THE RECOGNITION OF FOREIGN DIVORCE DECREES: CREATIVITY AND ORTHODOXY

In England until 1971 the courts had a free hand in the formulation of the law relating to recognition of foreign divorce decrees. The history of the courts' activities in this field shows, for a long time, a reluctance towards a flexible and liberal approach. Judicial creativity was until recently stifled by the adherence to the domicile criterion, the supremacy of which was not seriously challenged until 1953. Yet orthodoxy dies hard: the decision in *Travers* v. *Holley* [1] did not bring in a new framework for the recognition of foreign divorces: for fourteen years it remained merely as an uneasy departure from the domicile criterion. It was not until the controversial House of Lords case of *Indyka* v. *Indyka*,[2] coming in an era of innovative activities by the Law Lords, that a new theoretical basis was sought to be built for the recognition of foreign divorces.

Indyka's case repudiated the orthodox approach of tight compartments of recognition, and propounded a broad basis of recognition which was intended to embrace decrees granted by foreign courts with which the parties affected had, at the time of the petition, a real and substantial connexion. And as a precaution against abuse, the courts were left with sufficient discretion to renounce foreign divorces on considerations of public policy.[3]

But before the English courts had finished groping their way about the structure and boundaries of this new recognition framework, the English Legislature swept it aside in favour of a different scheme of recognition, partially based on the 1968 Hague Convention on Private International Law.

The Singapore Legislature, however, has remained silent about foreign divorces. I propose to examine the Singapore law on the recognition of foreign divorce decrees in the light of the only relevant reported local case and to point out the choices available in the development of our law in this area.

1. [1953] P. 246.
2. [1969] 1 A.C. 33.
3. For detailed analyses of the case and its aftermath, see Cheshire and North, *Cheshire's Private International Law*, 8th Ed. (1970) pp. 360-368; Morris, *The Conflict of Laws*, (1971) pp. 140-145; Nygh, *Conflict of Laws in Australia*, 2nd Ed. (1971) pp. 489-498.

The Facts in Sivarajan v. Sivarajan[4]

Sivarajan married in Tellicherry, India, in 1966, under an Indian statute which prohibited polygamy. The same statute also gave an Indian court jurisdiction to dissolve marriages celebrated within its local limits. In January 1970 Sivarajan while domiciled in Singapore divorced his wife in the Indian court of the district where he celebrated his marriage. He was then in Tellicherry on a short visit, and apparently commenced proceedings when advised by relatives that he could obtain a divorce there. It also appears from the judgment of Winslow J. that under the Indian statute no ground need be established apart from the celebration of the marriage within the relevant locality.

Mrs. Sivarajan then sued her husband for maintenance under section 60(1) (c) of the Women's Charter. Sivarajan's defence was that because of the Indian divorce she was no longer his wife. The magistrate hearing the case decided that the Indian divorce was not entitled to recognition in Singapore, and ordered Sivarajan to pay his wife maintenance. Sivarajan appealed to the High Court, and the case came before Winslow J.

His Lordship upheld the magistrate's decision. This is hardly surprising, for as will be submitted later, even with the new basis for recognition propounded in *Indyka's* case, Sivarajan had nothing much to stand on. But his Lordship's reasons for the decision are significant, and it is submitted that the headnote to the case was misleading because it failed to indicate that the learned judge in fact based his decision on alternate grounds.

Before I examine Winslow J.'s judgment, I propose to review briefly the English law on the recognition of foreign divorce decrees, so that the significance of *Sivarajan's* case may be seen against this background.

The Orthodox English Position Before Indyka v. Indyka

Until 1953, the English courts recognized only divorce decrees granted or recognized by the courts of the parties' domicile at the time of the institution of proceedings.[5] The leading case of *Le Mesurier* v. *Le Mesurier*[6] was a Privy Council decision on appeal from Ceylon, but it proceeded on the premise that by universal consent among civilized nations there was in respect of every married couple only one jurisdiction competent to dissolve their marriage, namely, the jurisdiction of "the domicile for the time being of the married pair", and this premise was adopted by the House of Lords.[7]

4. [1972] 2 M.L.J. 231.

