A STUDY OF THE GROUNDS FOR DIVORCE UNDER THE FRENCH DIVORCE REFORM LAW OF 11 JULY 1975

by

JOY ANN MORAIS

Paper submitted for LL.M, FAMILY LAW
at VICTORIA UNIVERSITY OF WELLINGTON,
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Introduction:

This paper involves a study of the grounds for divorce introduced by the divorce reform law of 11 July 1975[1].

It does not propose either to give a legislative history nor place the new law within an historical perspective. This has been adequately executed by Mary Ann Glendon[2] and Dominik Lasok[3].

The primary purpose of this paper is to undertake a study of the French case law on the grounds for divorce and to make this accessible to the non-French speaking person. Its principal use will be for the person with a knowledge of family law, who can then compare and evaluate his divorce law system with the one presented. It does not propose to undertake a comparative study of the New Zealand/French divorce grounds as this would be beyond the scope of the paper. Research in the area studied was needed because there does not appear to exist to date[4] a systematic and overall study to see the new system at work.

The law of 11 July 1975 came into effect on 1 January 1976. This study has looked at all the available reported cases[5].

It is submitted that it is essential to be familiar with the organization of the French Court system as far as family law is concerned. This is because the cases have to be placed within a certain framework. This and certain basic elements are outlined in Annex I.

As Glendon has translated[6] all the relevent Articles of the Code Civil, it is proposed to adopt her translation as the standard translation. A few changes or alternative expressions may be submitted if it is felt that by doing so a concept might be better explained.

The paper shall be divided into three sections corresponding to the three grounds for divorce provided for by the law:-

(1) Divorce by Mutual Consent

(2) Divorce on grounds of fault

and (3) Divorce for Disruption of the life in common.

I. DIVORCE BY MUTUAL CONSENT

Under the Code divorce by mutual consent takes two forms:

(a) Divorce by joint petition of the spouses. Articles 230 to 232 govern this version of divorce by mutual consent.

and (b) Divorce petitioned by one spouse and accepted by the other. Articles 232 to 236 apply here.

Glendon[7] termed divorce by mutual consent the 'piece de resistance' of the new French divorce laws. However, this study has revealed that few cases were reported using this ground for divorce and very little attention was paid to it by French academics.

It was puzzling to figure out, why this ground,

one of the fundamental innovatious of the reform law, had so quickly faded into obscurity.. The reason, that Massip(8) gave and the writer wishes to adopt, having come to the same conclusion, lies in the 'essence' of the grounds. Divorce by Mutual Consent belongs to the domain of non-contentious proceedings. Unlike divorce on grounds of fault or even to an extent divorce for breakdown of life in common which involve contentious proceedings, divorce by Mutual Consent relates to what in French is termed 'la procédure gracieuse'. In other words the parties are not involved in contested litigation; the proceedings being based on that consent. Thus, there is really nothing to report about such cases - since the parties are necessarily in agreement about the divorce and its consequences; typically all the judge has to do is grant the divorce.

A. Divorce by joint application of the Spouses (Articles 230 to 232)(a)

Glendon has observed that the Articles provided for four successive Court appearances, a three-month waiting period (Art.231) before the petition could be reviewed and the judge's option under Art.251 to attempt a conciliation between the parties. She went on to note that the judge had even if the above conditions were satisfied the discretion (under Art.232) to dismiss the petition if he felt the best interests of the children and one of the spouses were not adequately protected.

She contended that "that this will not be a speedy

form of divorce is apparent not only from the delays provided for in the text, but from commentary of those familiar with the everyday affairs of the divorce courts"[10]. It is submitted that perhaps Glendon, apart from her observations was unduly influenced by Raymond Lindon's[11] pessimistic views on the section. Lindon prophesied that procedure was not going to speed things up.

It is submitted that this view, in the light of this survey proves the contrary true - that divorce on the grounds of mutual consent can be an efficient and rapid process.

Two cases will be considered to substantiate this submission:

(1) J.A.M. du Tribunal de Paris, 12 Feb.1976[12]

(2) Tribunal de Grande instance de Paris 16 July 1976[13].

The first decision of the Tribunal of Paris was seized by Lindon as evidence that his prophecy was true.

The facts of the first case were as follows: The final agreement was not accepted by the judge because it did not state all the assets of the husband. Therefore, without full knowledge of the husband's assets, adequate provision could not be made for the wife and children. During the course of the proceedings the judge was made aware of the husband's assets that he had not stated. Further, the existence of a child by a previous marriage of the husband was also revealed during the proceedings.

The judge, then needed to know what provisions were being made for that child.

The judge, therefore,refused to accept the agreement until the husband furnished him with more elaborate details of his finances and evidence that provision for the wife and children was accordingly made.

Lindon[14] submitted that this case was illustrative of his pessimistic views. He felt that inspite of the fact that the parties in the past used to resort to such activities as the farce of writing false letters of insult,they managed to get their divorce with less delay. He went on to say that this form of divorce could only be rapid when it was being used by the poor. Towards the end of his commentary he stated that the slow proceedings even at the level of the hearing(he estimated it would take the judge at least three hours to hear the case) makes one look back for the 'good old times'.

This writer, respectfully has to disagree with Lindon. In a recent article by Massip[15] who conducted a survey on the reception of the Courts of this ground for divorce, it was established that the average duration of these proceedings was from six to eight months. However, and this it is submitted is important to note, a divorce on this ground could be obtained within four to five months, after the lodging of the initial petition. He also notes that to get a divorce within four to five months of the initial petition was not a rare occurence. Massip says that

proceedings can take longer if the parties use the full time limits given by the articles. The other situation where proceedings may take a long time is when a complex property problem that is not adequately settled by the agreement is placed before the Courts. However, this problem usually arises when the initial request has been deposited without consulting a notary to value and certify the value of the estate. If this step is taken by people with property before applying for the divorce much time will be saved(16). Thus a well documented agreement deposited with the initial request can lead to the proceedings moving smoothly.

It should also be noted that all the judges that Massip interviewed advocated divorce by mutual consent stating that it was by far faster than divorce that was brought under contentious proceedings. Another 'time saver' was that on the granting of a divorce by mutual consent, the divorce took effect from the day it was granted. There is no waiting period. In contentious cases the couple have to wait to get certificates from the civil registrars stating that they are divorced(17).

The second case, illustrates that a divorce by mutual agreement can be a rapid process.

In this case(18) the judge accepted the initial request for divorce on the joint petition of the parties. The parties presented, annexed to their draft agreement the final agreement. The judge approved of the draft agreement but indicated that the final agreement had to make provision for how the Court's costs were to be met.

Therefore, it is submitted that the judge has already accelerated the divorce process by stipulating before the cases comes up for hearing again, after the compulsory three months' period of reflection, what has to be done to the final agreement. This means that in effect in the event of no complications arising, the Court can grant the divorce on renewal of the petition. The whole process can easily be settled within four months. It is submitted it proves both Lindon and Glendon wrong on this point: they contended the whole process would be a long one.

The case does not state whether the parties were rich or poor. Massip's findings tend to show that young couples, with not many possessions tend to favour this form of divorce[19]. Lindon [20] in his commentary stated that proceedings would be longer if the parties were rich. It is submitted this will not be the case if all the assets are clearly assessed and declared in the agreement. It should be remembered that these are non-contentious proceedings. If parties, want to squabble over their amassed fortunes they should seek their divorce on another ground. On the other hand an honest appraisal of the financial situation of the parties in the agreement so that the interests of the spouses and children are protected, will clearly not be rejected by the judge.

Another criticism that has been raised against the Section is that the judge possesses so much discretion that "through successive denials of approval, the judge can in effect force the parties to adopt an agreement of which he is indirectly the author"(21).

The early decision of a J.A.M. on 12 February 1976 was used by Marcel Brazier(22) to support this contention that the judge might possess too much discretion and indirectly dictate the parties agreement. He noted with astonishment that "in the light of an agreement entered into by the spouses based on their mutual consent, a contract that has been freely approved bf by adults, the judge has interfered by demanding"(23) so many things.

It is submitted, that in this particular case the judge was right in refusing to approve the agreement and asking for all those details. The facts of the case revealed that the judge was only made aware of certain assets of the husband, a wealthy man with property in Brazil and of his child of a previous marriage during the proceedings. These facts having surfaced, it is submitted that the judge, had no option but to ask for another agreement to be drawn up. The The judge's function here, it is submitted is partly that of

a 'watchdog' of the parties' interests. In this manner, recourse to this provision by one spouse getting the other's consent, and then 'cheating' him of his share of the property will be prevented.

Lindon[24] remarked that Brazier reasoned like a lawyer, whereas as a judge himself, he could appreciate the judge's decision.

Lindon in a commentary of the second case of 16 July, 1976 uses this case to refute the contention that the discretionary power of the judge was being used in a more 'dictatorial' role. He said that in the previous case (T.G. B. Ord.12 Feb.1976) he tried to show how the judge was there to protect the 'moral and material' interests of the children and to make sure that neither party was being deprived of his share. The present case, he stated, went to show that the judge will accept the agreement if all the matters are in order.

It is submitted that Lindon's view of the discretionary power of the judge is correct and by illustrating his stand by these two early decisions he places the discretionary power of the judge in its proper perspective.

