Divorce and Remarriage as Human Rights: The Irish Constitution and the European Convention on Human Rights at Odds in Johnston v. Ireland

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*Johnston v. Ireland*

**Introduction**

In Ireland, divorce is unconstitutional. Since the enactment of the constitution in 1937, Irish law has rejected any efforts to dissolve the unity of marriage. In *Johnston v. Ireland*, Roy Johnston and his new family challenged the Irish ban on divorce in the European Court of Human Rights, claiming Irish law violated their rights to found a family, enjoy their privacy, practice their religion, and be free from discrimination.

The European Court of Human Rights rejected the Johnstons’ claim that the Irish legal system violated the European Convention on Human rights. Nevertheless, the court granted their daughter some relief. The court ordered Ireland to equalize the legal treatment of all children under Irish law, regardless of the marital status of the child’s parents. This holding was a partial remedy for the Johnstons’ daughter Nessa, and did nothing to aid her parents.

Given Ireland’s strong opposition to divorce, it is unlikely that the European Court, an international body, could have enforced a decision for the Johnstons. The *Johnston* case points out the tacit limits on the court’s power and its ultimate usefulness. Although the European Convention on Human Rights protects fundamental individual rights, the court in *Johnston* faced a situation where the claimants’ interests directly opposed the Irish constitution.

This Note examines the background of the *Johnston* case and the propriety of the European Court of Human Rights decision. Part I summarizes Ireland’s political and religious divisions that shape the Irish law of divorce and related family matters. Parts II and III discuss the European Convention on Human Rights and the *Johnston v. Ireland* decision.

1. Roy Johnston had been legally separated from his wife and three children for several years when he met Janice Williams-Johnston. Seven years later they had a daughter, Nessa. They wished to marry, but in Ireland Johnston could not obtain a divorce from his first wife.

2. See infra notes 185-88 and accompanying text.

itself. The Note concludes in Part IV that Johnston was wrongly decided. The European Court of Human Rights should have protected the individual claimants in Johnston, not the established Irish regime. The court should have found that the Irish constitutional bar to divorce violates the Convention and should have protected divorce as a human right.

I. Ireland: Political, Religious, and Legal Background

A. Historical Divisions

Ireland is the only major Western European nation that has retained its ban on divorce. While the prohibition on divorce is undoubtedly linked to the heavy influence of the Roman Catholic Church in Ireland, religion alone fails to provide a complete explanation. Politics also plays a large role. In Ireland, religion and politics are often inextricably mixed. This section traces the recent history of the religious and political divisions of the Irish isle, focusing on the events leading up to and including the absolute ban on divorce in the Irish Constitution.

From Norman times in the eleventh century until 1922, an English government ruled Ireland. The crown granted many English nobles estates in Ireland, and many Protestant settlers moved to the growing port towns in the North. While the indigenous Catholic majority remained concentrated in the poorer, agrarian South, the wealthier Protestant minority stayed largely in the northeastern area of the Irish Isle.

In 1922, after centuries of British rule and several failed compromises with Britain, Ireland gained independence. Great Britain retained control of the six northeastern counties of Ulster which became

4. See infra notes 82-84 and accompanying text.
5. Other predominantly Catholic nations have eased their divorce restrictions. Spain, for example, allowed divorce beginning in 1981. Duncan, supra note 3, at 155. Argentina passed legislation in 1987, codifying a 1986 Argentina Supreme Court ruling allowing divorce. N.Y. Times, May 9, 1987, § I, at 2, col. 4.
6. One need only look to the continuing violence in Northern Ireland between Catholics and Protestants to see that the dispute has moved beyond religious differences. The recent uproar over the proposed agreement for joint British/Irish rule of Northern Ireland further illustrates the political and economic factors involved in what is ostensibly a religious conflict. See M. O’Brien, A Concise History of Ireland 166-76 (1985).
7. Id. at 39.
8. Id. at 61-76.
10. For a discussion of several Irish reform movements in the nineteenth and twentieth centuries, see generally M. O’Brien, supra note 6, at 123-152.
11. R. Grimes & P. Horgan, Introduction to Law in the Republic of Ireland 49 (1981). Grimes and Horgan note that the date of independence is difficult to fix. The signing of the Anglo-Irish Treaty of 1921 officially set the date of independence, but the treaty was strongly opposed by some, and in large part led to the Irish Civil War of 1921-1923 over the extent of British control in Ireland. Id. See generally J. Murphy, Ireland in the Twentieth Century 27-60 (1975).
Northern Ireland. The new Irish nation, the Irish Free State, encompassed the largely Catholic southern counties that form modern Ireland. The Irish Free State, founded by a Catholic nationalist group, left open the possibility of unification with Northern Ireland by adopting an officially nonsectarian constitution.

B. Legal Framework

1. The 1937 Constitution

From 1922 to 1937, political parties vying for power in Ireland struggled with each other and the new constitution. In those fifteen years Parliament's power structure changed, and the constitution was amended twenty-seven times. Fianna Fail, the major opposition republican party, combined forces with Sinn Fein, another more radical republican party, to gain control of the Dail, or parliament. Fianna Fail, strongly Catholic, perceived all attempts to bring the North into the Union as futile and even undesirable. Fianna Fail pushed for complete Irish independence and separation from Britain. In 1937, with the 1922 constitution becoming increasingly unworkable, the parties in power drafted a new constitution. The new constitution abandoned the earlier document's silence on religious issues. There was no longer a need to appease groups outside the Catholic, republican majority.

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12. The Anglo-Irish Treaty of 1921 established the two areas of Ulster and the Republic but provided a Boundary Commission, ostensibly to examine the border line with an eye toward moving it to include the Catholic residents of Ulster in the Republic. In practice, however, no such change occurred. M. O'BRIEN, supra note 6, at 150.

13. In 1922 ninety percent of the inhabitants of the Irish Free State were Roman Catholics. Hogan, supra note 9, at 50.

14. For example, the constitution made no mention of divorce. See J. WHYTE, CHURCH AND STATE IN MODERN IRELAND: 1923-1979 at 51 (2d ed. 1980); A. SHATTER, FAMILY LAW IN THE REPUBLIC OF IRELAND 144-45 (1981). Hogan, supra note 9, at 53.

15. Hogan, supra note 9, at 53. The constitution may be amended by the people through referendum. IR. CONST., art. 47. The referendum must originate in the Dail Eireann, or lower house of Parliament, and then pass both houses. Id. The public must then approve the proposed amendment by a simple majority in a popular referendum. Id. There is no public initiation of constitutional amendments. B. DOOLAN, CONSTITUTIONAL LAW AND CONSTITUTIONAL RIGHTS IN IRELAND 5-6 (1984).


17. Recall that the North was largely Protestant and Unionist (desiring political union with Britain). Any alliance between North and South would have demanded compromises that the revolutionary republicans were perhaps unwilling to grant. Hogan, supra note 9, at 50-55.

18. Id. at 52.

19. Fianna Fail, with its leader Eamonn de Valera, was the major force in framing the new constitution. J. MURPHY, supra note 11, at 89-99; Hogan, supra note 9, at 52-54.