5. Cheshire and North, *Cheshire's Private International Law*, 8th Ed. (1970) pp. 354-360.

6. [1895] A.C. 517.

7. *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641. *Armitage* v. *Attorney-General* [1906] P. 135 decided that the same rationale justified the recognition of a foreign divorce decree which, though not granted by the court of the domicile, was recognised by it.

In *Travers* v. *Holley*[8] the English Court of Appeal made an inroad into this principle by holding: that a divorce decree granted by a foreign court (which is not the court of the parties' domicile) would be recognized if the foreign court assumed a jurisdiction which the English courts *mutatis mutandis* claimed for themselves. In that case, the deserted wife obtained a decree in the Supreme Court of New South Wales which assumed jurisdiction on the ground that immediately before the desertion the husband was domiciled in New South Wales. This case was later interpreted to stand for the proposition that a foreign divorce decree would be recognized if the circumstances were such that an English court in the shoes of the foreign court would have assumed jurisdiction.[9] No further inroads were made into the domicile criterion until 1967.

Indyka v. Indyka and the Departure From Orthodoxy

In the controversial decision of *Indyka* v. *Indyka*[10] the House of Lords expressed dissatisfaction with the orthodox position on the recognition of foreign divorces. The Law Lords agreed that the domicile principle should remain one of the criteria of recognition and all, with the exception of Lord Reid, were prepared to uphold *Travers* v. *Holley.* The decision could have stopped here, for the only other issue presented on the appeal was whether *Travers* v. *Holley* could be applied to a foreign decree granted at a time when there was no reciprocity in jurisdiction between English courts and the foreign court, although by the time the case was heard in England, the English courts had been given a reciprocal jurisdiction: whether, so to speak, the present jurisdiction of the English courts, though non-existent at the time the foreign decree was granted, could be relied on to invoke the principle of *Travers* v. *Holley.* The majority of the Law Lords answered the question in the affirmative.

But their Lordships went further than the immediate issues before them: they expressed the opinion that foreign divorces should also in appropriate circumstances be recognized on grounds unrelated to the English courts' own jurisdiction. Various indications were given of what these appropriate circumstances are, but later cases at first instance accepted that a foreign decree may be recognized on this ground if a "real and substantial connexion" existed between the petitioner or the respondent and the foreign jurisdiction which granted the decree.

The result of *Indyka* v. *Indyka* was a more liberal attitude on the part of English judges in granting recognition to foreign decrees. The lack of an agreed definition of "real and substantial connexion", both in the judgments of the Law Lords in *Indyka's* case and in subsequent decisions at first instance, provided adequate latitude for judicial

8. [1953] P. 246.

9. *Robinson-Scott* v. *Robinson-Scott* [1958] P. 71. The statutory extensions to the English Courts' jurisdiction are, until recently, similar to section 126 of the Women's Charter.

10. [1969] 1 A.C. 33.

creativity. Residence for less than three years,[11] a short period of residence coupled with nationality[12] and past domicile coupled with the location of the matrimonial home[13] have all been regarded as sufficiently "real and substantial" connexions. Recognition has also been given when the divorce would be recognised by the country with which the petitioning wife had a real and substantial connexion, though she had no such connexion with the country where the divorce was granted.[14] At the same time, the Registrar-General of Marriage in England and Wales found himself with an immensely increased number of cases where he has had to decide whether or not to celebrate a marriage after a foreign divorce.[15]

The vague and flexible criterion that the House of Lords propounded in *Indyka* undoubtedly prevented a great number of limping marriages. But the resulting uncertainty in the law would seem incongruous for an area where the marital status of people is at stake. It is not surprising, therefore, that many lawyers view *Indyka's* case as an abdication of responsibility by a well-meaning House of Lords. The confusion created by that case did not last long: in England today, the real and substantial connexion test has been exorcised by the Recognition of Divorces And Legal Separations Act 1971 which will be discussed later.