"Procédure Passerelle"[25]

Under article 246 when a divorce has been petitioned

under articles 233 to 245, the parties can, so long as no decision has been pronounced ask for the grounds of their divorce to be changed to that of a divorce by mutual consent. By this mechanism, the parties, who might have based their original petitions for divorce on the grounds of fault or breakdown of life in common can convert their original grounds for divorce into a divorce by mutual consent. It should be noted that art. 233 relates to the second variation of divorce by mutual consent. Thus, even this ground(divorce demanded by one spouse and accepted by the other) can be transformed into divorce by the joint agreement of the parties.

The case of the Tribunal de grande instance Belfore[26] showed this procedure in practice.

Massip[27] in his commentary of article 246 found on the information he had gathered from interviewing magistrates that around 10% of divorces by mutual consent were originally petitions for divorce on fault grounds. The reasons given for this switch from contentious proceedings to a 'divorce gracieux'are that:9(1) sometimes the parties themselves or their lawyers come to an agreement to do so during the proceedings

or (2) More frequently it is the magistrate, who, during his duty to attempt a conciliation between the spouses on getting to agree on the various effects of the granting of a divorce, will instigate them to change their ground for divorce (to that of mutual consent)[28]

It must be mentioned that although the parties might have come to their agreement during the conciliation attempt they still have to submit their mutual request to the matrimonial affairs judge[29] and go through the procedure as set down by articles 231 and 232.

What Massip's survey proves therefore is that there is a significant number of cases which are being converted from the old fault grounds to the new mutual consent grounds.

Lindon[30] in his case criticism of the decision of 12 February 1976 predicted that because of the drawbacks of the mutual consent system, namely, the fact that it was a long process, (according to him) it was going to provoke many applicants for divorce to revert to the "good old system"[31]

It is submitted, that in the light of current practice this view is no longer tenable. In fact as Massip's findings show quite the opposite is happening. It is submitted

that the early predictions and fears, of the use of this ground for divorce should no longer be maintained as current practice has proved them false. It is proposed to look at a new problem that has surfaced with the use of the section.

In an article by Raymond Lindon and Philip Bertin[32] the authors state that divorce by mutual consent presents two characteristics:

(1) a judicial decision

and (2) an agreement(convention) to which the judge grants his approval(homologation).

They state therefore that divorce by mutual consent is of a hybrid nature. Following this line of reasoning the consequences of this hybrid nature are that:

(1) the judicial decision cannot be nullified

but (2) the judge's approval of the agreement can be attached on the grounds peculiar to the French Code Civil art.1109[33]

More particularly the financial consequences that flow from one of these factors that vitiate consent is of importance here.[34]

The questions the writers ask are:-

(1) What will happen if one of the parties declares that his consent was wrongly obtained?

(2) Can he ask for a declaration stating that:

(a) the entire decision(the decision granting the divorce and the approval of the agreement) be declared null and void

or (b) can he only ask for the setting aside of the agreement, even though this agreement could determine the intention of one or both the spouses?

Three cases have to be considered here.(35)

In the first case from Mans decided in 1979, the divorce had already been pronounced by the judge. The wife was asking for an annulment of the divorce because she alleged, she was the victim of a lésion(lésion de plus d'un quart)(36). What happened here, was that the husband was given ownership of a building and the wife was paid a sum of money for this. The husband contended that as the agreement had judicial approval it formed part of the Court's decision. This decision, had the authority of a judicial decision (autorité de la chose jugée) and could not be nullified.

The Tribunal held that the decision to grant the divorce could not be reviewed. However the wife was entitled

to bring an action to claim damages for the alleged pecuniary gain her husband made by obtaining her consent by unlawful means.

The other two decisions both concern cases where the wife withdrew her consent after the judge had registered it.(37) Inspite of the fact that the consent of the wife had been registered, the divorce was refused. Therefore, the re-examining of one of the conditions of the divorce resulted in a re-examining of the divorce itself.

It is submitted that the first case and the last two cases deal with completely different situations. Whereas the question of consent is fundamental to the obtaining of a divorce on the grounds of mutual consent, a modification in the agreement need not necessarily provoke the review of the divorce itself.(38) This is the position the authors seem to take. They conclude by stating that the legislator wanted to remove all the farcical elements that existed under the previous grounds for divorce but the possibility of being able to revoke one's consent risks reintroducing elements of 'comedy' and 'cheating' even under this form of divorce.

It is submitted thatthis is not a valid criticism. Under the previous law, when the spouses resorted to the

elements of 'comedy' and 'cheating' they were doing so, so as to be able to come within the fault ground of divorce. In fact in those cases it was the parties who were in agreement for getting the divorce that went through this farcical process(so as to be able to get divorced). The problem we are dealing with is totally different. We are dealing with a situation where a party has changed its mind about getting the divorce. When this happens and more so if there is good reason for it (for example if the consent was obtained by false pretences) the party should be allowed recourse to the Courts. There is nothing comical about this.(39)

Finally, it is proposed to list some figures, figures showing the frequency that divorce by mutual consent is used. It is submitted that one cannot really come to any conclusive deductions from these figures;for example,Lindon and Bertin give no figures for 1978. Massip in his article published in 1979 quotes a figure of 26% of divorces by mutual consent for the whole national territory. However, he does not give the year to which this percentage applies. All we know is that he got the statistics from the Ministry of Justice(Lettre de la Chancellerie du 1ermai 1978)

Year	% of Divorce using 'mutual consent' grounds in relation to total number of divorces at national level.
1976	25%
1977	34%
for year ending 1st June 1979	38%

*(40)

From Massip's figures, it is clear that Paris and the areas surrounding Paris account for the highest percentage of divorces by mutual consent.

Paris - 51%

Parisian agglomeration - 34%

Massip suggests the reason why this form of divorce is used more in the Parisian region is perhaps of the role played by lawyers. Lawyers seem to have an important role guiding their clients in their choice of grounds for divorce. In the provinces the lawyers tend to favour the traditional approach. They, therefore, still advise their clients to petition for divorce on fault grounds. Whereas,in Paris, the two lawyers Massip interviewed said that they tried to get their clients to petition for divorce by mutual consent.

Over 60% of their files on divorce used this form of divorce.

He went on to note that it was couples who were married for not very long that were most willing to resort to this form of divorce. It holds true that these couples in terms of 'material wealth' possess relatively less than those couples with a long established marriage. It was also noticed that couples with a very small family or no children at all used this form of divorce.(41)

According to the judges of the matrimonial Courts Massip interviewed, the younger couples feel a repugnance in going into their intimate marital problems before a judge. They are also 'seduced' by a judicial process that appears to them to be more domern and 'responsible'.

B. Articles 233 - 235

The second ground for divorce by mutual consent is "divorce applied for by one spouse and accepted by the other".(42)

The important thing to note about this ground for divorce is that the spouse that accepts the divorce sought by the other has to accept the divorce for the reasons that the petitioner has stated and no other. The divorce will not be granted if the parties, for example, both want to get divorced by disagreeing on the reasons submitted to the Court.(43)

This ground for divorce has not excited any academic commentary. In fact, as far as grounds for divorce are concerned, it seems only one case has been reported since 1976 to date. Therefore, it is impossible to arrive at any conclusions about this ground for divorce.

The case was among the first reported decisions of the T.G.I of Paris(44).

In this case the husband,who was petitioning for the divorce, was unable to communicate his application for divorce to his wife. He had sent his application for divorce to her by registered post. She received the letter but returned it unopened to the petitioner.

Under the décret that supplements this ground, the petitioner has to have his grounds for divorce communicated to the other party within a month. Article 61(45) of the décret allows the non-petitioning party to either accept or refuse the petition. This spouse can tacitly reject the petition by not replying during the month when the registered letter is received. The whole process will fail if there is no reply after a month has lapsed.

In the case before the Tribunal the period of one month allowed by art.61 had not yet lapsed. Therefore

the proceedings were in a state where they could be neither carried on further nor declared lapsed.(caduque). The Tribunal declared the proceedings to have no legal consequences.

It is interesting to note that the judge made an order under the Code of Civil Procedure for the appointment of a Court official(huissier) to deliver the petition into the hands of the wife. This point is interesting because the use of a huissier was not designed for divorce cases.(46)

However, it must be noted that even the appointment of such an officer will have no effect on these proceedings unless he is able to deliver the petition to the petitioner's hand.

The only alternative, for the petitioner, it is submitted, is to use an alternative ground for divorce.

II. DIVORCE FOR FAULT

Divorce on grounds of fault is covered by articles 242-245.(47)

The important point to note is that under the law of 1884 adultery was a 'peremptory' ground of divorce. This meant that a spouse was automatically entitled to a divorce if the adultery of the other spouse was established.

Under the new law adultery is no longer a separate ground for divorce.(48)

It is submitted, that as this is the principal innovation of the law as far as fault grounds go, and because the law in this area is well established, it has not excited academic study.

There are three cases which illustrate the use of this ground for divorce.(49)

The facts of the first case were as follows: Both parties petitioned for divorce on the ground of fault. They both state as grounds for divorce the adultery of the other(50). The Court held that when the two spouses petitioned for divorce on the grounds of adultery, each party was lodging a petition, a petition based on the grounds of fault. The seriousness and/or gravity of the alleged fault loses its importance. The fact that both parties claimed the same fault grounds cancelled out the effect of the fault and thus the divorce was refused.