20. Hogan explains how the constitution appears to exclude non-Catholics from the tone of its preamble:

The preamble to the constitution recites, inter alia: "We the People of Eire humbly acknowledge all our obligations to our Divine Lord Jesus Christ, who sustained our fathers through centuries of trial...do hereby adopt, enact and give ourselves this Constitution." The reference to Jesus Christ sus-
In particular, the 1937 constitution included three pro-Catholic articles not found in the 1922 constitution, all of which remain in effect today. Article 44 nominally established national religious toleration, but at the same time recognized the “special position” of the Roman Catholic Church. Article 42 recognized parents as the “primary and natural educator[s]” of children. Finally, article 41 promoted the traditional family and prohibited divorce.

Section 41.3.2 of the 1937 constitution provides “No law shall be enacted providing for the grant of a dissolution of marriage.” Other sections of article 41 recognized the family as the “natural primary” unit of society and assured citizens that the state will “protect the Family... as the necessary basis of social order.”

2. Judicial Interpretation of the 1937 Constitution

Although the Irish courts have played an active role in expanding personal rights beyond the plain language of the constitution in some areas, they have limited constitutional protection of non-marital families. Despite increasing marriage breakdown and the resulting increase in non-marital relationships and families, the courts have resisted recognizing the rights of those outside traditional family units. In State (Nicolaou) v. An Bord Uchtala, the Irish Supreme Court held that article 41 of the constitution protects only the marital family.

Hogan, supra note 9, at 55 n.17.
21. Ir. Const., art. 44.
22. Ir. Const., art. 42.
24. Ir. Const., § 41.3.2.
25. Ir. Const., §§ 41.1.1, 41.1.2. A new draft constitution, proposed by the Progressive Democratic Party, eliminates both the express prohibition on divorce as well as references to God and religion. Draft Constitution, discussed in Machey, A Constitution for a New Republic, Irish Law Times 64 (1988). The Draft’s preamble omits references to the trinity and Jesus Christ found in the 1937 constitution, stating instead that the people of Ireland “affirm the inalienable, indefensible and sovereign right of the Irish Nation to choose its own form of Government...” Draft Constitution, id. The Draft promises to protect both the marital and non-marital family. Article 2.10 of the Draft also guarantees the equal legal status of all children regardless of parentage. Draft Constitution, id. The Draft Constitution proposes important changes in Irish family law. However, it faces almost insurmountable hurdles prior to becoming law. Given the public opposition to the Irish divorce referendum, see infra notes 70-96 and accompanying text, such changes would not come easily.
27. See infra notes 70-72 and accompanying text for statistical evidence of marital breakdown.
29. Id. at 590.
The court's refusal to expand the meaning of "family" has affected not only the adults in non-marital relationships, but their children as well. Although the Irish High Court has stated that the constitution protects illegitimate and legitimate children equally with regard to the child's "personal rights to life, to be fed, to be protected, to be reared and educated," in other disputes the court has continued to distinguish between legitimate and illegitimate children.

Inheritance law is one important area in which illegitimate children are treated differently. In 1984, in O'B. v. S., the Supreme Court upheld the Succession Act of 1965, barring illegitimate children from inheriting. The court held that references to the statutory definition of "child" did not include the illegitimate child. The court dismissed the plaintiff's constitutional claim that the Act unfairly discriminated against children outside of marriage by stating that the constitution placed an affirmative duty on the state to protect the marital family.

3. Statutory Law Affecting Family and Divorce

In addition to judicial interpretation of the meaning of family and marriage under the constitution, Irish statutory law further enforces preferred treatment of the marital family. Under Irish law, unmarried persons have no duty to maintain their partners, and partners do not have any rights of succession. While there is no express barrier to maintenance arrangements or *inter vivos* transfers, preexisting duties to the spouse and marital children may thwart such efforts.

30. M v. M. (Ir. H. Ct. Dec. 2, 1982) (unreported) (cited in Hogan, *supra* note 9, at 89). This statement by the High Court arguably is dicta. The narrow holding was that the mother of a child born outside marriage has a constitutional right to custody.

31. See *infra* notes 32-35 and accompanying text.


33. Succession Act, No. 27 (1965).

34. O'B v. S. 1984 I.R. 316, 329-31. The plaintiff was the daughter of an unmarried couple who lived together for thirty-five years. *Id.* at 318.

35. *Id.* at 318. While treating illegitimate children as "nobody's child" and hence barring them from inheriting from anyone was common in many Western nations, including the United States, most officially abandoned the doctrine ten to twenty years ago. Even while adhering to it, few if any did so on the basis of a constitutional provision. R. MNOOKIN, CHILD, FAMILY AND STATE 169-75, 213-14 (1978). See *infra* notes 178-88 and accompanying text.


38. For example, Roy Johnston could not support Janice Williams-Johnston at the expense of his spouse or children from his marriage. Also, maintenance agreements are less secure because they may be struck down as defective or ended by agreement. See 1983 Y.B. EUR. CONV. ON HUM. RTS. 135 (Eur. Comm'n on Human Rights).

In the United States, the issue in evaluating succession rights of non-marital family members has not been whether the alternatives are available but whether allowing differentiation on the basis of status alone is equitable. See Trimble v. Gordon, 430 U.S. 762 (1977) (exclusion of illegitimate child from father's estate violates equal protection clause of the fourteenth amendment, U.S. Constitution). See *infra* note 183 and accompanying text.
The Family Law Act of 1981, which provides for summary remedies for domestic violence, does not apply to the non-marital family. Non-marital families do not enjoy the benefits of marital families under the social welfare system. The Family Home Protection Act of 1976, which prohibits the sale of the home without the consent of both spouses, also excludes the non-marital family. In all, Irish statutory law differentiates considerably between marital and non-marital families.

Ireland, nevertheless, has recently made some progressive changes regarding the status of illegitimate children. The Status of Children Act (1987) became law on June 14, 1988. The statute is new and will doubtless face constitutional challenges, but section 29 of the Act allows illegitimate children to share equally with legitimate children in a decedant’s estate under the laws of intestate succession. Illegitimate children may also apply for provision under a will. Part IV of the Act brings illegitimate children within the protection of the Irish Family Law (Maintenance of Spouses and Children Act (1976)). The Act provides general relief to illegitimate children by stating “relationships are to be determined irrespective of whether a person’s father and mother are or have been married to each other.” Despite this broad language, the Act does allow some distinctions among parents based on marital status.

The Status of Children Act appears quite progressive, but it faces strong constitutional challenges. Even if the Act passes constitutional muster, it fails to alleviate the social stigma children born out of wedlock suffer. Permitting divorce, however, would allow couples to dissolve prior unions and then remarry before having children. Divorce would

40. C. JENNINGS, WHO OWNS IRELAND—WHO OWNS YOU? 19-27 (1985). Jennings suggests that an additional source of discrimination in the social welfare system stems from defining women’s status and welfare payments in accordance with their relationship to men (e.g., widows, abandoned wives). Id. at 22.
41. Family Home Protection Act, No. 27 (1976).
42. Id.
43. Other legal disabilities for unmarried couples include unfavorable treatment of transfers between them under the capital acquisitions tax. Capital Acquisition Tax Act, No. 8 (1976). An unmarried couple is also prohibited from jointly adopting a child. Adoption Act, No. 25 (1952).
45. Id.
46. Id.
47. Id. at 133, summarizing Status of Children Act (1984).
48. Woulfe, supra note 44, at 133.
49. See supra notes 28-29 and accompanying text.
thus prevent the social stigmatization children such as Nessa Johnston suffer.

