

# Grounds for Divorce Under Proposed Legislation: The Irish and Italian Perspectives by Andrew Sciberras

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AN ACT TO MAKE PROVISION FOR THE EXERCISE OF  
JURISDICTION CONFERRED BY THE CONSTITUTION  
ON THE COURTS IN RELATION TO DIVORCE, TO ENABLE THE COURTS TO MAKE  
ANCILLARY ORDERS IN OR AFTER PROCEEDINGS FOR DIVORCE,  
AS RESPECTS TRANSFERS OF PROPERTY OF DIVORCED PARTIES,  
EXEMPTION FROM, OR FOR THE ABATEMENT OF, STAMP DUTY) AND TO PROVIDE FOR

On the 6<sup>th</sup> of July 2010, Dr. Jeffrey Pullicino Orlando MP (Nationalist Party) tabled a Private Member's Bill (the Bill) in the House of Representatives wherein he formally presented the [Family Law \(Divorce\) Act](#).<sup>[1]</sup> This article intends to examine and comparatively analyse<sup>[2]</sup> the provisions of the said bill, particularly focusing on [the grounds for obtaining the divorce decree](#), although the author does not exclude examining other areas of the subject in due course.

In the preliminary it must be remarked that the said bill seems to have been derived almost lock, stock and barrel from the [Irish Family Law \(Divorce\) Act of 1996](#). Therefore, recourse to Irish jurisprudence relating to the grounds of divorce is fundamental in order to achieve a better understanding of the subject. The Irish law adopts the so-called 'no-fault divorce system', meaning that parties are spared from 'the potentially embarrassing and adversarial requirement of stating fault based grounds by providing for the dissolution of a marriage on a finding that the relationship is no longer viable.'<sup>[3]</sup> This is unlike the situation deriving under the laws regulating separation in the Civil Code wherein the grounds for separation include fault-based motives such as adultery or cruelty.<sup>[4]</sup>

[The Grounds for Divorce under the Bill and Irish Law](#)

It is general practise that one of the first exercises a Court faces upon

hearing a case is in deciding whether it has jurisdiction or otherwise. In accordance with Article 30 of the proposed bill the Court may grant a divorce decree if, but only if, one of the following requirements is satisfied:-

- (a) either of the spouses concerned was domiciled in the State on the date of the institution of the proceedings concerned; or
- (b) either of the spouses was ordinarily resident in the State throughout the period of one year ending on that date.

It is interesting to note that this article grants jurisdiction to the Courts of Malta also on the basis of 'ordinary residence' and is not limited strictly to the more rigid and arbitrary notion of 'domicile'.<sup>[5]</sup> Thus, this appears to complement, albeit not entirely,<sup>[6]</sup> Article 3 of the Brussels II Regulation<sup>[7]</sup> which confers jurisdiction in matters relating to divorce, legal separation, or marriage annulment with the Courts of the Member State in whose territory the spouses are 'habitually resident'. This is unlike the rule obtaining under Article 33 of the Marriage Act (Chapter 255 of the Laws of Malta)<sup>[8]</sup> which only permits the recognition of a divorce obtained outside Malta if one of the spouses is domiciled in or is a citizen of that foreign country.

According to Article 3 of the proposed bill if the Court is satisfied that:-

- (a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years;
- (b) there is no reasonable prospect of reconciliation between the spouses; and
- (c) such provision as the court considers proper, having regard to the circumstances exists, or will be made for the spouses and any dependant member of the family

the court may, in exercise of the jurisdiction conferred by the Constitution, grant a decree of divorce in respect of the marriage concerned.

As has already been elaborated, it can be seen from the foregoing that no element of fault or blame needs to be ascribed to either party in order to qualify for a divorce under this section.<sup>[9]</sup> Furthermore, the wording of this article suggests that all three grounds must be satisfied before a decree can be granted. It is therefore prudent to analyse each ground separately in order to obtain a better understanding of the legislator's intention

#### 1. Lived Apart

The spouses must have been living apart for four of the previous five years. Therefore, to obtain a divorce decree, it is necessary that the parties be married for in excess of five years. Unlike the Italian legislation, which shall be examined later, this requirement is satisfied even if the 'separation' between the spouses is de facto.<sup>[10]</sup>

