domicile or obtained elsewhere and recognised as valid in that country;

(*b*) by virtue of any enactment other than this Act;

but, save as aforesaid, no such divorce or legal separation shall be recognised as valid except as provided in this Act.

General provisions

Non-recognition of divorce by third country no bar to re-marriage.

7.—Where the validity of a divorce obtained in any country is entitled to recognition by virtue of the foregoing provisions of this Act or by virtue of any rule or enactment preserved by section 6 of this Act, neither spouse shall be precluded from re-marrying on the ground that the validity of the divorce would not be recognised in any other country.

Clause 6

1. This clause achieves three purposes. First, by paragraph (*a*) it retains, as a ground of recognition additional to those prescribed in the Convention or in clause 3, the existing ground that the divorce or legal separation was obtained in the country where the parties were domiciled (in our sense of that concept) or was obtained elsewhere but recognised as valid in that country: see paragraph 20 of the Report. Normally if the divorce or legal separation was obtained in the country of the domicile it would be entitled to recognition under clause 3: see subsection (2) of clause 3. But that would not necessarily be so for, under clause 3(2), the test is domicile as understood in the country where the decree is granted; under the present clause it is our concept of domicile which governs.

2. Secondly, by paragraph (*b*), it retains any existing statutory ground of recognition. Although grounds of recognition in general have never been codified there are certain statutes dealing with specific situations, *e.g.*, the Indian Divorces (Validity) Act 1921, Kenya Divorces (Validity) Act 1922, Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950, Matrimonial Causes (War Marriages) Act 1944. In so far as these Acts have any continuing operation, divorces and legal separations recognised in Great Britain by virtue of them will still be recognised.

3. Finally, and most importantly, the final words of the clause make it clear that, save as above, the grounds of recognition laid down in the Bill are to be the sole grounds of recognition. The effect is to abolish the rules in *Travers* v. *Holley* (see paragraphs 3(3), 4(4) and 22–24 of the Report) and in *Indyka* v. *Indyka* (see paragraphs 3(4) and (5), 4(5) and 25 of the Report) and any rule there may be in Scotland that the country where a matrimonial offence occurred has jurisdiction (see paragraphs 4(3) and 26 of the Report). It also precludes the courts from developing any further judge-made rules of recognition in relation to divorces or legal separations.

Clause 7

This clause implements Article 11 of the Convention but extends both to British divorces under clause 1 and to " overseas divorces " under clauses 2–6. It provides that if a divorce is entitled to recognition the parties shall not be precluded from re-marrying on the ground that the validity of the divorce would not be recognised in some other country; for example, that of the party's domicile. It over-rules the much criticised decision in *R.* v. *Brentwood Superintendent Registrar* [1968] 2 Q.B. 965: see paragraph 13 of the Report.

Exceptions from recognition.

8.—(1) The validity of—

(*a*) a decree of divorce or judicial separation granted in the British Isles; or

(*b*) an overseas divorce or legal separation,

shall not be recognised in any part of Great Britain if it was granted or obtained at a time when, according to the law of that part of Great Britain (including its rules of private international law and the provisions of this Act), there was no subsisting marriage between the parties.

(2) This Act does not require the recognition of the validity of an overseas divorce or legal separation—

(*a*) if it was obtained by one spouse—

(i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or

(*b*) if its recognition would manifestly be contrary to public policy.

(3) Nothing in this Act shall be construed as requiring the recognition of any findings of fault made in any proceedings for divorce or separation or of any maintenance, custody or other ancillary order made in any such proceedings.

Clause 8

1. Subsection (1) of this section gives effect to the principle in Article 9 of the Convention. It is expressed somewhat more narrowly and precisely than Article 9 and avoids the expression " incompatible with a previous decision determining the matrimonial status " which it was thought would inevitably give rise to difficulties. Instead, it simply provides that our courts shall not recognise a divorce, judicial or legal separation if under our legal rules there was then no marriage in existence: see paragraph 13 of the Report.