When rejecting the petitions, the judge informed the parties that there were other more

appropriate grounds to their particular case that they could use to obtain a divorce.(In particular divorce by joint petition of the spouses or divorce sought by one party and accepted by the other).

It is submitted that two factors can be derived from the case:

(a) That this case is in accord with the case law under the previous law. Under the old law of 1884 although adultery was a 'peremptory ground' for divorce, where both parties petitioned for divorce on the grounds of adultery(of the other) the judges could either accept or reject the petition.

(b) This case demonstrates the fact that where the parties both want the divorce and for the same grounds,they should petition for the divorce on mutual consent grounds. The judge's direction to them to do so, it is submitted, is the right approach. One of the fundamental reasons for the introduction of divorce by mutual consent was so that it would replace fault grounds. It is submitted, that decisions of this kind will direct more conservative lawyers to reorient their traditional adversarial approach to a divorce

where the parties are encouraged to sort out their affairs on more amicable terms.

In the case reported on 31 October 1977, the Cour d'Appel held that although adultery was no longer a 'peremptory ground' for divorce, this did not mean that the method used for proving the adultery had changed. Although divorce reform changed the character of adultery from a criminal wrong to a civil wrong, this did not change the method of establishing adultery.

Finally the most important case to be considered in this area is a decision by the Cour de Cassation.(51)

This case gave a decision on article 242. The Court held that under article 242 a spouse could not petition for a divorce for the acts done by the other spouse unless the acts satisfied two criteria:

(a)that they constituted a serious or repeated violation of the duties and obligations of marriage.

and (b)made intolerable the maintaining of life in common.

Therefore, in this case the cross petition of the wife('demande reconventionelle') for a divorce based

on the fault of her husband, had to show that his relationship with another woman which was damaging for his wife, constituted a serious violation of the duties and obligations of marriage. The cross-petition succeeded(thus on the grounds of the husband's adultery and the fact that his relationship with this other woman which was damaging for his wife,constituted a serious violation of the duties and obligations of marriage.(52) The divorce could be pronounced on the grounds of the cross petition.

This case clearly states that adultery on its own, will not justify a divorce under art.242.

III."DU DIVORCE POUR RUPTURE DE LA VIE COMMUNE"
(Divorce for breakdown of life in common)

Divorce for breakdown of life in common is the grounds for divorce that has excited by far the most academic commentary.(53) It should be recalled that this ground for divorce was the other main innovation of the French Divorce Reform(divorce by mutual consent being the other). It is in this form that the French introduced objective grounds for divorce to their divorce laws.

The relevant articles are articles 237-241(54) Articles 237, 240 and 241 will be studied.

I. Article 237

According to the discoveries of this study the main problems that arose under this article have been connected with the debate of whether a subjective element in the form of 'intention' to cease life in common, could be said to be an integral part of the article. If it is so, when in effect did the period of separation commence? Or did the actual separation of the spouses relate solely to a purely objective notion? If the spouses were separated for the required period under art.237 (6 years) was the Court to grant the divorce irrespective of the circumstances that led to this separation?

Before studying this debate, a lesser problem on what "factually separated" means, will be looked at.

A. "Factually Separated"

Two early cases that were criticised[55] for their method of deciding what period of separation could be considered to come within the meaning of "factually separated" are the decisions of:

(a) the J.A.M. Belfort, 9 June 1976[56]

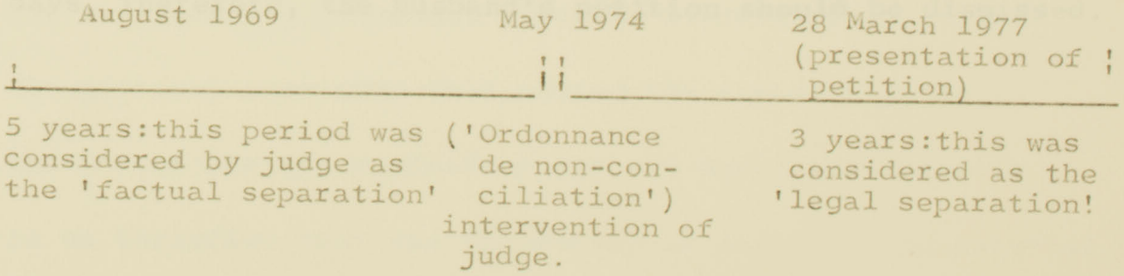
and (b) T.G.I. Pontoise, of 28 March 1977[57]

In the Belfort and Pontoise decisions the

judges held that a 'legal separation' (séparation de droit) could not be considered as forming part of the 'factual separation'(séparation de fait). Thus, if the parties lived apart because, for example, they went to Court and got an Order stating that they were to maintain separate residences (résidence séparée) or if they received a Court Order of 'non-conciliation'(ordonnance de non-conciliation) the time that flowed from the date of these orders was considered as a period of 'legal separation' and therefore could not be added to those years of living apart to total the years of 'factual separation'.

Perhaps a diagram, using the facts of the Pontoise decision may help explain these periods of separation that the Courts distinguished.

The parties were separated in August 1969 In May 1974 they were granted an Order of 'non-conciliation'. On 28 March 1977 the husband petitioned for a divorce on grounds of breakdown of life in common.



The judge held that these two periods of separation, the 'factual separation' and the 'legal separation' could not be added together. Therefore, as the 'factual separation' did not add up to the requisite six years, the petition had to be dismissed.

It is submitted that recent decisions[58] clearly show that this form of reasoning is wrong and that 'legal separation' can be considered as a part of the 'factual separation' that the article speaks of.

A 1979 decision by the Cour d'Appel of Paris[59] clearly states that the period of 'legal separation(can be taken into account to form part of the period of factual separation.

In this case the wife claimed that the judge should only consider the total of the two 'factual' periods of separation and not the periods during which legal proceedings were taking place. Thus the total of the two periods would come up to 5 years 3 months and 19 days. Therefore, the husband's petition should be dismissed.

17/6/65	20/1/66	22/4/71	8/1/76	29/6/78
	legal proceedings			
the husband leaves home.	H.petition for divorce	Court dismiss petition	H.petitions for divorce for 2nd time	hearing
factual separation	legal separation		factual separation	legal separation
(factual sep.)	(+)		(factual sep)	

5 years 3 months 19 days.

The Cour d'Appel in reply to the wife's submissions said that this method of reasoning misunderstood the very concept of a factual separation. A factual separation existed when there no longer remained any life together between the parties. It manifested itself when either both the spouses or one of them no longer had the intention of continuing the marital relationship.(this the husband clearly proved by leaving home and soon after petitioning for divorce).

In a decision of the Cour de Cassation(60) the Court held that under article 237 "a spouse can petition for a divorce on the grounds of a prolonged disruption of life in common, when the spouses live separated factually for six years. It does not make any difference as to what the circumstances were that caused the separation; it is, sufficient for the conditions set out under this article to be satisfied that the 'community of life' in the material as well as in the effective sense has ceased to exist bet- the spouses"(61).

Therefore, to satisfy article 237 there must be a 6 year separation period, irrespective of what caused it and a breakdown in the marital relationship.

Lindon, commenting on the Cour d'Appel's decision states:"Whatever the form that may clothe the separation, it must be taken into account the moment that it corresponds with an intention of breaking life in common".(62)

This brings forth the next point of discussion. Can one read an element of 'intention' into article 237? When one reads 'factual separation' is it limited to the fact that the parties live in separate residences or must there also be an element of intention, that the parties (or one of them) intends to live separately.

B.

There have been many controversies to decide whether breakdown of life in common should include an element of intention.

This debate, it is submitted, gave rise to two radically opposing camps:

(1) Those who see this ground for divorce as a purely objective ground. Therefore, the fact that there is a 6 year separation, according

to them, should be sufficient for the divorce to be granted. Breton, Benabent and Manique, notably, belong to this school. They feel that once the judge has established that the couple have lived apart[63] for 6 years he must grant them the divorce. Thus, they desire the removal of all subjective elements from this ground for divorce.

(2) Those who desire to introduce a subjective element, such as the intention to live apart so that the judge, in coming to his decision can evaluate the situation before him by looking into the intentions of the parties. The majority of French academics tend to subscribe to this view.

They regard the notion of separation in two aspects: (1) the material aspect.

(separate residences)

and (2) the intentional element.(intention to live separately).

Thus Massip, Lindon, Bertin, Grosliere, Brazier, notably, belong to this school.[64]

It is clear that the element of 'intention'

does not arise when the period of separation has been a long one. However, there have been situations where the Courts have looked for a subjective element .(65) Until recently, this element was 'intention'. Now, two different approaches seem to be taken by the Courts.

(1) The Court in this approach first establishes that there is a separation that has lasted six years. It then establishes that during those six years a marital breakdown has taken place. Thus, it is not looking at the intention of the parties. What it is looking for is to establish that no life in common exists between them. This is what the Cour de Cassation held in the previously quoted decision of 30 January 1980. This method of reasoning can be traced back to Dean Carbonnier. His reasoning was also adopted by Massip.(66) Therefore, one does away completely with the notion of intention. It is submitted that as the Cour de Cassation has taken this stand, the question of 'intention' will play a lesser role in future cases.