4. Existing Ways to End Marriage in Ireland
   a. Nullity

Absent domestic divorce, few options remain to bring a legal end to an irretrievable marriage.\textsuperscript{50} Under limited circumstances, one may seek to nullify a marriage in the civil courts. While the Catholic Church and Irish law do not allow the dissolution of a valid marriage, a grant of civil nullity signifies that no valid marriage ever existed.\textsuperscript{51}

In order for a marriage to be valid, the parties must have the legal capacity to marry. Partners must be over sixteen years old, not already married, and not related by blood.\textsuperscript{52} Additionally, the parties must follow the formalities of marriage, including parental consent for those under twenty-one and appropriate ceremonial procedures depending on religious affiliation.\textsuperscript{53} Irish law considers a marriage null and void if one or both of the parties lacked the capacity to marry or failed to observe the necessary formalities. A marriage also is void if the parties did not consent to marry, as shown by duress, mistake, misrepresentation, or fraud.\textsuperscript{54} A different class of marriages that may be nullified is termed the “voidable marriage.” In order to have the union declared invalid under the voidable marriage doctrine, one of the parties must show that the other party was mentally ill, impotent, or a homosexual at the time of marriage.\textsuperscript{55}

Since 1976, Irish courts have broadened the grounds for civil null-
lity, particularly in the psychological areas of duress or mental illness.\textsuperscript{56}

This expansion has led to an increasing acceptance of psychiatric illness as grounds for nullity\textsuperscript{57} as well as a broader interpretation of other psychological factors such as duress. In an example of the latter, the Supreme Court held in \textit{N. (otherwise K.) v. K.}\textsuperscript{58} that pressure from the pregnant petitioner's parents to marry so influenced her that her decision to marry was made under duress and thus void.\textsuperscript{59} The court rejected prior judicial definitions that limited duress to threats of physical or otherwise harmful consequences.\textsuperscript{60} Noting the irrevocable nature of marriage in Ireland, the court held that the validity of marriage depended upon a fully free exercise of the independent will of the parties.\textsuperscript{61}

The court's recent liberalization of civil nullity as a means to circumvent the constitutional ban on divorce\textsuperscript{62} may have already reached its limits. Critics argue that the court's restatement of duress goes beyond the accepted definition in Irish contract law.\textsuperscript{63} Despite the expansion of duress and other grounds, nullity is still unavailable for marriages that break down after the wedding for reasons unforeseeable at the time of marriage, such as a later developing mental illness or a couple's gradual growing apart.\textsuperscript{64} Today nullity remains a limited remedy for relatively few couples.

Even if nullity were available in all cases, difficulties remain. Any children from an annulled marriage would be illegitimate and hence subject to unequal legal treatment.\textsuperscript{65} If nullity increased dramatically, so as to be readily available to void a marriage broken down by later developing disabilities nominally present at the time of marriage but not pressing until much later, one must consider whether Ireland arguably would be left with only a tortured distinction between divorce and nullity.


\textsuperscript{58} 1986 I.L.R.M. 75.

\textsuperscript{59} Id. at 82-83.


\textsuperscript{61} N. (otherwise K.) v. K., 1986 I.L.R.M. at 82.

\textsuperscript{62} Chief Justice Finlay noted in N. (otherwise K.) v. K., that since the Irish Constitution bars divorce and makes "the contract of marriage absolutely irrevocable," parties must give consent freely. \textit{Id.} Hence, the court was conscious of its decision as an outlet for those bound to a marriage that, in the court's new interpretation, never was a valid union.

\textsuperscript{63} \textit{Id.} at 85 (Henchy, J., dissenting). "[T]he courts . . . have given a more liberal scope to the doctrine of duress as a nullifying element than would be applied in the construction of certain kinds of contract." \textit{Id.}

\textsuperscript{64} A. Shatter, \textit{supra} note 14, at 76-79.

\textsuperscript{65} \textit{Id.} at 79. \textit{See infra} notes 185-87 and accompanying text.
b. Foreign Divorce

Another way to end a marriage in Ireland is for a couple to obtain a foreign divorce. Such divorces are only available under limited circumstances. For a foreign divorce to be recognized in Ireland, the husband must have been domiciled in the country in which the divorce is obtained with the intent to remain indefinitely and not merely for the purpose of obtaining a divorce. Hence, the rules for the recognition of a foreign divorce in Ireland may be more stringent than in the country that granted it.

If either spouse plans to remarry in Ireland after obtaining a foreign divorce, he or she must overcome yet another obstacle. The Irish Registrar-General must refer any application for marriage in Ireland involving a divorced party to legal counsel to determine if the foreign divorce requirements have been met. Both the foreign divorce and remarriage requirements place an enormous burden on Irish couples seeking to obtain a divorce. While annulment or foreign divorce may offer the possibility of relief from an unbearable marriage, they are unavailable to most Irish couples.

C. Divorce in the Modern Context: The Referendum

The Irish constitutional prohibition of divorce has failed to prevent marital breakdown and the formation of non-traditional families. An estimated 72,000 unmarried couples live together in Ireland, and in 1986, more than 9,000 women received deserted wives' social welfare payments. The number of single-parent families has increased dramatically in the past years. Similarly, the number of women receiving Ireland's unmarried mother's allowance trebled in the past ten years from 3,800 in 1977 to 11,500 in 1985.

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66. B. Doolan, supra note 51, at 226. The "domicile of spouses is decided by the husband. While a wife may live in another country her domicile remains Irish as long as her husband lives [in Ireland]. Any change in her status may not be recognised in [Irish] courts." Id. Such a requirement makes it virtually impossible for a woman to obtain a foreign divorce against her husband's wishes. This illustrates the limited utility of foreign divorce as a means for avoiding the divorce ban as well as the male-centered Irish society in connection with social welfare. Supra note 40.

67. See A. Shatter, supra note 14, at 159.

68. Id.


70. Menendez, Down the Emerald Aisle: Irish Voters Reaffirm Church-State Marriage in Divorce Referendum, 39 Church & St. 175 (Sept. 1986).


1. The Referendum Debate

To address the problems of marital breakdown, several groups have sought to revise the constitution to allow divorce in some circumstances. A national referendum to amend the constitution to allow divorce reached the ballot on June 26, 1986. The proposed amendment permitted divorce only when the marriage had failed for five years with no possibility of reconciliation. It also authorized the court to require that the party seeking divorce support a dependent spouse and any dependent children.