Winslow J.'s judgment in Sivarajan's Case

The learned judge referred to the magistrate's finding that the appellant (Sivarajan) was domiciled in Singapore when the divorce was granted by the Indian court, and observed that "by virtue of the provisions of section 80 of the Women's Charter, jurisdiction with regard to the dissolution of a marriage such as this ... rests with the High Court of Singapore".[16] This statement, accurate though it undoubtedly was, seems rather out of place in the case which, after all, was not concerned with whether the Singapore court had jurisdiction to dissolve the marriage. But the significance of the observation became apparent as, after recounting the basis on which the Indian court assumed jurisdiction to grant the divorce, Winslow J. held as follows:

> "It is quite clear that if the appellant had merely been a resident here who had obtained a divorce in India on the basis of his being domiciled there, the courts in Singapore would recognise such a divorce. That, however, is not the position in this case. [The Indian Court] did not purport to exercise jurisdiction on the ground of his being domiciled there. The Court clothed itself with jurisdiction because the place where the marriage was celebrated lay within its jurisdiction. It is a fact found by the magistrate that the appellant at the time he obtained his divorce in India was in fact domiciled in Singapore. The court in Singapore therefore cannot recognize such a divorce".[17]

11. *Welsby* v. *Welsby* [1970] 1 W.L.R. 877; *Alexander* v. *Alexander* (1969) 113 S.J. 344.
12. *Angelo* v. *Angelo* [1967] 3 All E.R. 314; *Brown* v. *Brown* [1968] P. 518; *Tijanic* v. *Tijanic* [1968] P. 181.
13. *Blair* v. *Blair* [1968] 3 All E.R. 639.
14. *Mather* v. *Mahoney* [1968] 1 W.L.R. 1773; *Messina* v. *Smith* [1971] 2 W.L.R. 225.
15. Morris, *The Conflict of Laws*, (1971) p. 143.
16. [1972] 2 M.L.J. 231.
17. [1972] 2 M.L.J. 231, 232.

Three comments may be made on this portion of his Lordship's judgment. First, it is respectfully submitted that in the Conflict of Laws, the question of recognition of foreign divorces does not depend on the ground of jurisdiction relied on by the foreign court. The competence of the foreign court depends rather on certain factual connexions between the parties and that court — and the court of the forum, the Singapore Court, alone decides whether the relevant connexion exists.[18] Second, as a corollary to the first, if the Singapore Court decides that the relevant factual connexion exists, then the foreign divorce will be recognized. It is irrelevant that the foreign court's ground of jurisdiction was something different. Indeed, it is irrelevant that the foreign court has not even been aware of the factual connexion considered relevant by the Singapore Court. Thus a decree of divorce granted by the court of the country where in the opinion of the Singapore Court the parties were at that time domiciled will be recognised in Singapore, even though the foreign court's ground of jurisdiction was the parties' nationality — even though the foreign court may not have heard of the concept of domicile.

Third, read with his Lordship's earlier statement, Winslow J. seemed to be implying here that the legislature in making domicile the primary test of the Singapore Court's jurisdiction has at the same time decreed that divorces granted by courts other than the courts of the parties' domicile are not to be recognised in Singapore. That this was his Lordship's intention becomes clear when, in a later portion of his judgment, he based his reluctance to follow *Indyka's* case on the ground that "in England no statutory provision exists such as that contained in section 80 of the Women's Charter making domicile the test for jurisdiction in divorce, the domicile test in England being only judge-made law".[19] It is the accepted view in England that when the legislature extended the court's jurisdiction beyond the domicile test, it was not legislating on the question of recognition of foreign divorces. The decision in *Travers* v. *Holley* was an explicit policy holding on the part of the courts. The provisions of the Women's Charter defining the Singapore Courts' divorce jurisdiction — sections 80 and 126 — closely follow English law, both judge-made and legislative, with no reference whatsoever to the question of recognition. If the English Courts until the commencement of the English Recognition of Divorces and Legal Separations Act 1971 could still regard themselves as the sole arbiters on the question of recognition, it is respectfully submitted that Winslow J. was adopting an unnecessarily restrictive approach to section 80 of the Women's Charter, an approach which would effectively tie our recognition rules to the *Le Mesurier*[20] and the *Travers* v. *Holley*[21] situations which the English judges tried so hard to undo in recent years.