(2) The Court has looked for the intention [67] of one of the parties. In these cases, it can be seen that although there has been a separation of residences, the Court has looked to see if there has been in fact an intention for a total breakdown of life in common. In a decision of 20 December 1976, the T.G.I of Paris[68] held that although the spouses frequently met and the wife(petitioner) used to even live weekends with her in-laws and joined her children and husband for a winter vacation the carrying on of this relationship was necessitated by the existence of young children. Thus, the period of separation between the spouses could not be affected by this relationship.[69] The Court held that there was a prolonged disruption of life in common.

In another decision of the same Tribunal on 7 February 1977[70] it was held that even if a relationship existed between the parties[71] "the contact maintained between the spouses did not constitute either cohabitation

or intimate friendship and could not imply on the part of the husband the intention of living otherwise than separated from his wife"(72)

Finally the case that was criticised adversely and brings out the problems of trying to incorporate the intentional element into this article will now be considered.

The facts of the case before the T.G.I.Paris on 18 January 1977(73) were:

The wife after 21 years of marriage left her home in Paris in April 1969. This was because she had suffered from a nervous breakdown and wished to live on the Cote d'Azur where the climate was better suited for her health. She first lived in a home for convalescence but within a few months moved out. She then boarded with a pensioner; being a trained nurse, she looked after him in return for her keep. She visited her family in Paris from time to time.(It should be noted that her contact with her husband was limited to sorting out financial matters). In March 1976 she petitioned for divorce.

The Tribunal dismissed her petition on the grounds that it was difficult to determine a precise moment in time when the wife had formed the intention to

break all marital ties. That as this intention was formed gradually it was hard to state precisely when this 'intention' crystallised. Thus, the Tribunal could not determine when the period of separation actually commenced.

Breton criticised this case by stating that as long as there was the six year period of separation, the law did not require an element of intention to be established. He submitted that even if the separation was not a voluntary one, a spouse was entitled to petition for a divorce under art.237. All that was required was the six year separation.

It is interesting to note the Massip who felt that the intention of one of the spouses was necessary to establish a separation, on commenting on this case modified his opinion. He says a case like this illustrates the problem of finding the precise moment when the intention crystallised. Therefore, was it not better instead of looking for the intention of the parties, to see if in fact, all aspects of life in common had ceased?

It is submitted, that Massip, by basically adopting Dean Carbonnier's reasoning has departed from his original stand that 'intention' was an essential element.

It is also interesting to note that the Cour de Cassation gave its decision almost using Dean Carbonnier's reasoning word for word.(75)

In conclusion several observations and submissions must be made. On the intentional element it is clear from the reported cases that 'intention' is of importance only when the separation period just fulfills the six year requisite(as set down by art.237). Intention, seems irrelevant in the long established separations. Therefore, the practice of the Court illustrates that, it already is granting divorces on the objective grounds of 'factual separation'(in long established separations). It is further submitted that the question of 'intention' should not be relevant to the Court's decision. However as it is clear that the majority of French academics and judges have not as yet fully accepted the granting of a divorce on objective grounds, in certain 'grey area' situations, where the spouses maintain some contact(for example) and the period of separation is just within the six years, they will look into the circumstances of the case to see if 'in fact' a separation took place. It is submitted that if they feel the need to do so they should apply the test

set by Dean Carbonnier and the Cour de Cassation: (1) was there a separation(separate residences)(2) had the community of life on the maternal and effective levels ceased. It is submitted that amicable terms and the fact that in the hypothetical situation where the parties are partners in some business enterprise and thus have financial dealings, should not come within this test.

Finally it is submitted, that basically it remains a question of time when the Courts will grant the divorce on purely objective grounds. That divorce is a painful and traumatic process for the spouse who is against it holds no doubt true. However, to live six years apart from one's husband or wife goes towards proving the non-existence of the 'marriage'. In any case the spouses, here are better conditioned to accep the after effects of a divorce; they have been living for long enough without the other spouse to be able to establish a new life. Thus the divorce here, it is submitted, is only recognising a situation that has lasted for six years.

The final point to be made here is that it is acknowledged that divorce can be a cruel way of ending the faithful party's hope for the return of the errant

spouse. If one can compare the situation of the faithful spouse to that of the spouse who for religious or personal convictions does not believe in divorce but gets a judicial separation we see that in the latter case after a three-year judicial separation, one of the spouses can petition for divorce without the other's consent. Thus a six year separation period seems long enough to establish the divorce petition should be granted.

2. DIVORCE FOR BREAKDOWN OF LIFE IN COMMON. The 'Exceptional hardship'clause(Art.240)

The 'exceptional hardship' clause is of importance because the petition for divorce has to be dismissed if the non-petitioning spouse can establish either material or moral consequences flowing from the granting of the divorce.

It is submitted, that because of the many cases that have been reported where this clause has been invoked it is impossible to go through all of them individually. However, all the reported cases that have come to the writer's attention, on this particular aspect have been translated and noted in chronological order(this is not exactly the order in which they are reported). They are

set out so that a global appreciation of the use of the clause can be obtained. The relevant information for this case study has been divided into five sections:(76)

(1) The name of the Court or Tribunal that heard the case, the date of the decision, the date it was reported and where it was reported.

(2) The reasons the spouse gave for invoking the 'exceptional hardship' clause.

(3) By "submission retained by the judge" is meant those material or moral grounds that the spouse submitted and the judge accepted as amounting to exceptional hardship.

(4) The judge's decision: whether he accepted or rejected the clause. This section is also important because depending on the success or failure of the clause the divorce may be granted or dismissed.

and (5) the reasons the judge gave for arriving at his decision.

It is submitted that this chart is essential for the undertaking of the use of the clause and the manner in which the Courts have interpreted its use.

	Name of Tribunal or Court in chronological order	Reasons submitted by Spouse to justify the using of exceptional hardship clause	Submission retained by judge		Decision of judge to accept or refuse 'exceptional hardship'		Reasons given by judge for his decision
			material	moral	refusal	acceptance	
1.	T.G.I.Compiegne 26 Oct.1976 (D.S.1978 I.R.9 p.12)	(1)no private means (2)opposed to divorce;sees label of 'divorced woman'as a terrible discredit;morally damaging (3)bad health	✓	✓		✓	The marriage had lasted 56 years; the W is 78 years old.She does not possess any financial means of supporting herself.In the eyes of certain people the tag'divorced woman'still can cause undeniable moral damage. Here the woman was against divorce and the granting of a divorce would have caused traumatic consequences on her poor health. The only resources the woman could be said to have is a little home which she jointly possesses with her H.If they sell this, she will have to seek refuge in an old folks home ,a cruel solution for a person used to living at her home. Further she will lose her right to her H.'s pension if he divorces her inspite of the long duration of marriage.
2.	T.G.I.Paris 12 Nov.1976 (J.C.P.1976) II 18513 bis 2^{e} espece note Lindon.	(1)age-63 years old (2)personal convictions-she was against divorce for personal reasons.			✓		The judge found that the parties had lived apart for 19 years.She was 44 years old when their life in common ceased and this would not have stood in the way of granting a divorce. Thus,the age of the woman is insufficient to raise this clause.In the same manner she must show that the consequences of the divorce would bring about consequences for her of 'exceptional hardship'.

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3.	T.G.I. D'Aix-en-Provence I Ch.18 Nov.'76 (J.C.P.1977 185322[e] espece, note Lindon	(1)age (2)seriously ill (3)no profession (4)has very little personal means	✓	✓		✓	The woman was born in 1915,married in 1938 and this marriage lasted until 1967.She was seriously ill,did not have a profession and possesses hardly any private means of support. The divorce would also bring about the sale of the villa she was living in with her married son & his family. The sale of the villa,which was part of the matrimonial property,would have brought about the expulsion of the family.
4.	T.G.I.Toulouse 2 ch.18 Nov. 1976 (J.C.P.1977 II.18679	left by her husband who went to live with another woman, her niece.			✓		The 'exceptional hardship'clause cannot be invoked unless the submission relates to the consequences of divorce. Thus it cannot be invoked when what is submitted to the Court as the reason for the marital breakdown.
5.	T.G.I. Aix-en-Provence 1[re] ch.25 Nov. 1976. (J.C.P.1977 II 18532,3[e] espece note Lindon	(1)health(skin cancer) (2)fact that if husband predeceases her,she would lose all his pension;if divorced possessed hardly any financial means of support.	✓	✓		✓	The wife was almost 69 years old (4 years older than her H.)She was married in 1932 and was separated from her H.after around 30 years of married life.She was also sick and (this played an imp.part in the decision) she would lose her right to her H's pension if he divorced her.
6.	T.G.I. Renves, 3[e] ch.16 dec.1976 (J.C.P.1977 I.2857, annexe 11, étude Lindon)	religious convictions			✓		For the spouse that holds to certain moral and religious principles, divorce is even harder to bear,when it is imposed on the person(the person not having sought the divorce) However,this(the divorce)is a normal consequences that flows from invoking art.237.To turn this normal consequence into an abnormal one,