The referendum sparked debate on a number of issues connected with divorce and highlighted Ireland's political and religious divisions. The debate centered on four closely linked topics: the Catholic Church's proper role in the debate, the possibility that allowing divorce would pave the way for a united Ireland, the potential practical effects of divorce, and the humanitarian need for compassion in allowing divorce. While Irish voters rejected the proposed amendment by a wide margin, the referendum debate shed light on this explosive, emotional issue.

a. Church and State: The Role of the Catholic Hierarchy in the Referendum Debate

The Catholic Church strongly opposed the amendment and is credited

73. A. Shatter, supra note 14, at 147-151.
74. The timing of the referendum coincided with oral argument before the European Court in the Johnston case. This left the Irish Government in the anomalous position of arguing before the court on Monday that the constitutional ban on divorce did not violate human rights and on Thursday, urging the electorate to vote for the constitutional amendment allowing divorce. Irish Times, June 23, 1986, at 8, col. 4.
75. Proposed tenth amendment to the Irish constitution, reprinted in Irish Times, June 26, 1986, at 8, col. 4. The proposed amendment replaced the existing section 41.3.2 with the following text:

Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that—
I. a marriage has failed,
II. the failure has continued for a period of, or periods amounting to, at least five years,
III. there is no reasonable possibility of reconciliation between the parties to the marriage, and
IV. any other condition prescribed by law has been complied with,
the court may in accordance with law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision having regard to the circumstances will be made for any dependent spouse and for any child of or any child who is dependent on either spouse.

Id.
76. Id.
77. See infra notes 82-84 and accompanying text.
78. See infra notes 85-87 and accompanying text.
79. See infra notes 88-92 and accompanying text.
80. See infra notes 93-94 and accompanying text.
81. See infra notes 95-96 and accompanying text.
with responsibility for the unexpectedly high negative vote. Many saw the church's involvement as indicative of the great division in opinion on the nature of Irish society. John Cooney, a political correspondent to the Irish Times, commented that "[t]he [divorce] campaign has . . . again highlighted the differences in outlook between those attached to traditional Catholic values and those aspiring to a more pluralist society that does not insist on the maintenance of the Catholic ethos and teaching in the Constitution." The predominantly Catholic population of Ireland had to make this choice in the face of a strong Church opposition to divorce.

b. North and South: Is Divorce Necessary for a United Ireland?

Closely related to the church and state issue but with an added political dimension was the debate concerning the effect of the referendum on future relations between Northern Ireland and the Republic to the south. Hopes for a united republic waned because the laws of Northern Ireland allow divorce, arguably maintaining a barrier between the two nations on this important social and religious issue. As moderates in the North urged support for the referendum, an editorial in the Belfast Telegraph predicted that a vote against divorce would "severely dent" Prime Minister FitzGerald's vision of a reunited Ireland. Members of FitzGerald's political party, Fine Gael, also feared greater separation between North and South if the referendum failed.

82. Menendez, supra note 70, at 175 ("the major factor for the unexpectedly heavy negative vote was the role of the Roman Catholic Church as arbiter of conscience of all but a handful of Irish voices."). See also Dr. Jeremiah Newman, Bishop of Limerick, God Says "No" to Divorce, Irish Times, June 23, 1986, at 1, col. 2. Dr. Keven McNamera, the Archbishop of Dublin also expressed the Church's "emphatic opposition" to the referendum, saying divorce would hinder people "in their efforts to live in union with God in this life and in the next." Irish Times, June 23, 1986, at 1, col. 2.

83. The Irish Labour Party faulted the church hierarchy for intimidating Catholics to vote against the referendum, stating: "How much better it would have been if the two bishops felt able to rely on the commitment of their people—a commitment that has seen them and the Church through much—rather than on fear." Irish Times, June 23, 1986, at 1, col. 2.


85. Irish Times, June 26, 1986, at 1, col. 5.


87. Four members of Fine Gael predicted that without passage of the tenth amendment, the border between Northern Ireland and the Republic "would assume the severity of a Berlin Wall—separating the troubled North from what will be seen as a partitionist, inward-looking and smug State dominated by the views of one Church." Irish Times, June 26, 1986, at 8, col. 7.

When the referendum vote was tallied, those in Northern Ireland supporting union with Great Britain hailed the negative result as evidence of partitionist thinking. The Unionist party leader declared, "The referendum result shows . . . Maynooth [the leading Catholic seminary in Ireland] rather than the Dail still rules. The Roman Catholic Church rules supreme over a subservient State and people." Irish Times, June 28, 1986, at 9, col. 1. John Hume, the moderate Catholic leader in Northern Ireland, sadly expressed similar thoughts: "Why would Protestants in Northern Ire-
c. Effects of Divorce: Hardship for Women and Children?

Opponents of the referendum also argued that divorce in Ireland would cause tremendous hardship among divorced women and their children. One group claimed that divorce would impoverish wives, eventually leading to compulsory adoption of their children. In response, referendum supporters argued that the rising level of marital breakdown in Ireland was the primary source of hardship for spouses and children and that legalizing the status of the deserted would ameliorate their condition. Deserted wives would have the constitutional right to adequate maintenance from their spouses for the first time, and children might avoid the stress associated with an unhappy marriage. In short, supporters of the referendum contended that the arguments against divorce were misplaced, exaggerated, and played unreasonably on people's fears.

d. Compassion for Broken Marriages

For many Irish, the critical element in the referendum debate was compassion. Supporters cast the victims of marital breakdown in a humanitarian light. They argued that marital dissolution was the exception to the institution of marriage, and its victims deserve understanding. "Put compassion in the Constitution" was the slogan urging many to support divorce. Proponents supported divorce not as a solution to marital problems, but as "a means of easing the pain, of ensuring that people whose marriages have broken down are not condemned to lives of misery without a second chance."

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89. See supra notes 63-65 and accompanying text.
91. The Irish Association of Labour Teachers stated that teachers who had observed the signs of marital failure in their students agreed that the "situation improved dramatically when the separation took place." Irish Times, June 21, 1986, at 8, col. 1. The Association hoped that allowing divorce would permit the separation to take place with "less rancor, tension . . . trauma . . . and even violence." Id.
93. Irish Times, June 26, 1986, at 8, col. 3.
94. Walsh, One more challenge for the Republic, Irish Times, June 26, 1986, at 10, col. 1. The Irish Times, Dublin's leading newspaper, supported the referendum for largely the same reason. A voting-day editorial urged the public to take "an unparalleled opportunity to be generous, to vote for people who are in trouble. The issue of divorce should not be looked at in terms of possible, hypothetical dangers in the future . . . but in terms of the many who are in marital straits." Id. at 11, col. 1.
2. Referendum Results

On June 26, 1986, over 60% of the eligible voters cast their ballots,\(^9\) resulting in a two-to-one margin against the referendum. Over 60% of the participating electorate voted "no" to divorce in Ireland.\(^9\)

II. The European Convention on Human Rights

A. Origin

With little opportunity to obtain a valid divorce through domestic channels, some Irish citizens have looked to international tribunals for relief. Applicant Roy Johnston in Johnston v. Ireland looked to the European Court on Human Rights for protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms.\(^9\) This Part will examine the nature of rights guaranteed in the Convention and the protection machinery the Convention offers.