It applies to both British decrees under clause 1 and to overseas decrees under clauses 2–6. It also applies where there was not a subsisting marriage because it had already been dissolved or annulled by our courts, or because, under our rules of private international law, there never was a valid marriage or, although there had been one, it had been validly dissolved or annulled. If, for example, the courts of the country in which the parties were domiciled had declared the marriage to be void, this would be recognised by the courts of England and Scotland and, hence, they would not recognise a subsequent divorce or separation granted either in the British Isles or elsewhere.

2. Subsection (2) preserves the existing rule that recognition may be refused on the ground of public policy: see paragraph 11 of the Report. In accordance with Articles 8 and 10 of the Convention, it distinguishes three situations:

(i) where adequate steps were not taken to give one party notice of the proceedings (subsection 2(*a*) (i));

(ii) where he was for reasons other than lack of notice not given an adequate opportunity of taking part in the proceedings (subsection 2(*a*) (ii)); and

(iii) where to recognise the divorce or legal separation would be contrary to public policy (subsection 2(*b*)).

British Isles divorces and separations entitled to recognition under clause 1 are excluded; it has been thought that in such circumstances the complaining party should seek to have the decree set aside by the court which granted it, or on appeal from that court, and that it would be objectionable to allow a court in another part of the British Isles to refuse to recognise the decree.

3. The wording of paragraph (*a*) of subsection (2) recognises that there may be some circumstances where it is reasonable not to take steps to give notice (for example, where the circumstances were such as to justify the foreign court in dispensing with service) and others where, because the divorce is a unilateral one, there are no proceedings in which the other party can take part—and therefore no point in giving him notice. If such a unilateral divorce is not recognised, it must be because paragraph (*b*) is invoked. The word " manifestly " in paragraph (*b*) is probably redundant because our courts would never invoke the doctrine of public policy unless they were quite clear that it was right to do so. Nevertheless the word appears in Article 10 of the Convention where it was deliberately inserted to discourage the excessive reliance by the courts of some countries on alleged grounds of public policy. In order to comply strictly with the Convention and to proclaim our adherence to a policy of self-restraint, it has seemed advisable to retain the word in our legislation.

4. Subsection (3) is in accordance with Article 1 of the Convention: see paragraphs 7 and 15 of the Report. It applies both to overseas and British Isles decrees. Although, under clause 5, the British courts may be bound by findings of jurisdictional facts and be bound to recognise the effectiveness of the divorce or separation, they are not bound by findings of fault or by ancillary orders.

Short title, interpretation, transitional provisions and extent.

9.—(1) This Act may be cited as the Recognition of Divorces and Legal Separations Act 1970.

(2) In this Act " the British Isles " means the United Kingdom, the Channel Islands and the Isle of Man.

(3) The provisions of this Act relating to overseas divorces and legal separations apply to a divorce or legal separation obtained before the date of the commencement of this Act as well as to one obtained thereafter and, in the case of a divorce or legal separation obtained before that date—

(*a*) require, or, as the case may be, preclude, the recognition of its validity in relation to any time before that date as well as in relation to any time thereafter; but

(*b*) do not affect any property rights to which any person became entitled before that date or apply where the question of the validity of the divorce or legal separation has been decided by any competent court in the British Isles before that date.

(4) This Act does not extend to Northern Ireland.

EXPLANATORY NOTES

Clause 9

1. Only subsection (3) requires explanation. Clause 1, relating to British Isles divorces or judicial separations, is expressed to apply only to those granted after the commencement of the Act. But, for reasons stated in paragraphs 45–50 of the Report, the provisions relating to the recognition of overseas divorces and legal separations (clauses 2–6) apply to existing decrees: see subsection (3)(*a*) of this clause. But by virtue of subsection (3)(*b*) this does not affect any property rights to which any person became entitled before the Act comes into operation; nor does it apply where the question of the validity of the divorce or legal separation has been decided by any competent court in the British Isles before that date. Hence if, for example, a divorce has been granted in a foreign country and the Scottish courts before the Act comes into operation have decided that it was invalid, the English courts will be entitled to follow the Scottish ruling instead of having to recognise the divorce.

2. Subsection (4) will, of course, require amendment if it is decided to extend the ambit of the legislation to Northern Ireland and to other parts of the British Isles.

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