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							the party has to show how consequences flowing from it are going to have an abnormal character and cause exceptional hardship. A principle held, no matter how honourable is not sufficient to defeat this ground.
7.	T.G.I.Toulouse 6 Jan.1977 (J.C.P.1977 I.2865 , ennexe etude Lindon.	states the divorce will bring for her consequences of 'exceptional hardship'			✓		The marriage took place in 1937;the parties had 7 children(all adults). They stopped living tog.in 1960.The divorce will not bring consequences of 'exceptional hardship' for her. She was being provided by her H. and the divorce would not change her financial situation for the worse. From the'moral'point of view all the divorce is doing is recognising a long separation.The W.has failed to show how this recognising which is provided for by the law for such situations has exceptionally hard consequences for her.
8.	T.G.I.Lille 20 Jan 1977 (D.S.1978 I.R.note Breton) Rw.trim dr. Civ.1977 548,obs Raynaud.	W.states that taking into account her age and the duration of her marriage,the divorce will have moral and material consequences of extreme hardship.		✓		✓	The term 'exceptional' is used to mean a 'very grave hardship'.It is for the judge to decide if from the facts there is 'extreme hardship' when the spouses have been married for 30 years,with 24 years of these together. They had raised a family of four children and in previous divorce proceedings the H.could not allege any fault on his W.s part.She was faultless.Also there was medical evidence that at least since 1970 the W.suffered from bouts of serious depression.The divorce would only aggravate her condition. The divorce

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	T.G.I.Lille. (ctd.)				✓		would cause moral consequences of 'exceptional hardship' as in the meaning of art.240 Therefore petition for divorce refused on grounds of 'exceptional hardship'(moral consequences).
9.	T.G.I.Montpellier 1re ch.28 Jan. 1977. (D.S.1978.I.R. note Breton)	Wife completely against divorce on moral grounds.		✓		✓	The W.here was 79 years old.After 17 years of married life the H.left her to struggle and bring up two children still infant. She was an examplary person;fault is she was also fanatically against divorce.She could have long ago petitioned for a divorce on the ground of the exclusive fault of her H.Not only did she refuse to do so but she has been opposed to the attempt of her H.to get a judicial separation.She is a person who has been brought up under the old divorce legislation,who sees divorce as a "sanction" and has but reprobation for it.Although on the material and marital side the divorce will not change any of the existing circumstances(the separation being so long) on the moral and social level it would bring about serious repercussions which amount to 'exceptional hardship'*(Interesting to note the fact that H.had an illegitimat son by his existing union that he could legitimise had judge granted divorce was not strong enough a reason to accept his petition for divorce).

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10.	T.G.I.Bayonne 31st Jan.1977 (J.C.P.1977 1. 2857,annexe 1 etude Lindon)	(1)no private means (financial) (2)no professional qualifications (3)help she gave H.to rise in his profession			✓		The judge held that at the end of the majority of most person's carrers it was natural that they should attain a level superior to that they began their working life with.That a spouse may have helped the other come up in his career can be claimed by that spouse.However this has no bearing on the consequences of divorce-that this would cause 'exceptional hardship'.Further he financial circumstances were being taken care of by the H. Divorce granted 'exceptional hardship' non existant.
11.	T.G.I.Paris 23 Feb.1977 (J.C.P.1977 11 18599, 4e espece, note Lindon)	She would suffer material and moral consequences amounting to 'extreme hardship' if H.was granted divorce.	✓	✓		✓	The couple was married in 1940 and separated in 1959-almost 20 years of marriage.The Court held that inspite of the contention that the W.will see no change in her material circumstances(the H.was willing to continue paying her the same maintenance he already was)this could not be so. It held that in fact during difficult years the W.had to sell a home to make ends meet and that material consequences at the age of the spouse meant more than just providing for the basic up-keep of the spouse. Beside the W.had for 17 years struggled inspite all kinds of humiliating situation,matrial loss,deceptions and bitter conflict to maintain her family of six children.She did not merit to morally feel 'exceptional hardship' that she would suffer if the divorce was granted to her H.

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12.	T.G.I.Paris Aff.Mat.Sec.A Sect.A, 11 March 1977 (J.C.P.11 18682)	Loss of the right of wife to husband's pension.	✓	✓		✓	The judge refused to grant the divorce because morally as well as materially the wife would suffer consequences of exceptional hardship. The judge would not grant the divorce because the wife(if divorced) could not benefit from her husband's pension, after having lived for 37 years,with him(27 October 1930 married;1967 separated;1977 petition for divorce).She also had no personal wealth and had lost the use of an eye.
13.	T.G.I.Rennes 15 March 1977 (J.C.P.1977 1 2857,annexe 111 etude Lindon) D.S.I.R.1978, note Breton)			✓		✓	The divorce would cause 'exceptional hardship' within the meaning of art. 240 - moral consequences giving rise the 'exceptional hardship. The W. was 72 years old, she spent 28 years of their 42-year marriage at the side of her doctor husband.She lost three children because of her poor heart,loss of love and support from the H. and public humiliation of having him prefer another woman.
14.	T.G.I.Nanterre 3e ch.17 March 1977. (J.C.P.1977 II 18656, note Lindon)				✓		The 'exceptional hardship' clause should be used restrictively otherwise the majority of cases coming under the grounds for divorce for breakdown of life in common must be refused.(Petition for divorce must be refused).

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	T.G.I. Nanterre (contd)			✓	✓		In this case, although the wife did suffer a set back in her career when she followed her H. abroad nevertheless she is still working and receiving a decent salary. She will also receive a pension which is in no way insignificant. Her H. had also agreed to pay her a monthly sum and has given her, for life, the benefit of an apartment that belongs to him. He is also paying all the taxs etc. on this building. Although the divorce is contrary to the wife's wishes, nevertheless she is neither on a material nor moral level going to suffer in a serious manner from the consequences of this divorce.
15.	T.G.I. Boulogne - Sur-mer 1er avril 1977. J.C.P. 1978 II 18807. Note Lindon.	Religious convictions of Husband			✓		The religious convictions of the H. cannot be taken into account to defeat a petition for divorce because of the purely subjective character of the convictions. It is impossible for the judge to appraise its force and its sincerity. It would have been quite different if the H. could have shown that because of his religious convictions, the granting of the divorce would have serious repercussions either on his physical or mental health. In view of the fact that the latter conditions were not fulfilled, the Court had to grant the divorce to the unfaithful wife. *This is the first case where a H. has raised the clause.

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16.	T.G.I. Boulogue -sur-mer 15 April 1977 J.C.P.I.,2857 annexe IV, etude Lindon.	Personal convictions (religions)		✓	✓		After 26 years of marriage(married 8 May 1936,separated 30 Jan.1962)the H. petitioned for a divorce. Considerations such as the age of the parties, the duration of marriage should not be taken into account in deciding if the divorce is going to bring about consequences of exception -al hardship for the W.The W's financial situation will not change if her H. continues paying maintenance on divorce. As for her personal convictions as far as the subject of divorce is concerned, they cannot be taken into consideration as they are purely subjective in character. Thus it will be difficult for the judge to evaluate the force and sincerity of the W's personal convictions. If it could have been proved that because of her convictions, a divorce would affect her health, for example then, it would be relevant to take into account personal convictions. However, nothing in this case points to the fact that her religious convictions could have an adverse effect on her. The Court is aware of the painful experience the W. has to go through especially if she believes in the indissolubility of marriage. However, it must also be added, that spouses who for religious reasons, get a judicial separation, can after a period of three years have lapsed, petition for

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	T.G.I. Bouloque						a divorce. Thus even in this case, one spouse against the wishes or beliefs of the other can petition for a divorce.
17.	T.G.I. Marseille 4e ch. 28 April 1977. (J.C.P. 1978 III. 2886, Annexe IV, Lindon	(1) poor health; produced several medical certificates stating she was ill and that this was basically caused and aggravated because of personal problems (H. leaving home notable) (2) Her two children now adults had left home- loneliness. (3) her unfavourable financial situation.	✓	✓		✓	The couple were married in 1946. The H. left home in 1968 leaving his W. to see their two children then 20 years old and 18 years old through their studies. Both children have now left home. Since 1968 the W. has been in a state of depression that reoccurs Her state of health is to a large extent the outcome of her family problems. Due to illness, she has to take long periods of leave from work. Thus her financial situation has progressively deterioriated Her H. inspite of his wealth has only given towards her maintenance, the right to live in their jointly owned apartment-matrimonial home. The granting of a divorce will cause 'exceptional hardship' to the W. on both the material and moral level. The derisory maintenance offered by her H. will not help better her financial situation. Also the divorce will effect her health, aggravate her condition, which is already in a bad way due to her being all alone. (Her age and the duration of the marriage were also taken into account - born in 1920).