In the wake of the second world war, the newly formed Council of Europe sought to achieve a closer unity between its members for the purpose of "safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress."\(^9\) European nations pursued this goal through the drafting of the European Convention on Human Rights and Fundamental Freedoms.\(^9\) In the Convention, members of the Council reaffirmed "their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend."\(^10\) Member nations signed it in 1950, and it took effect in 1953.\(^10\)

B. Jurisdiction and Enforcement

To date, all twenty-one member states of the Council of Europe have
ratified the Convention, thus submitting themselves to its jurisdiction. While some nations selectively adopted only parts of the Convention and its more recent protocols, Ireland has ratified the entire Convention.

In addition to setting forth substantive legal provisions, the Convention includes the procedural machinery necessary to enforce fundamental freedoms. Both national governments and individuals may file complaints of alleged violations of the Convention with the European Commission of Human Rights. After the Commission writes its report, it may refer the case to the European Court of Human Rights for further review. In addition, a nation-party may appeal directly to the European Court of Human Rights. Individuals have no right to a mandatory appeal before the Court. If neither the Commission nor the nation-party refers the case to the European Court, the Committee of Ministers for the Council of Europe issues a report on whether the defendant violated the Convention. The Committee of Ministers, an organ of the Council of Europe, is responsible for enforcing judgments of the European Court. In Johnston v. Ireland, Roy Johnston complained first to the Commission, which issued a decision against Johnston, but referred the case to the court, where Johnston again lost.

Although all parties to the Convention “undertake to abide by the decision of the court in any case to which they are a party,” they vary in the force that they grant the Convention in their respective domestic legal systems. While some nations place the Convention on a legal level


103. See Sands, supra note 102, at 5 n.36, for citation to the eight protocols.

104. European Convention on Human Rights, supra note 99. The enforcement machinery of the Convention sets it apart from other human rights agreements such as the U.N. Universal Declaration on Human Rights, supra note 101.

105. European Convention on Human Rights, supra note 99, arts. 24 and 25. Article 25 of the Convention permits individuals to bring complaints if their country has approved the article. Ireland has submitted itself to the entire Convention. EUROPEAN CONVENTION ON HUMAN RIGHTS 54 (Directorate of Information, Strasbourg, 1968).


107. Id.


110. Id.


equal to their own constitutions, others, notably Ireland, have not incorporated the Convention into domestic law and refuse to adjudicate issues raised under it in their domestic courts. Thus, in some countries, one may challenge alleged human rights violations in domestic courts on the grounds that such action violates the European Convention, while in Ireland, this course is unavailable. Irish citizens must proceed directly to the European Commission and Court in Strasbourg.

C. Rights Protected

Foremost among the rights the Convention protects is the right to life and liberty. One could view the other provisions as subordinate expressions of the basic respect for life. The Convention also guarantees the following rights: prohibition of torture or inhuman treatment; prohibition of slavery or forced labor; fair public hearings by an independent tribunal to determine civil claims and criminal charges; prohibition of retroactive criminal convictions; respect for family and private life; freedom of religion, thought, and conscience; freedom of expression; freedom of assembly and association; freedom to marry and found a family; and freedom to enjoy protected rights without discrimination.

Johnston involved alleged violations of the provisions regarding marriage, family, and the right to religious freedom and equal treatment. The debate in Johnston focused on article 12 of the Convention which provides: "Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exer-

114. *E. v. E.*, (Ir. H. Ct., May 7, 1982) (unreported), cited in Whyte, *The Application of the European Convention of Human Rights Before the Irish Courts*, 31 INT'L & COMP. L.Q. 856, 857 (1982). In this case the Irish High Court found no cause of action for plaintiff challenging domestic legal aid provisions on the theory that it violated the Convention as interpreted in Airey v. Ireland. See infra notes 183-84 and accompanying text. The court ruled that since the Convention was not part of domestic law, disputes concerning it could not be adjudicated in Irish courts. Instead, the court instructed the plaintiff to seek relief in the European Commission and Court, a process that would likely require several more years. *Id.* The court cited art. 29, § 6 of the Irish Constitution which states: "No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas." *Id.*
116. *Id.* art. 3.
117. *Id.* art. 4.
118. *Id.* art. 6.
119. *Id.* art. 7.
120. *Id.* art. 8.
121. *Id.* art. 9.
122. *Id.* art. 10.
123. *Id.* art. 11.
124. *Id.* art. 12.
125. *Id.* art. 14.
Also at issue in Johnston was article 8 of the Convention which states that "[e]veryone has . . . [the] right to respect for his private and family life . . . . There shall be no interference . . . with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security." Johnston also challenged Ireland's divorce ban on the grounds that it violated his religious freedom as guaranteed by article 9 and that Ireland discriminated against his non-marital family in violation of article 14.

D. Judicial Interpretation of the Convention Articles at Issue

Since the Convention's implementation in 1953, both the Commission and the Court of Human Rights have applied and interpreted the various Convention provisions in their decisions. The two tribunals' decisions have often broadened the protection of individual human rights under the Convention.

In Marckx v. Belgium, the European Court of Human Rights decided that a Belgian statute that differentiated between the succession rights of legitimate and illegitimate children violated the Convention. The statute was in place in 1950 when Belgium signed the Convention. It is likely that Belgium would have objected to forced equality had the original draft demanded it. Nevertheless the court held that the statute had to be changed to provide equal treatment for children within and outside the marital family. The court wrote that the Convention must be interpreted in "light of present-day conditions," rather than by an inflexible reading of the original text.

The significance of Marckx lies in the court's showing its willingness to interpret the Convention broadly. In Marckx, the court struck down a...
law that was permissible in many of the signatory countries in 1950, when the Convention was signed.\textsuperscript{136} Knowing that Belgium did not intend to include equality for illegitimate children in the Convention did not deter the court from expanding the rights protected beyond what was expressly included or intended in the Convention.\textsuperscript{137}

The court found in \textit{Airey v. Ireland}\textsuperscript{138} that the Convention may create positive obligations for member states in order to protect the human rights the Convention guarantees.\textsuperscript{139} In \textit{Airey}, the complainant sought release from her allegedly violent, alcoholic husband through a court-ordered separation.\textsuperscript{140} Mrs. Airey was unable to meet the legal costs of the separation procedure and demanded that Ireland provide free legal services.\textsuperscript{141} She argued that the absence of an effective, accessible remedy for marital breakdown violated her Article 8 rights to respect for family life.\textsuperscript{142} The court agreed, holding that "protection of family life may sometimes necessitate [a married couple] being relieved from the duty to live together."\textsuperscript{143} The interplay of these cases and \textit{Johnston} will be more fully developed in Part IV.\textsuperscript{144}

III. \textbf{Johnston v. Ireland}

A. Facts

In 1952, Roy Johnston, the "first applicant," married in a Church of Ireland ceremony.\textsuperscript{145} After thirteen years of marriage, during which he and his wife had three children, "it became clear . . . that the marriage had irretrievably broken down."\textsuperscript{146} He and his wife separated. In 1971, Johnston moved in with the "second applicant," Janice Williams-Johnston. Seven years later, they had a child, Nessa Williams-Johnston, the "third applicant". As discussed above, the Irish constitution prohibited Johnston from either divorcing his first wife or marrying Williams-Johnston. The separation agreement Johnston and his wife signed legally divided their property and provided that Johnston would financially sup-
port his wife and children. It did not and could not allow Johnston or his wife to remarry. While Johnston and Janice Williams-Johnston primarily sought the opportunity to marry, they also complained of their inferior legal status and that of their daughter.