Winslow J.'s View on Indyka's Case

Counsel for the appellant tried to invoke *Indyka's* case, as the learned judge put it, "to the effect that an English Court would recog-

18. Morris, *The Conflict of Laws* (1971) pp. 135-6.

19. [1972] 2 M.L.J. 231, 232.

20. [1895] A.C. 517.

21. [1953] p. 246.

nize a divorce granted on the basis of nationality by the court of a foreign country with which the petitioner could be said to have a real and substantial connexion".[22] As pointed out earlier, the learned judge seemed inclined to hold that *Indyka's* case cannot be imported into Singapore because of section 80 of the Women's Charter, and hence he was prepared to equate the legislature's directives on the Singapore Court's jurisdiction with the tests for recognition of foreign decrees. But I submit that his Lordship did not absolutely reject *Indyka*, since he went on to hold that even if *Indyka's* case were to apply, the appellant had failed to make out any real and substantial connexion with the foreign jurisdiction. All that he could show was the celebration of his marriage there and this, Winslow J. held, was insufficient to satisfy the *Indyka* test. His Lordship's decision on this point is supported by at least one English case.[23]

It is clear that *Sivarajan's* case has not laid down in certain terms the Singapore law on the subject of recognition of foreign divorces.

The Present State of Singapore Law on Recognition: A Policy Choice

Sivarajan's ease is the only reported local decision in which the question of recognition of foreign divorce decrees was considered. Although portions of the judgment suggest that the jurisdiction provisions in the Women's Charter also decide the circumstances under which foreign divorces will be recognised, the suggestion is compelling neither as a matter of logic nor by the express wording of the statute. Moreover, the learned judge's willingness to consider the case on the assumption that *Indyka* v. *Indyka* applied raises the hope that the subsequent development of Singapore law will not be stultified by automatic references to the statutory provisions on the jurisdiction of our courts. I respectfully submit that notwithstanding the observations of Winslow J. in *Sivarajan's* case, the question of what foreign divorces Singapore should recognise admits of an answer only from the judiciary. Our judges will have to decide on broad grounds of policy the theoretical framework within which rules of recognition may be worked out.

What, then, are the policy choices open to a Singapore Court ? English law, as always, provides a convenient point of departure. The common law of England, as has been shown, began with a rigid criterion which was relaxed to include the idea of reciprocity as defined in *Travers* v. *Holley.* Then came the extremely flexible criterion of *Indyka's* case. But flexibility brings uncertainty — and the English Parliament in 1971 put an end to the flexible approach by re-imposing compartments of recognition which, however, attempted to overcome the defects of the pre-*Indyka* common law by ensuring that the technicality of the domicile concept does not prevent genuine and reasonable foreign divorces from being recognised.

The domicile concept was the downfall of the English common law rules of recognition, for it does not coincide with the man-on-the-

22. [1972] 2 M.L.J. 231, 232.

23. *Peters* v. *Peters* [1969] P. 275.

street's understanding of a home. The doctrine of the domicile of origin together with the incapacity of minors to acquire their own domiciles, have sometimes resulted in the holding that a man is domiciled in a country which he has never seen. This absurd result is often reinforced by the doctrine of revival of the domicile of origin. And of course, a married woman shares with infants and lunatics the disability as regards acquisition of a domicile, for even after she has been deserted by her husband, she is still forced to share his domicile.[24] The relief afforded her by *Travers* v. *Holley* is incomplete in that married women will still have to chase their opportunity for divorce by tracing their husbands' domicile unless they were deserted or if they could wait in one country for three years before instituting proceedings.