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18.	T.G.I.Briey 26 May 1977 (J.C.P.1977 I 2865, annexe I etude Lindon.	She would suffer exceptional hardship.				✓	The Court refused the divorce because the W. proved to be a perfect and exemplary W. It invoked a previous case where the petition for divorce of the H. was refused. The Court there found the W. was utterly faultless. She was willing to also forgive her H.She hid his behaviour from his parents and their children.
19.	T.G.I. Bayonne 12 July 1977 (D.S.1978,I.R. I p.15, note Breton).	It is not clear if the wife asked for the divorce to be refused on grounds of exceptional hardship or if the Court was just illustrating from the facts of this case why in such situations this Clause should not be invoked by the wife.(It favoured restrictive use of clause).			✓		The parties were married in 1939 and separated in 1952. The W.cannot make use of the 'exceptional hardship' clause in this case. It will be refused because on both the material and moral levels the W. will not suffer from the consequences of the divorce. On the moral level, she has the right to keep her H.'s name.Thus in the eyes of society,or for all, external purposes, she maintains her social standing previous to the divorce. On the material level, the divorce will not change her financial situation. She never saw her H.since he left home but received monthly maintenance payments.She owned property.
20.	T.G.I.Paris 8 November 1977 (D.S.1978 I.R. 9 p.15 note Breton)	(1)invalid daughter(aged 33 years old)that wife had to look after. (2)Wife's own poor health - suffered from a nervous breakdown in 1951(due to behaviour of hushand) and since then her mental health has never been too stable.			✓		The Court held that if the W.only produced already existing circumstances -the state of her mental health and the fact that her daughter is an invalid with no hope of being cured - without producing anything that might prove that her hard plight might be aggravated by the divorce on either the moral or material level

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	T.G.I.Paris 8 Nov.1977						the divorce had to granted to her husband.
21.	T.G.I.Paris 23 Nov.1977 (D.S.1978 I.R.i p.15 note Breton)	The divorce would produce material and moral consequences which would amount to 'exceptional hardship'			✓		Married life together of spouses 5 years.(married 1964,separated 1969) In 1972 the H. petitioned for a divorce that was refused.Court held that the circumstances in this case did not justify the use of the 'exceptional hardship'clause.Both spouses had professions and salaries. The divorce in general will not change the material circumstances of the wife.On the moral level, the W's age, she was 53 when they separated is not an obstacle to the divorce; in the same manner the fact her H. had an adulterous union, with a younger woman, although humilating could not be considered.
22.	Cour d'Appel Paris. Paris,24^{e}Ch. A,16 March, 1978. , 2^{e} espece (J.C.P.1978 II. 18964, 2^{e}espece note Lindon.	Moral reasons. (1) age - wife is 62 years old. (2) exemplary wife and for 30 years actively helped her husband,who also was her rabbi and spiritual director,in his religious functions. The only reason she did not wish to follow her husband to Israel was because she did not wish to be witness to a relationship he was carrying on there.	✓	✓		✓	Court first stated that it could not take into account the previous circumstances or behaviour(etc) of the parties when it was evaluating the moral consequences that could arise if a divorce was pronounced. However, they can use these facts to clarify the present position of the spouses - these past occurances can show the couple's evolution and clarify their present contentions. It then went on to take into account the age of the woman(63 yrs.at hearing of appeal); the duration of marriage 30 years of life together (1939-1969).Three children(adults)

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22,	*if her Husband remarried she would lose all rights to a sum of money that is to go to his surviving wife on demise. (3)As to the other financial provisions-they were derisory or shocking.					were born and the W. was not only 'loving and faithful' to her H. but that she was the collaborater of a rabbi in the development of an important religious community;that she shared the same faith as her H. who was at the same time her spiritual director.The factual separation is particularly cruel in the present circumstances.The W. bears it with much pain and suffering far more than she can ever express,for having thus lose the person who was her confidant and the believer in a divine law that they shared.It goes without saying that she will suffer terribly if her status as wife of the rabbi is removed(before her children and community).On the material level the W. will lose her rights to the H's particular sum of money if on divorce he remarries. (He has an existing established union with another woman in Israel). Thus, in this case the divorce is refused as the wife will suffer from material and moral consequences amounting to 'exceptional hardship'.

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23.	Cour d'Appel Paris. 2e Paris 23 March 1978 (appeal from Trib.gr.inst. Bobiquy 9 June 1977) (J.C.P.II 1978,18854, note Lindon)	(1) age:67 years old and in poor health(has heart disease).The divorce will make her lose all rights to her husband's 'pension'. (2) Her material situation will be further weakened as she will have to share(split) the matrimonial property which is mainly composed of: (a) an apartment(inherited from her mother) (b) a country home.	✓			✓	The petition for divorce on the grounds for divorce for breakdown of life in common should be dismissed when the divorce will bring about material consequences of an exceptional hardship.This was the case here where the W. was 67 years old, of poor health and who could carry on a paid profession when the marriage(period of life together) had lasted over 33 years and the divorce would mean that the W.would have to close a part of her financial resources to meet the legal obligations towards her H.(Thus, the apartment and country home would have to be sold and the proceeds divided. There is some suggestion that the H. might give the apartment to his W.)She would also lose her right to his pension. *Interesting to note that Cour d' Appel overturned decision of T.G.I. Lindon draws attention to fact that there might be some significance to fact that majority of T.G.I. were male and the composition of majority of Cour d'Appel, female.

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24.	Cour d'Appel, Paris. Paris, 1re Ch, 11 May 1978. (J.C.P. 1978 II. 18980, note Lindon)	(1) her age (2) her frail health (3) Above all the sacrifices she made to support on her own, the couple, so that Marcel M, who was her concubine for 18 years before becoming her husband, could develop his talent as an artist fully and arrive at the fame he enjoys now.	✓	✓	✓		The Court first considered her material position (although from the report of the case, she did not expressly state that her material position would be affected). They held that the divorce would not alter her existing financial situation. She was well provided for. On the moral aspect, they held that the divorce for her, would not amount to having to suffer consequences of exceptional hardship. She had already lived separated from her H. for more than 10 years and could not have misunderstood the situation that it had become irreversible.
25.	Cour d'Appel Paris Paris, 24e Ch, A. 25 May 1978. (J.C.P. 1978 11. 18964 note Lindon)	Wife submitted that she would lose a pecuniary gain, which will be her principle source of income, on the decease of her husband if he divorces her.	✓			✓	The Court held that the material consequences of the wife on divorce would be grave enough to fall within the terms of art. 240. They also added that she was 71 years old, her state of health poor and she would have a very modest income to live on.
26.	Cour d'Appel Paris. Paris 6e Ch, A, 29 June 1978. (J.C.P. 7 March 1979, 19064, Note Lindon)	wife submitted age: 66 years old. Duration of marriage 32 years (19 years of life in common) Divorce would bring about loneliness to her life.		✓	✓		Divorce is always an ordeal for the spouse that does not petition for it. For there to be 'exceptional hardship, the hardship must be of a particular intensity. In this case all that the divorce was doing was officialising a situation that existed for 13 years. For the clause to operate, the particular circumstances of the case must prove that

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			material	moral	refusal	acceptance	
26.							in the given case this factor (alleged to result in exceptional hardship) must be of an 'abnormal character and causing 'exceptional hardship' if divorce is granted.
27.	Cour d'Appel Reims. Reims, 12 October 1978. (D.S.1979)	Cruelty that divorce will cause her in view of: (a) her age(64 yrs.old) (b)duration of marriage (46 years)(13 years separation) (c)'exceptional hardship' to son also (d)no resourses(private means)	✓	✓		✓	The petition for divorce was dismissed, because it would bring about consequences of 'exceptional hardship' not only for the W. aged 64 years, who after 46 years of marriage finds herself without any financial support because of the fault of her H.to give real assistance, but also for the son of the couple who will otherwise have to sacrifice his youth to look after his mother (abandoned by his father). Interesting to note that this is the first case where the consequences of divorce in relation to child has been invoked successfully.

It is proposed to consider the various points of interest that the cases have brought to light.

'Exceptional hardship' is defined by Case No.8 as a very grave(severe) hardship. It also states that it is for the judges to decide whether or not the facts of the case support the claim of exceptional hardship.

The Tribunal de grande instance Grasse stated that "the notion of being exceptional which implied something that was extraordinary, very rare, abnormal(in the sense of anomalous,irregular) had been included by the legislator to limit the use of the hardship clause to those cases that manifest derogatory consequences that are at the same time painful but unavoidable from both the moral and material aspects of the dissolution of the marital bond."(77)

In Case No.26 the Cour d'Appel stated that divorce is always an ordeal for the spouse that does not petition for it. For there to be exceptional hardship, the hardship had to be of a particular intensity. In order for the clause to operate it must be shown that the consequences flowing from the divorce would be of an "abnormal" character.

A restrictive use of the clause was favoured by the Court in Case No.14. Although it must be remarked

that it was clear on the facts of that case the wife suffered neither material nor moral consequences amounting to exceptional hardship. To have allowed her to succeed in using the clause(and thus defeating her husband's petition for divorce) would have been, it is submitted, an abuse of the provision.

Two decisions by the Cour de Cassation will be considered. In the first decision(78) the Court held that the judges of the Tribunal de grande instance and of the Cour de'Appel had the sovereign power of deciding if on the facts material or moral consequences of exceptional gravity would flow on the granting of the divorce. In a similar decision, this year, the Cour de Cassation(79) declared that the power to decide whether on the particular facts, the party was justified in invoking the clause, was left to the sovereign appraisal of the facts by the judges of the lower Courts.

It is submitted that this highly subjective approach of the Courts makes it impossible to state conclusively that the Courts will apply a consistent method of reasoning to arrive at a decision. Whether the raising of the clause will defeat a petition for divorce or not

will thus depend on the individual case before the Courts and the judge's interpretation of those facts. However, there are certain principles that have to be complied with and it will be examined how far the Courts have adhered to them.

The most important of these principles is that the exceptional hardship clause is directed towards the future, towards the consequences that will flow if the divorce is granted. The academic commentators(80) have been explicit that when invoking this clause, past deeds of the parties are of no importance; what the judge must look at is whether on the facts before him a situation of exceptional hardship will arise if he grants the divorce.