Unfortunately for both practitioner and judge however the proposed bill and the Irish law on which it is modelled provide no definition of the expression 'lived apart' or 'living apart'. This raises several pertinent questions of interpretation. For instance, can the spouses be considered to be 'living apart' even though they live under the same roof? Upon whom does the onus to prove that the spouses have been living apart fall? The prevailing view, according to Irish jurisprudence is, in response to the first question, that it all depends on the facts of the case. However, case-law can help to put the answer on a firmer footing. In the UK judgment **Santos v Santos**<sup>[11]</sup> it was held that:-

[L]iving apart...is a state of affairs to establish which it is in the vast generality of cases...necessary to prove something more than that the husband and wife are physically separated. For the purposes of that vast generality, it is sufficient to say that the relevant state of affairs does not exist whilst both parties recognise the marriage as subsisting. That involves considering attitudes of mind and naturally the difficulty of judicially determining that attitude in a particular case may on occasion be great...identification of an attitude of mind is required. [At p. 255].

This reasoning was accepted in the Irish judgment of **McA vs. McA**<sup>[12]</sup> where judge McCracken J. recognised that as 'there is a mental element to' living apart other than mere physical separation, there is more to living together than being physically in the same house. In this case the father's return to the family household was motivated by the desire to develop his relationship with his children and not to restart the marriage. In absence of the intellectual attachment to the marriage the spouses were deemed to be living apart even though they shared the same household.<sup>[13]</sup>

## 2. No reasonable prospect of reconciliation

The court must be satisfied that 'there is no reasonable prospect of reconciliation between the spouses'. The four-year separation period (per the first requirement) may already be indicative of the fact that reconciliation between the spouses is unlikely the Court is still under the obligation to examine whether there is a reasonable possibility for reconciliation. In fact Articles 4 and 5 of the proposed bill obliges the lawyers representing the applicant and respondent respectively to discuss with their clients the possibility of a reconciliation and give him or her the names and addresses of persons qualified to help to effect a reconciliation prior to the institution of proceedings.

As with the first requirement it all depends on the facts and circumstances of each particular case and the degree of acrimony or agreement in each case will assist the court in deciding the issue.<sup>[14]</sup> In **E.P. v C.P.**<sup>[15]</sup> it was held that this ground would be satisfied if the

breakdown of the marriage was irretrievable: both parties accept that there is no reasonable prospect of reconciliation.<sup>[16]</sup> In this sense the Courts must not adopt a strict interpretation of this requirement. Rather, they must ensure that there is no reasonable prospect of reconciliation and not that there is absolutely no hope.

3. Such provision as the court considers proper

The Court must be satisfied that such provision as the court considers proper, having regard to the circumstances exists, or will be made for the spouses and any dependent members of the family.<sup>[17]</sup> This means that the Court must be prima facie ensured that provision, that is, alimony or maintenance, for the spouses and any dependant members of the family already exists or will be made prior to granting the decree of divorce. It could be that prior to divorce, the spouses have already obtained a judicial or consensual separation and, in consequence, one of the spouses has already been directed by the Court to pay maintenance to the other and to sustain his or her children. Again, this requirement is not devoid of interpretational problems, in particular the interpretation that should be given to 'dependent member of the family'. Should this be limited to the definition given in Article 2 of the proposed bill or should it be extended so as to cover all children such that a divorcing parent may be ordered to pay maintenance even to his adult children?

#### Grounds for Divorce under Italian Legislation

Interestingly enough, Italian legislation does not speak of divorzio but of scioglimento del matrimonio civile, that is, of the dissolution of the civil marriage and/or of cessazione degli effetti civili del matrimonio concordatario, celebrato da ministri del culto cattolico (termination of the civil effects of marriage celebrated by ministers of Catholic worship).

In order to examine the relevant rules, recourse must be made to Article 149 of the Codice Civile which states that marriage shall be dissolved upon the death of one of the spouses and in other cases prescribed by law. These 'other cases', in the context of divorce, are provided for in Law No. 898 of 1970, as amended by Law No.74, 1987, namely the so-called 'divorce law.'