B. European Commission on Human Rights Decision

In the first hearing of the case, the European Commission on Human Rights found against Johnston’s and Janice Williams-Johnston’s claims of entitlement to divorce and discrimination under Irish law. The Commission found, however, that Ireland had breached article 8 by failing to respect the family life of all three applicants with regard to the child, Nessa. The Commission affirmed the basic premise of *Marckx* that the Convention is a “living instrument.” That the Irish constitution predated the convention was irrelevant. In doing so, the Commission reaffirmed its power to adapt the Convention to current concerns and to reserve to itself the power of judicial review over the signatory state’s law.

Nevertheless, the Commission limited its decision to the plain language of the Convention. It would not “include within the convention matters which have been explicitly and deliberately excluded from its ambit.” Specifically, the Commission held that the right to marry guaranteed by article 12 did not provide the right to divorce and subsequent remarriage. As support for this position, the Commission cited the *travaux preparatoires*, the record of deliberations during the drafting of the Convention, for the proposition that the drafters intentionally omitted the right to divorce.

C. European Court of Human Rights Decision

After hearing Johnston’s appeal, the European Court of Human Rights affirmed the Commission’s decision by a vote of sixteen to one. In a lengthy opinion, the court considered and rejected each of the complainants’ arguments. While acknowledging its previous decisions supporting the applicants’ position, the court declined to extend the principles of *Marckx* and *Airey* to Johnston’s situation.

147. *Id.* at para. 12; *See supra* note 24 and accompanying text.
150. *Id.* at para. 100.
151. *Id.* at para. 101.
152. *Id.* at para. 103.
153. *Id.* at para. 96; *see* Collected Edition of the “Travaux Preparatoires” (1975) [hereinafter *travaux preparatoires*].
154. The drafters generally followed the United Nations’s Universal Declaration of Human Rights which does call for the right to divorce. With little explanation, the Convention drafters consciously omitted it from what became article 12. *Travaux preparatoires*, *supra* note 153, at 168, 194 (vol. 1).
1. Article 12: The Right to Marry

Article 12 of the European Convention on Human Rights provides that "[m]en and women of marriageable age have the right to marry and to found a family." The applicants did not argue that the Convention guaranteed a *per se* right to divorce, but rather that the divorce prohibition under Irish law deprived them of their right to marry under article 12. The court considered the right to remarry and the inability to divorce so intertwined in this case that they could not be analyzed separately. Hence, the issue for the court was whether the right to marry and the right to divorce could be derived from article 12.

In considering "the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose," the court determined there was no right to divorce under article 12. First, the court deferred to Irish law, refusing to find that "in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by article 12." Second, the court noted, as the Commission had, that in the *travaux preparatoires*, the Convention drafters notably deleted words pertaining to marriage dissolution from the U.N. Universal Declaration of Human Rights. Third, while acknowledging that the "Convention and its Protocols must be interpreted in the light of present-day conditions," the court, citing *Marckx*, found it could not "derive from these instruments a right that was not included therein at the outset."

2. Article 8: Respect for Family Life

The court also rejected the applicants' arguments based on Article 8, which provides that "[e]veryone has the right to respect of his private and family life." The court noted that article 8 "applies to the 'family life' of the 'illegitimate' family as well as to that of the 'legitimate' family" and that it may impose "positive obligations inherent in an effective 'respect' for family life." While the court found the Williams-Johnstons to be a family, it concluded that the contours of "effective

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157. The applicants' argument here is problematic. It seems to suggest that only a separated person with another potential mate should have the right to divorce so he or she can remarry.
158. The court held, "The second applicant is not complaining of a general inability to marry but the inability to marry the first applicant. This situation stems directly from his inability to obtain a divorce. Consequently the case cannot be examined in isolation from the problem of non-availability of divorce." Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) (1986), at para. 50.
159. *Id.* at para. 51.
160. *Id.* at para. 52.
161. *Id.* See *travaux preparatoires*, *supra* note 153, at 268 (vol. 1).
163. *Id.*
respect," must be determined on a case-by-case basis. Despite finding that Ireland had violated the family's article 8 rights, the court declined to grant relief in the form of divorce. The court's rationale was that the more specific article 12 did not include the right.

3. Article 9: Freedom of Religion and Conscience

The court rejected Johnston's argument that the Irish ban on divorce violated his freedom of conscience and religion. With little discussion, the court simply found that "Article 9 cannot, in its ordinary meaning, be taken to extend" to divorce. The court failed to discuss possible religious conflicts between Ireland as a predominantly Catholic state and the applicants as a religious minority.

4. Article 14: Right to be Free from Discrimination

Article 14 provides that the "enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination." The applicants argued that the ban on divorce discriminated on the basis of financial status, as more wealthy persons were better able to obtain a foreign divorce. Nevertheless, the court found that the Irish statutes pertaining to foreign divorce were imposed equally on all citizens.

5. Finding for Nessa, the Child

Despite its decision against the first and second applicants, the court found in favor of the Williams-Johnstons' daughter, Nessa. Citing the legal impediments to an illegitimate child leading a normal family life, the court found that Irish law violated the article 8 guarantee of her right to respect of her family life. The court stressed that Marckx implied "an obligation for the State to act in a manner calculated to allow these family ties to develop normally." The court directed Ireland to equalize legal treatment of all children.

IV. Analysis

A. Allowing Divorce for the Child's Sake

By contributing to the incidents of illegitimacy that produce both social

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166. Id.
167. Id. at para. 63.
168. Though Roy Johnston was raised in the Protestant Church of Ireland, he, Janice Williams-Johnston, and their daughter Nessa now belong to the Society of Friends, or Quakers. Id. at para. 15.
171. Id.
172. Id. at paras. 75-76.
173. Id. at para. 74.
and legal disabilities for children like Nessa, the Irish divorce ban undercuts the state's expressed goal of supporting family life. The court acknowledged that the ban harmed Nessa socially, and that Nessa's illegitimate status caused by the prohibition on her parent's right to marry stigmatized her. Legally, she faces substantial barriers to inheritance from her parents, benefits of social welfare programs, and tax treatment equal to that of other Irish citizens. Moreover, even though the potential harm to Nessa stems from her illegitimate status, a situation over which she had no control, current Irish law leaves her without a remedy.

Because of their unique vulnerabilities, children historically have been singled out to receive special protective treatment under the law. Psychologists, attorneys and international political legal bodies have acknowledged this by stressing that the "best interests of the child" must be "the paramount consideration" in any legal context affecting children. Where a child is involved in a legal dispute, her interests should generally come before the adult interests or possibly before larger societal goals because of her special needs. Moreover,

174. See supra notes 30-35 and accompanying text.
175. The United States Supreme Court has struck down statutes that discriminate based on illegitimacy. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1971):

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing.