If the academics were certain the law was clear on this point, the judges seemed to have thought otherwise in Case No.18. However, Case No.18 is an exception to the rule and has been very much criticised.(81) It has been contrasted by commentators with Case No.4. Case No.4, it will be recalled, dealt with the situation of the husband leaving home to live with his mistress who was his wife's niece. The Court held, that as the scandalous circumstances were already in existence all the divorce would do would be to give recognition to the situation.

An interesting case to note is Case No.22. Here the Court first stated that it could not take into account the previous behaviour of the parties and other such factors when deciding on whether to accept or reject the clause. However, the past occurrences could be used to enlighten the Court when dealing with the facts before them. They would take them into account for better understanding the case.

It is submitted that the couple's past conduct and circumstances have heavily influenced the judges decision in many case. In cases No.8,9,11,13,17,18 and 22 the judges refused to grant the divorce; it is submitted they were considerably influenced by the spouses past.

Case No.20 is interesting because the Court there held that existing circumstances could not be used under this clause to defeat a petition for divorce unless the spouse could show how her plight would be aggravated by the granting of the divorce.

In the definition quoted from the T.G.I. de Grasse, the Court, it is submitted was wrong, in holding that both material and moral consequences of extreme hardship have to flow from the granting of the divorce. Under article 240 the spouse may invoke exceptional hardship grounds for either moral or material consequences

that would take place if the divorce was granted. It is clear from the Chart, that the Court will consider 'exceptional hardship' when only one consequence is invoked.

The Court's general attitude to the exceptional hardship clause being invoked because of opposition to divorce on religious grounds is that as stated in the two Boulogne-sur-mer decisions(Case No.15 and Case No.16). The problem the Courts face here, is that of evaluating the spouse's sincerity when no evidence is brought before the Courts to show how this religious conviction is going to bring about consequences of extreme hardship in the spouse's life.

Perhaps, an analogy with religious beliefs would be the claim of 'loss of social standing'. Here the spouse justifies the use of the provision by stating that the granting of the divorce would lead to the spouse falling into disrepute in the eyes of society. Thus, if we look at Case No.1 the Court held there that the tag of 'divorced woman' could still mean something in the eyes of a certain group of people and cause undeniable moral damage to the spouse opposing the divorce petition.(However, see Case 19

for an opposite decision being reached by Court on practically the same reasons submitted by spouse).

On the material grounds a survey of the chart shows that the Courts are willing to accept lack of financial resources as a reason for using the provision. As a general observation, where the provision succeeded the spouse was old(quite often sick), with no profession and possessing hardly any or no private means at all. It can also be noted that in those cases where this reason failed the spouse had adequate financial support. Attention should be drawn to the "pension" referred to in these cases. Under recent French legislation(82) the civil and military pension schemes have been revised as well as the social security pension schemes. Under these revised schemes the non-petitioning spouse is provided for. However, the "pension" that the cases refer to are those that the husbands are entitled to under special retirement schemes.(83) Under the terms of these schemes, it is only the legal wife who survives the husband that is entitled to this pension. If the husband divorces his wife, she is(irrespective of the number of years, she has been married to him) entitled to nothing. As Massip(84) notes, it is about time the legislator reforms this anormaly. If this reform

takes place the wife will be entitled to a proportion of the pension that will correspond to the number of years she has been married.

It is submitted, that if this reform is carried through undoubtedly cases like No.12, for example, would be differently decided.

Finally several general points of interest will be made. In the twenty seven cases studied only in one of them was the spouse invoking this provision male. The fact that women appeared to be the 'sole' users of this provision seemed so well established that when Lindon wrote his commentary on this case he referred to the petitioner as "she".

As Breton[85] found, it is submitted that it is difficult to draw any conclusions from looking at such factors as the age of the parties, the duration of the separation and the duration of the marriages. However, this information has been collected[86] and by looking at Annexe II an overall picture can be obtained of the type of cases that are presented to the Courts.

In only two cases was the provision invoked, where the consequences of exceptional hardship might affect a child.

In Case 20 the wife stated that she had a 33

year old daughter who was an invalid. The decision in this case it is submitted is of no relevance to gauge the effectiveness of invoking the clause in relation to the consequences that the child would suffer. This is because, it will be recalled, the Tribunal could not entertain the clause as the wife did not state how the divorce would affect existing circumstances.

The clause operated in the one case(Case 27) where it was properly raised. The wife alleged that the divorce would bring about 'exceptional hardship' to her son. The Court accepted this because it stated that the son would have to sacrifice his youth to look after his mother.

It is submitted, that from the findings of Annexe 11, the wives tend to be old and the duration of the separation a long one. Perhaps, these two factors can lead to the conclusion that if there are children of the marriage, they would be adults. Thus, it would be hard to invoke the provision on the grounds that the children will suffer from the consequences of the divorce.

Of the 27 cases noted in 15 of them the exceptional hardship provision was successfully used to defeat a petition for divorce. A conclusion that can be drawn from this incidence of success, it is submitted, is the

judges' general attitude towards cases where a divorce is petitioned on the grounds of rupture of life in common. The judges are reluctant to accept the fact that the spouse who leaves home and thus is at 'fault' can petition for the divorce. One then wonders whether the exceptional hardship clause can re-introduce a certain element of 'fault' into what is supposed to be an objective ground for divorce. Francoise Furkel(87) submitted that the provision could re-introduce the notion of fault. This is because, before arriving at his decision the judge normally looks at the behaviour of the parties at the moment of the breakdown. In particular, if the facts cast the petitioner in the role of the "villain" there is a definite tendency of the judges not granting the divorce. The 'moral' element comes into play; as the cases show, it is clear that in reaching certain decisions the judges were influenced by the fact that one party was of exemplary character and "faultless" behaviour while the other was clearly villanous.

As Lindon(88) observed, the attitude of the judges in certain cases clearly demonstrates that although the legislators can drastically change legal rules, they can neither radically nor rapidly change the moral attitudes

of people. Lindon's observation, it is submitted can be corroborated by this case study.

3.DIVORCE FOR BREAKDOWN OF LIFE IN COMMON. 'Demande Re conventionelle'(Art.241)

When a spouse petitions for divorce on the grounds of breakdown of life in common the other spouse has a right to cross-petition by alleging the fault of the spouse who took the initiative. If the judge accepts the cross-petition, he dismisses the principal petition and grants the divorce on the ground of fault of the spouse who took the initiative.

It is submitted,that a survey of all the reported cases shows that the law has been consistently and correctly applied by the Courts. The one problem that can arise, in this area, is if the principal petitioner, on the cross-petition of the other spouse, wishes to also cross-petition this cross-petition using fault grounds too. However, it is submitted, even the law here is very clear:only the 'other spouse'(meaning the spouse who did not present the principal petition) can use this article.

It is sufficient to illustrate this article with one case. This is the decision of the Cour d'Appel Paris

in 1978[89]. The facts and decision are: The husband petitioned for divorce on the grounds of breakdown of life in common. The wife cross-petitioned under art.241. The husband then tried to get the divorce granted on the grounds of 'shared fault'.

The Court dismissed the husband's petition and granted divorce on the grounds of 'exclusive' fault of the husband - thus accepting the cross-petition of the wife.

The Court made it clear that under art.241 what is authorised is that in response to a petition made for the grounds of breakdown of life in common a cross-petition can be made by the other spouse on the grounds of fault of the principal petitioner. The spouse who petitioned initially has no right to use this section; it is only open to the other spouse.

When the Court accepts the grounds for divorce as set out by the cross-petition it substitutes the principal petition with that of the cross-petition. The consequences of divorce will then have to be regulated as if the divorce was petitioned on fault grounds.

Massip[90] in a commentary noted that it was frequent for a spouse to retaliate to a petition for divorce on grounds of breakdown of life in common, by

cross petitioning for divorce on fault grounds.

However, it is important to remember that under art.241 if the cross-petition is successful, it is granted on the grounds of exclusive fault of the principal petitioner. There is no provision (as under the proper fault grounds for petitioning a divorce) to get the divorce declared on grounds of 'shared fault (art.245). This is very explicit. If one traces back to when the divorce reform law was voted by Parliament(11 July 1975) it will be remarked that a suggestion to add to art.241 a provision for 'shared fault' was defeated.

Conclusion:

The writer proposes to draw certain general conclusions from the discoveries of this study.

The first point of interest is that divorce by mutual consent is efficient, that it proves more rapid than other grounds for divorce and that the judges seem to be advocating its use.(91) This is indeed an interesting and important discovery especially in the light of early predictions that the ground would not work. Thus, typically, Glendon predicted that:

"In the case of mutual consent, one cannot help but be reminded that the mutual consent provisions of the 1804 Code were nearly a dead letter even before repeal in 1816 because they were too cumbersome. The same has been true of the mutual consent provisions which remained in force in Belgium even after the end of Napolenic rule"(92)

It will be recalled that Lindon felt these proceedings too cumbersome and predicted a return to fault grounds.

These views, it is submitted, are no longer tenable.

Further, it is submitted that the role of the judge is that of a 'watch dog' of the parties' interests. Initial fears as voiced by Brazier and Glendon notably, that the judge has so much discretion that he might end up indirectly being the author of the parties agreement can no longer be maintained, Where he did play an active role, it was to protect the interests of the spouse and child.