First, Articles 1 and 2 of Law No. 898/70 indicate that the first investigation to be made by the Court regards the inability to maintain or restore the material and spiritual communion between the spouses for one of the causes identified by Article 3. The declaration of divorce, therefore, does not automatically follow a finding of the presence of one of the reasons under Article 3, but in any case requires the determination by the Court of the existence of a practical impossibility of maintaining or restoring family life upon the failure of the spiritual and material union between the spouses. This is similar to the provision

under the Irish legislation which requires that 'there is no reasonable prospect of reconciliation between the spouses' for the decree of divorce to be granted although it goes one step further by linking the impossibility of reconciliation with the breaking down of the spiritual and material union between the spouses.

That said, the Court must determine that one of these strict objective grounds, pursuant to Article 3<sup>[18]</sup> of the Act under review exists:-

1) the conviction of one of the spouses, after the celebration of the marriage, which conviction has become *res judicata*, even for acts committed before the celebration of the marriage, to life imprisonment or imprisonment for a term of more than fifteen years for one or more intentional crimes or any term of imprisonment for incest, rape, induction, coercion, exploitation or prostitution, or for aiding and abetting the murder of a child or attempted murder against a spouse or child, or even to any term of imprisonment, with two or more convictions for crimes of injury, circumvention of an invalid, of non-family care and abuse committed against a spouse or child;

2) the acquittal of one of the spouses from having committed one of the crimes in the previous paragraph upon grounds of insanity or due to prescription of the criminal action if the divorce court establishes, respectively, the inability of spouses to maintain or restore family life or that there are in fact committed the elements and conditions for the punishment of these crimes;

3) the judicial pronouncement of personal separation between the spouses which has become *res judicata* or by decree of approval in case of consensual separation, provided that at least three years have passed from the first appearance of the spouses before the presiding judge in the proceedings of personal separation.<sup>[19]</sup>

4) a marriage ratified (that is celebrated), but not consummated, regardless of the ignorance of the possible impossibility of sexual intercourse;

5) a court decision which is the final step in rectifying the allocation of sex, according to Law No.164, 1982 (transsexualism)

It is manifestly evident that the grounds for dissolution of civil marriage under Italian legislation are much more elaborate than the Irish grounds for divorce. First of all the Italian legislator acknowledged that dissolution should be made possible if one of the spouses is *res judicata* convicted for particularly heinous crimes<sup>[20]</sup> meriting imprisonment for life or imprisonment beyond 15 years as well as conviction for crimes against public morals such as incest, rape and prostitution. It seems that here the legislator is acknowledging the fact that upon such conviction there is a big possibility for the spouses to be unable to maintain or restore family life but it does not exclude, by virtue of Articles 1 and 2, the possibility for reconciliation between the spouses

nonetheless.

The fourth ground listed above links the dissolution of the marriage with judicial or consensual separation provided that three years have elapsed since the first appearance before the presiding judge in the proceedings of separation.<sup>[21]</sup> This is unlike the Irish law which does not require such judgment or the commencement of such proceedings but that the spouses have lived apart for four of the past five years. The Italian ground could be the wiser one because various necessary and fundamental formalities such as the allocation of the matrimonial home, alimony payments, and custody of children would have already been covered by virtue of the separation proceedings. Moreover, separation proceedings, coupled with the three year separation period after their commencement, would serve as further conclusive proof that there is 'no reasonable prospect of reconciliation between the spouses'. Furthermore, the Italian grounds for dissolution of the marriage also incorporate one of the traditional grounds for annulment, this being impotence (the inability to bear offspring) or refusal to consummate the marriage. This section seems to pay homage to the secular and Canonical legal doctrine that consummation of a marriage, that is, the conjugal act between the spouses for the purpose of bearing offspring, is a fundamental aspect of marriage and an obligation spouses owe to each other. In fact, both the Marriage Act<sup>[22]</sup> and Canon law<sup>[23]</sup> provide that an inability or refusal to consummate the marriage is a valid ground for annulment. A more controversial provision, but one which should not be excluded by our legislator, is in the granting of divorce if one spouse has undergone sex reassignment surgery and has legally changed his or her gender through a Court decision in this regard.

It should also be noted that with the amendments of Law No.74/87 the Italian divorce law has been streamlined such that spouses may present a divorce application jointly, in which case the law provides for a closed session (in camera) where the parties will appear before the Court for the first and only hearing. This is known as the *procedimento per direttissima* or 'direct route' and is somewhat similar to Article 4 (2) (b) of the proposed bill provides the spouses with the possibility of mediation to help effect a divorce on a basis agreed between them jointly.