The Recognition of Divorces And Legal Separations Act 1971 preserves both the domicile criterion and its extension in *Armitage* v. *Attorney-General.*[25] In addition, domicile is defined, in relation to a country the law of which uses the concept of domicile as a ground of jurisdiction, as including domicile within the meaning of that law.[26] Thus a foreign state which rejects the doctrine of revival of the domicile of origin and assumes jurisdiction on the ground that a previous domicile there continues despite abandonment until a new domicile has been acquired will be able to grant a divorce recognised by English courts. Moreover, a foreign divorce is recognised if either spouse was habitually resident in the country granting the decree, or if either spouse was a national of that country.[27]

The Act also abolished partially the common law rule that a finding of jurisdiction by a foreign court does not bind an English court. Section 5(1) provides that any finding of fact made (whether expressly or by implication) 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 shall be conclusive evidence of the fact found if both spouses took part in the proceedings, and in any other case, be sufficient proof of that fact unless the contrary is shown. Section 7 in providing that where a foreign divorce is entitled to recognition under the Act, neither spouse shall be precluded from re-marrying in Great Britain on the ground that the validity of the divorce would not be recognised in any other country, clearly overrules the decision in *R.* v. *Brentwood Marriage Registrar*[28] in which a man who has obtained a divorce decree recognized by English law was held by English courts to be incapable of re-marrying because the law of his domicile regarded him as still being married. Finally, section 8 of the Act lays down the grounds on which an otherwise valid foreign divorce may be refused recognition. These relate to the failure to give notice in the original proceedings, to the denial of the opportunity to take part in those proceedings and to public policy.

24. *Lord Advocate* v. *Jaffrey* [1921] 1 A.C. 146.

25. [1906] P. 135. See section 6(a) of the Act.

26. Section 3(2).

27. Section 3(1).

28. [1968] 2 Q.B. 956.

It is submitted that the English Act is a vast improvement over both the pre-*Indyka* and the post-*Indyka* common law. The ideal situation for Singapore would be for our Parliament to legislate along similar lines. In the absence of legislation, however, it may still be possible for our courts to incorporate the English Act into our law. I refer to section 79 of the Women's Charter[29] which provides that subject to the provisions contained in Part IX of the Charter, "the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice acts and gives relief in matrimonial proceedings."

In *Martin* v. *Umi Kelsom*,[30] Thomson C.J. expressly relied on the Malayan equivalent of this section to import the English rules of Conflict of Laws as to the essential validity of marriages. The learned judge there remarked that "a question of the conflict of laws which arises in relation to a matter regarding which the Court's jurisdiction comes from the Divorce Ordinance is to be determined on the same principles as those on which such a question would be determined by the English Courts".[31]

There is a sense according to which "principles" acted on by a Court of law may encompass both common law and legislation.[32] Can it be argued, then, that the rules contained in the Recognition of Foreign Divorces and Legal Separations Act, being "principles" on which the English High Court acts and gives relief in matrimonial proceedings, must *ipso facto* be followed by the Singapore High Court, as there is no provision to the contrary in Part IX of the Charter ? If this argument is sound, one can go further to contend that the reforms of the concept of domicile effected by the Domicile and Matrimonial Proceedings Act 1973 of England are now part of Singapore law.

I would submit, however, that section 79 should not be so interpreted. As questions of family law do not fall under section 5 of the Civil Law Act, English statutes on family law are not, apart from section 79, imported into Singapore. And section 79 is limited to proceedings under Part IX of the Women's Charter, *i.e.*, divorce, nullity, judicial separation and restitution of conjugal rights. The above interpretation would mean that the Singapore courts would apply the English family law statutes in matrimonial proceedings, but not in, for example, proceedings relating to intestate succession. An illustration will suffice to bring out the absurdity of the situation. X, a man domiciled in

29. Singapore Statutes, Revised Edition, 1970, Cap. 47.

30. (1963) M.L.J. 1.