Id. 176. Id.
177. Since Nessa's parents may not marry, it is impossible for her to be legitimated. Nessa's parents cannot adopt her since they are unmarried. Adoption Act, No. 25 (1952).

The European Court noted that there are no "means available to [Nessa] or her parents to eliminate or reduce the differences [between legitimate and illegitimate children]." Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) (1986), at para. 75.

178. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 3 (1979) [hereinafter Goldstein, Freud & Solnit]. This work focuses on the psychological interests of the child, particularly in custody contests. However, the authors' emphasis on the primacy of the child's interest in guiding decisions affecting children is useful in analyzing Johnston.

On an international level, the United Nations has been active in enacting instruments upholding the special position of children and urging their protection. See Declaration of the Rights of the Child, Res. 1386 (XIV), Nov. 20, 1959 [hereinafter U.N. Declaration of the Rights of the Child]. Principle 8 provides that "the child shall in all circumstances be among the first to receive protection and relief." Id.

180. Id.
182. Id. at principle 2.
183. See Trimble v. Gordon, 430 U.S. 762 (1977). The United States Supreme Court struck down an Illinois statute that discriminated against illegitimate children in rights of succession. The court found the state's purpose in encouraging family
by pursuing the best interests of the child, society will benefit in the long run. Experts stress that in caring for the child, "society stands to gain a person capable of becoming an adequate parent for children of the future."  

Allowing divorce and subsequent remarriage in Ireland would serve the best interests of the illegitimate child. Nessa would have benefitted from her parents marrying in three ways. First, she would no longer be illegitimate in the eyes of the law and so would have gained greater constitutional and statutory protection. Second, she would have avoided the social stigma of illegitimacy. Finally, she would have been free to develop the natural bonds of normal family life that the court concedes are vital to both an individual and society. By impeding the right to divorce and remarry, Ireland undermines the very familial ties it strives to protect.

The relief the European Court granted Nessa, requiring Ireland to equalize legal treatment of all children, is inadequate. It fails to eliminate the label and hence the social stigma of illegitimacy. It also fails to consider that in refusing to allow divorce and subsequent marriage, the court prevents illegitimate children from enjoying a normal family life. The court conceded that the Irish legal system treats illegitimate children unequally and victimizes unmarried parents. The court went on to hold that Irish law, which fails to respect family life, violates the article 8 rights of all three applicants. Nevertheless, the court failed to find that this violation would be best avoided by allowing divorce. Simply allowing divorce for irreparably broken marriage would permit subsequent marriages. These subsequent marriages are in the best interest of illegitimate and future children.
B. Interpreting or Amending the Convention to Allow Divorce and Protect the Non-Marital Family

1. Article 12 Implies a Right to Divorce and Remarry

The language of article 12 guarantees that "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Roy Johnston claimed that the Irish divorce ban interfered with his right to remarry. While the divorce ban did not directly address Janice Williams-Johnston, since she was not married, it indirectly prohibited her from marrying the person she considered her husband and who was the father of her child. In order for Williams-Johnston to freely exercise her right to marry, Johnston must be permitted to remarry.

In interpreting article 12, the court emphasized the omission of any express provision for divorce in the Convention, as noted in the travaux préparatoires of the Convention. This reliance on the travaux is misplaced. The travaux, which were not published until twenty-five years after the signing of the Convention, were to be considered as a collection of reports on the drafting process, not as a definitive interpretation of the Convention. While the travaux may be useful and informative in discerning the historical development of the Convention, they should not be the determinative basis for a straightjacket on judicial interpretation. The court overly relied upon the travaux in interpreting article 12. Significantly, neither the travaux nor the court gives any substantive reason why there should be no right to divorce and remarriage. In light of the substantive agreements favoring divorce, the court should be more open to alternative interpretations of the Convention.

In addition, the case law interpreting the Convention supports a broad interpretation of the right to marry. In Marckx v. Belgium, discussed above, the court applied the Convention "in light of current conditions," even though the new interpretation conflicted with the original intent of the Convention signatories. Marckx should govern Johnston because of their factual and legal similarities. Both cases deal with the right to found and enjoy a family, Marckx for mother and child, Johnston for a non-marital family. Indeed the court conceded in Johnston that

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190. Although the purpose of article 12 is unclear from the travaux préparatoires, supra note 153, arguably in modern Western European society the right to marry includes the freedom to choose one's spouse in order to build a more fruitful life.
193. See supra notes 130-37 and accompanying text.
194. Admittedly, there are distinctions between Marckx and Johnston. Marckx deals primarily with the statutory rights of illegitimate children. Johnston mainly addresses parents' rights to divorce and remarriage. Arguably, Marckx is properly limited to the question of the rights of illegitimate children. In Marckx, the court also had only to order Belgium to amend a statute, not its constitution. Presumably, the latter demands a greater mandate to amend it. Nevertheless, these distinctions do not prohibit applying the rationale of Marckx to Johnston. Reasoning by analogy is an
Marckx governed with regard to the finding for Nessa. While in both cases the court could have reasoned that the nontraditional family was not protected under the text of the Convention only in Johnston did the Court emphasize the intent of the drafters. Even if the drafters had not originally intended to protect divorce under the Convention, the Johnston court, relying on Marckx, should have found for the applicants. Instead, the court took a rigid approach unsupported by normative reasoning or compelling precedent.

2. Article 8
Both the court and the Commission narrowly interpreted the article 8 right to family privacy. The Johnston court concluded that article 8 applied to the Williams-Johnstons, despite their non-marital status. They had lived together for fifteen years, and the court concluded that they were a family "notwithstanding the fact that their relationship exists outside marriage." The court had already found that the right to respect for family life demanded that member states make the means for achieving judicial separation accessible to married couples. In Airey v. Ireland, the court found that in order to protect family life the state must sometimes allow a couple relief from the duty to live together. Moreover, it required Ireland to provide free legal services for obtaining a legal separation. In doing so, it broadened the meaning of respect for the family, as protected by the Convention. The Johnston court could have followed this evolving interpretation of article 8, finding a right to divorce. Instead, the court held that article 12 controlled by virtue of its more specific terms and hence denied relief.

There are several flaws in the Johnston court's approach to article 8. First, the court gave no strong reason for failing to follow the evolving interpretation in order to fulfill the Convention's promise to protect human rights. Faced with a sympathetic situation and a history of granting relief to applicants claiming disadvantage, the court should have accepted practice in law generally and within the European Court's decisions. The language of Marckx shows that the Court intended the case to hold significance beyond its narrow factual context. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) (1979), at para. 58. The distinction between statutes and constitutions also fails to limit Marckx's application. Nothing in Marckx suggests the Court was reluctant to order a member nation to amend its constitution. Moreover, in Johnston, the court explicitly found the Irish constitution violated Nessa Williams-Johnston's article 8 rights. Johnston, 112 Eur. Ct. H.R. (ser. A) (1986).
to provide support for its decision to deny relief to the Williams-Johnstons. Based on article 8, the court held that with respect to Nessa, Ireland violated the family rights of all three applicants. Yet the court made a forced distinction between the right to family life for children and the right of the parents to marry in order to improve family life for themselves and their children. The court gives no reason why this distinction is appropriate.