[1] See Pullicino Orlando presents divorce bill, [www.timesofmalta.com](http://www.timesofmalta.com), 06/07/2010, <http://www.timesofmalta.com/articles/view/20100706/local/pullicino-orlando-presents-bill-for-introduction-of-divorce> <accessed on 22/10/2010>

- [2] Recourse is being made to Irish and Italian jurisprudence and legislation on divorce.
- [3] USLegal.com, No Fault Divorce Law & Legal Definition, <http://definitions.uslegal.com/n/no-fault-divorce/> <accessed on 22/10/2010>.
- [4] See in particular Articles 38 and 40 of the Civil Code.
- [5] Whereas domicile presupposes both a physical act of establishing residence elsewhere and a future intention to settle in the foreign country permanently (*animus manendi et non redeundi*), ordinary residence only is satisfied merely by a present intention of residence.
- [6] There is some debate amongst legal scholars as to whether 'habitual residence' and 'ordinary residence' may be used interchangeably although the prevailing view, at least under the common law, seems to be that the two terms refer to the same concept. See Department of Justice Canada, The Meaning of Ordinary Residence and Habitual Residence in the Common Law Provinces in a Family Law Context, [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2006/rhro\\_cl/p2.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2006/rhro_cl/p2.html) <accessed on 22/10/2010>.
- [7] Council Regulation (EC) No 2201/2003.
- [8] This Article has been rendered superfluous with the coming into force of the Brussels II Regulation owing to the fact that, in accordance with the Constitution of Malta and the European Union Act (Chapter 460 of the Laws of Malta), in case of conflict between Maltese law and EU law it is the latter which is supreme.
- [9] Because under this system no fault is ascribed to any of the spouses it is at the [subjective] discretion of the Court to determine fundamental issues such as the allocation of the matrimonial home, and the custody of children. This has angered many fathers and fathers' rights groups who argue that they have absolutely no protection against what they describe as the 'confiscation of their children'. This reasoning is born from the fact that Courts tend to favour mothers when awarding custody of children of the marriage. See S. Baskerville, *Taken Into Custody – The War Against Fathers, Marriage and the Family*, Cumberland House, 2007, Pg. 44.
- [10] This can be derived from the fact that Articles 4 and 5 of the proposed bill obliging lawyers representing applicant and respondent respectively to discuss with their clients of engaging in mediation to help effect a separation (if the spouses are not separated) and that such lawyers must also ensure that their clients are aware of judicial separation as an alternative to divorce.
- [11] [1972] 2 All ER 246
- [12] [2000] 2 Irish Law Reports Monthly (Ireland) (I.L.R.M.) 48
- [13] Geoffrey Shannon, *Grounds for Divorce and Maintenance Between Former Spouses – Republic of Ireland*, Law Society of Ireland, Dublin, August 2002, Pg. 24, <http://www.ceflonline.net/Reports/pdf/Ireland02.pdf> <accessed on 22/10/2010>.
- [14] *Ibid*, Pg. 10.
- [15] Unreported, High Court of Ireland, 22.11.1998
- [16] Geoffrey Shannon, *Op. Cit.*, Pg. 10.
- [17] According to Article 2 of the proposed bill, dependent member of the family refers to any child (biological or adopted) of both or either spouses who is under the age of 18 years – or if the child has attained that age is under 23 years but receiving a full time education or is mentally infirm.
- [18] Due to space restrictions the more important grounds have been covered in this article.
- [19] It is important to note that in the case of judicial separation, partial judgment given in respect of any demand or demands touching upon the patrimonial rights of the spouses (e.g. the allocation of the matrimonial home), is sufficient. See judgment by the Corte di Cassazione Nr. 416/2000.
- [20] Unlike Irish divorce legislation, the Italian rules incorporate a fault-based divorce system.
- [21] This means that if, for the sake of argument, separation proceedings have been instituted on the 1<sup>st</sup> of January 2009 and final judgment (or partial judgment in the case of judicial separation) has been delivered on the 1<sup>st</sup> of January 2010, another two years of separation must elapse before the dissolution of marriage may be granted under this ground.
- [22] See Articles 19(e) and (f) of the Marriage Act.
- [23] See Canon 1061 §1