31. *Ibid*., The actual decision of Thomson C.J., however, has been criticized. See Rowena Daw, "Some Problems of Conflict of Laws in West Malaysia and Singapore Family Law" (1972) 14 Mal. L.R. 179 at p. 192, and Jackson in (1963) 5 Mal. L.R. pp. 388-392.

32. Thus two of the meanings given to "principle" by the Concise Oxford Dictionary are "Fundamental source" and "Fundamental truth as basis of reasoning".

Hong Kong marries Y, a woman domiciled in Singapore. After the marriage X changes his domicile to Singapore, but Y moves to Hong Kong intending to settle there permanently. If we accept that in proceedings under Part IX of the Charter, section 79 imports the recent English statutory reforms, the Singapore High Court cannot entertain a divorce petition by X, since Y is, by the application of the Domicile and Matrimonial Proceedings Act 1973, domiciled in Hong Kong, and section 80(1)(c) of the Charter, which requires the domicile of *both* parties to be in Singapore, is therefore not satisfied. Assume, however, that Y dies intestate. Our Intestate Succession Act has no equivalent to section 79. Therefore our courts will distribute her movables on the basis that she was at the time of death domiciled in Singapore.

In the light of these considerations, section 79 should be interpreted to import only those English principles which are equally applicable in questions other than those arising under Part IX of the Charter. If this submission is correct, then the policy choices open to our courts in the area of recognition of foreign divorces are limited to the following three:

(1) The acceptance of Indyka v. Indyka;

(2) The rejection of Indyka v. Indyka and the acceptance of Le Mesurier v. Le Mesurier, Armitage v. Attorney-General and Travers v. Holley;

(3) The rejection in toto of the English cases, and the acceptance of Winslow J.'s dicta in Sivarajan's case to the effect that only foreign courts having jurisdiction according to the criteria of jurisdiction laid down by the Women's Charter for our own courts may claim recognition of their divorce decrees.

Of the three choices, (2) and (3) differ only in their respective rationales. (2) assumes that the question of recognition is within judicial policy, whereas (3) implies that the legislature by regulating our own courts' jurisdiction is at the same time pronouncing on the competence of foreign courts.[33] Both these approaches may be branded orthodox by comparison to the creativity required by (1).

Conclusion

The recognition of foreign divorces is an open question in Singapore. But in the last analysis our judges hold the key to the aswer which may be orthodox or creative according to the dictates of the judicial conscience. Moreover, section 79 may be so interpreted as to import automatically a whole lot of English family law statutes, thus equating section 79 to section 5 of the Civil Law Act, in their respective areas. This present state of uncertainty is surely undesirable, as the question of marital status is one that demands a reasonable degree of predictability.

33. Of course, if Winslow J.'s dicta is strictly interpreted, then *Armitage* v. *Attorney-General* has no application in Singapore, because it would recognize decrees not granted by the courts of the domicile and which do not necessarily satisfy section 126 *mutatis mutandis.* But one may assume that his Lordship would not have objected to recognizing decrees recognized by the courts of the domicile.

I would submit that in such a situation the judicial function cannot be entrusted with the policy decision: the court with its adversary set-up, its limitation of time and its rules on admissibility of evidence cannot consider adequately in the light of public opinion and expert advice from non-lawyers the repercussions of each policy alternative.[34] The legislature alone has the machinery, the resources and the time to decide on the best solution.

KENNETH K.S. WEE *

34. Cf. my arguments in "English Law and Chinese Family Custom in Singapore: The Problem of Fairness in Adjudication" (1974) 16 Mal. L.R. 75 at pp. 99-103. See also per Earnshaw J. in *Ngai Lau Shia* v. *Low Chee Neo* (1921) 14 S.S.L.R. 35, 54.

* LL.B. (Sydney) LL.M. (Yale), Barrister, Supreme Court of New South Wales, Lecturer in Law, University of Singapore.