3. Freedom to Divorce Based on Article 9 Freedom of Religion

Though the Court brushed aside the applicants' religious freedom argument, it seems central to the case. The applicants in Johnston were members of the Society of Friends, or Quaker religion, which did not prohibit them from divorcing or remarrying. The issue of religious freedom is particularly important in this case since the Irish ban on divorce is rooted in strong sectarian influences in Irish law.

From its beginning as an independent state, the Republic of Ireland has been fueled by Catholic nationalism. The contemporary constitution which bars divorce was adopted in 1937, after attempts to unite the Protestant North and Catholic South had failed. The language of the constitution reflects its Catholic backing. Today the Catholic hierarchy continues to be involved heavily in Irish politics, recently influencing the defeat of the divorce referendum. Clearly the bar to divorce is largely a religious matter.

Popular support for a law banning divorce also fails to justify the court's decision. First, the overwhelming Catholic majority in Ireland—nearly 95% of the population—tends to limit religious diversity and tolerance. The practical difficulty for a religious minority to overcome the anti-divorce provision is nearly insurmountable. Second, it is normatively undesirable to justify the divorce ban on democratic principles since the ban simply furthers tyranny of the majority. As Judge de Meyer pointed out in his dissent in Johnston, a democratic society

fit this condition. At the time of the Court decision, Johnston and Williams-Johnston had lived together for fifteen years. Yet neither they nor their child were able to form the type of family—the marital family—protected by Irish law. They suffered legal disabilities and social stigma, yet the Court uncharacteristically found against them.

204. See supra notes 172-73, 187-88 and accompanying text.
206. See id. at para. 60.
207. See supra notes 20-25 and accompanying text.
208. See supra notes 9-14 and accompanying text.
209. See supra notes 15-20 and accompanying text.
210. See supra note 20 and accompanying text.
211. See supra notes 82-84 and accompanying text.
212. Even on religious terms, the Irish system is more rigid than the canon law of the Catholic church. See McRedmond, The Constitution of Ireland and the Declaration on Religious Freedom, 70/71 LAW & JUST. 71 (1981).
demands “pluralism, tolerance and broadmindedness.”\textsuperscript{213} The court itself supported this proposition in earlier cases.\textsuperscript{214} In \textit{Young, James and Webster v. U.K.},\textsuperscript{215} the court wrote that “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”\textsuperscript{216} Popular support for prohibiting divorce fails to answer the practical and normative concerns of the aggrieved religious minority and hence fails to justify what Judge de Meyer calls “so draconian a system.”\textsuperscript{217}

C. Ramifications of a Decision in Johnston’s Favor

Since the \textit{Johnston} court found no right to divorce despite the strong normative arguments and sufficient precedent to find such a right, it is reasonable to ask what other factors played a role in the court’s decision. Arguably, the court in \textit{Johnston} tacitly recognized its limited ability to order fundamental changes in Irish society.

\textit{Johnston} calls into question the effectiveness of the Convention on Human Rights and its enforcement bodies. While many nations have followed the court’s decisions, often enacting reform legislation or even constitutional amendments, Ireland has not honored court decisions to the same extent.\textsuperscript{218} The court ultimately has little power to enforce its decisions; its final recourse is expulsion from the Council of Europe.\textsuperscript{219} The court relies heavily on the voluntary compliance of member states. It is questionable, if not doubtful, that Ireland would have complied if the court found in favor of divorce.

Some issues may be too politically volatile for the court to decide. Certainly there is a point beyond which a member state will not accept the Court of Human Rights rulings. Perhaps the court feared it would pass this point by ordering divorce in a 95% Catholic country that had resoundingly defeated a recent divorce referendum.

It is difficult to predict how Ireland would have reacted if the \textit{Johnston} Court had found a right to divorce. On one side, Ireland would

\begin{itemize}
\item \textsuperscript{215} 4 ECHR 38.
\item \textsuperscript{218} See supra note 114 and accompanying text.
\item \textsuperscript{219} R. Beddard, \textit{HUMAN RIGHTS AND EUROPE} 46 (1980). Ireland has already shown reluctance to enforce decisions of the European Court of Human Rights. In \textit{E. v. E.}, a domestic Irish case, the plaintiff sought free legal services under the European Court’s \textit{Airey} decision. The Irish court refused and instructed the plaintiff to go back to Human Rights Court for relief. \textit{Supra} note 114.
\end{itemize}
have to consider the value of upholding international agreements and its place in the Council of Europe.\(^{220}\) On the other side, it would have to weigh the value of the predominantly Catholic "Irish way of life"\(^{221}\) that has fueled the national identity for sixty years. Several factors suggest that legalizing divorce would be politically difficult for any Irish government. The Prime Minister of Ireland in 1986, Garret FitzGerald, came into power backing a "constitutional crusade,"\(^{222}\) that sought to eliminate religious and political barriers to a united Ireland.\(^{223}\) The defeat of the divorce referendum is one example of the failure of his agenda.\(^{224}\) Popular support for unification at the expense of "Irishness" also appears slight at best.\(^{225}\) In spite of pleas for a united Ireland from Northern and Southern republican thinkers,\(^{226}\) the general population voted overwhelmingly against the divorce referendum.\(^{227}\) Considering the public's unwillingness to accept divorce despite the lure of national unity, it appears that the Irish public and government would have reacted strongly against a decision in favor of Johnston.

While the court was aware of the political situation in Ireland and may have been influenced by it, such considerations do not justify a finding against Johnston. The court should fulfill its role as arbiter of the case at hand, deciding on the merits without regard to political repercussions. The Convention's intent is to allow minorities and individuals to challenge widespread discriminatory beliefs or practices. If the court failed to find for Johnston because of political concerns, then its effectiveness and usefulness are severely circumscribed.

Conclusion

The European Court of Human Rights wrongly decided the divorce question in *Johnston v. Ireland*. It failed to account for the best interests of the child, Nessa, and to follow the evolving standard of the Court's own precedent. The court should have found that Ireland's constitutional bar to divorce violated the right to marry, respect for family life, and freedom of religion under the European Convention on Human Rights. The court should have required Ireland to allow Roy Johnston to divorce his wife and marry Janice Williams-Johnston. In the future, the court should reverse *Johnston* and recognize divorce as a human right.

\(^{220}\) See R. Beddard, *supra* note 219, at 46.

\(^{221}\) See generally Hogan, *supra* note 9, at 92-96.

\(^{222}\) McRedmond, *supra* note 212.

\(^{223}\) Id.

\(^{224}\) Id. In addition to poor economic conditions, the defeat of the divorce referendum was a major factor in the defeat of FitzGerald's government shortly thereafter.

\(^{225}\) Ireland has vigorously asserted its individuality among nations since gaining home rule. For information on flourishing Irish culture, see M. O'Brien, *supra* note 6, at 129.

\(^{226}\) See *supra* notes 85-87 and accompanying text.

\(^{227}\) See *supra* note 96.
The court settled on a compromise solution for the child and offered no relief to her parents. In doing so, it highlighted Ireland's refusal to change its Catholic-influenced law and called into question the effectiveness of the Convention's power of enforcement.

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