Divorce by mutual consent seems also to be better accepted by younger couples. As Massip's study

revealed this fact was due to its non-contentious procedure which appealed to younger people. This certainly reflects the attitude of those couples who petition for a divorce on this ground - they wish to come to a more amicable settlement of their problems (and this ground was designed to achieve this end). Massip's study revealed that younger couples tended to be less bitter towards each other and preferred to keep their marital problems to themselves(they found it was distasteful to argue them out before a judge).

Divorce by mutual consent certainly appeals to a certain sector of the population and is efficiently catering to their needs.

The fact that judges are recommending those parties who had initially petitioned on fault grounds to apply for a divorce on mutual consent grounds(once they had brought them into agreement during the conciliation process) also shows that the judicial attitude has accepted and tends to favour divorce by mutual consent.

Finally, from the figures previously quoted, it can be seen that divorces on grounds of mutual consent are on the increase. It remains to be seen how far this ground will replace fault grounds.

If fault grounds for divorce is still the most popular form of divorce, it must be noted that this is essentially because most French are oriented towards thinking in 'fault terms'. The Courts will no longer consider adultery on its own to justify the granting of a divorce. The fact that the judges, as noted above, are encouraging couples who have reached agreement to apply for a divorce on mutual consent grounds (and there is provision in the law to do this) proves that the Courts are no longer going to accept this ground for divorce if a more suitable ground can be used.

The area where much can be written about is the ground for divorce for breakdown of life in common, for the French this was a principal innovation to their law because it introduced objective grounds for divorce. However, it is debatable really how objective this ground is. As this study shows the question of intention, the exceptional hardship clause and the cross-petition for exclusive fault of the petitioner, have all brought in a subjective element to this ground. Further the exceptional hardship clause and the cross-petition for exclusive fault of the principal petitioner have re-introduced the notion of fault

to a limited extent. A careful study of this ground for divorce reveals that in fact the petitioner is 'condemned' right from the start as the party in the wrong. To substantiate this submission, one need only turn to art.239. Under art.239, the petitioner has to carry the entire financial burden if his petition is successful. This can end up working against the 'innocent' party. In a case commented upon by Lindon[93] the wife who was deserted by her husband, petitioned for divorce on the grounds of breakdown of life in common, only to find that she had to bear the entire costs of the proceedings. She could have easily got a divorce on fault grounds and saved herself the expense.

The attitude of the judges and academics towards the interpretation of this ground for divorce was split into two radically opposing schools of thought as has been previously stated. However, it is important to note that there is a trend towards moving to a more objective interpretation of the grounds. As Furkel pointed out, when the grounds were introduced, a survey was conducted which showed that the majority of Frenchmen/Frenchwomen were against this form of divorce. However, it is submitted that as Furkel notes, it is a question of time when the Courts and the people will accept objective application of the

grounds.

It should be noted that the use of the grounds has proved successful in the context that the legislator had envisaged.(The situation the legislator had in mind was a long separation, the 'marriage' being an empty shell and presumably another adulterous union existing at the same time. See Annexe 11 for a general overview of the separation periods etc.)

It should also be noted that the future use of the exceptional hardship clause, it is submitted may be more restrictively applied. Religious or certain personal convictions while respected, will not be accepted as valid grounds unless there is some "concrete" evidence that they will affect the party on the divorce being granted. In the same way material grounds,may be viewed differently by the Courts if legislation to revise the special pension schemes is introduced. In a recent case(94) it was also held that where a pecuniary compensation can be made to the non-petitioning party and thus remove the material hardship, the divorce will not be refused. It is also submitted that in those cases where the wife has been living(and still is living) for years in a home owned by

both parties, the Courts may now think in terms of making a property transfer to that spouse and thus grant the divorce.

Certain errors of interpretation, it is submitted can also no longer be made - it is clear for example, that the exceptional hardship clause relates to the consequences that will flow from the divorce.

Although it must be remembered that the Court's approach to these cases will be subjective, it is predicted that the use of this clause will in future be raised less often and that the Courts will favour a more restrictive interpretation of the clause.

Finally, it is submitted that the initial period of the installation of the new law is over. A study of the available grounds for divorce shows that both breakdown of life in common and divorce on fault grounds can be converted to divorce by mutual consent. It is now a matter of waiting to see the evolution of the application of the new grounds for divorce.

Footnotes:

(1) Loi No.75-617 du 11 juillet 1975 portant reforme du divorce, J.O. 12 July 1975 p.7171 (1); D.S.Leg.248, 1975.

(2) Glendon:"The French Divorce Reform Law of 1976" (1976) 24 Am.J.C.L.199.

(3) Lasok:"The Reform of French Divorce Law". (1977) 51 Tul. L.Rev.259.

(4) Research on the paper ended in July 1980.

(5) All cases reported in the Semaine Juridique(J.C.P.) and Recueil Dalloz-Sirey from 1976 (vol.1) - mid 1980.

(6) op. cit. fin.(2)

(7) ibid at 203.

(8) Massip " Le divorce par consentement Mutuel et la pratique des tribunaux" 1979, D.S., Chron.XVlll,117.

(9) Article 230: When the spouses petition together for a divorce, they need not make known the cause; they must only submit for the approval of the judge the draft of an agreement which will regulate the consequences.

The petition may be presented either by the respective lawyers of the parties, or by one lawyer chosen by common accord.

Divorce by mutual consent may not be sought

during the first six months of marriage.

Article 231: The judge is to examine the petition with each of the parties, then to call them together. Then he is to call in the lawyer or lawyers.

If the spouses persist in their intention to divorce, the judge is to advise them that their petition should be renewed after a three-month period of reflection.

In the absence of a renewal within the six months following the expiration of this period of reflection, the joint petition will lapse.

Article 232: The judge is to pronounce the divorce if he is convinced that the intention of each spouse is real and that each of them has given his consent freely. In the same judgment he approves(homologue) the agreement governing the consequences of the divorce.

He can refuse his approval and the granting of the divorce if he judges that the agreement does not sufficiently secure the interests of the children or of one of the spouses.(Glendon op. cit).

(10) op. cit. at 204.

(11) Lindon "La nouvelle legislation sur le divorce" 1975 J.C.P.I. 2728, no.411 à 415

(12) J.A.M. du Tribunal de Paris (ord.12 février, 1976, J.C.P. 1976 11, 18319 note Lindon).

(13) Tribunal de Grande instance de Paris (ord. J.A.M. 16 juillet 1976

(14) f.n.(12) op. cit.

(15) Massip, op. cit.

(16) ibid, Massip urges people to consult the notary before making their initial request for divorce.

(17) idem.

(18) f.n.(13) op. cit.

(19) Divorce on this ground is tended to be favoured by young couples. This can be used as a reason in itself. However, here, the reason that it is wished to be emphasized is that couples with not many possessions tend to favour this form of divorce.

(20) f.n.(12) op. cit.

(21) f.n.(2) at. 205 op. cit.

(22) Gaz. Pal. 17, 18 mars 1976. ct. Lindon op.cit, f.n.(12).

(23) ibid "dans l'atmosphère d'un accord antre époux, d'un consentement mutuel, d'un contract librement consenti entre majeurs, le juge en vienne a solliciter" tant de choses.

N.B. In this case it is not very clear from the facts whether the agreement was collusive or whether the wife did not know about all the factors that were discovered in Court.

(24) f.n.(12) op. cit.

(25) passerelle; foot-bridge;(Nant)bridge,captain's bridge; gangway.

(26) T.G.I. Belfort. Ch. du conseil, 8 mars 1977, J.C.P. II 18654.

(27) f.n.(8) op. cit

(28) ibid, p.118.

"Mais assez souvent, c'est le magistrat, constatant lors de la tentative de conciliation que les époux sont d'accord sur l'ensemble des consequences du divorce ou sont a meme de se mettre d'accord à ce sujet, qui les incite à recourir au divorce gracieux".

N.B. Although, it is the parties only that can ask for a change in grounds under art.246, the magistrates from Massip's findings take an active part in getting the parties to change their grounds.

(29) J.A.M.

(30) f.n.(12) op. cit.

(31) idem.

(32) Raymond Lindon et Philippe Bertin:"La convention dite definitive on le Talon d'Archille du Divorce sur requete Conjointe" 1979 J.C.P.I,2969.

(33) Art.1109 - There is no valid consent if consent was given only by mistake(erreur) , or it it had been extorted by violence or obtained by fraud(dol: this can also mean deceit, wilful misrepresentation).

(34) Lésion - 'laesio enormis) Art.1118.

(35) (1) T.G.I. Mans 3 avril 1979, J.C.P.LI 19230

(2) T.C.I. Nanterre 20 mai 1976

J.C.P. II 18774, note Lindon

(3) La Cour de Dijon, 18 novembre 1978

Gaz. Pal. 1,328 note Brazier.

(see Lindon et Bertin, op. cit, for this case).

(36) Art.887.

(37) It appears from Lindon and Bertin's article, supra, that the decree was still not pronounced. It is unfortunate that we do not know at which point in time the judge registered the wives' consents. If it was when he was examining the request with the parties under art. 231, then it is clear that under art.232 he has to be satisfied that the consent of the parties has been given of their own free wills. If he registered the consent under a finding during proceedings under art.232 it might be argued that so long as the consent was given(and the agreement was in order) the divorce could have been pronounced.

(38) It is important to note that the prerequisite of a divorce by joint petition is that both the parties consent to getting divorced. Without consent of both parties this ground of divorde cannot be used. If during the proceedings one of the parties withdraws his consent, then the whole basis for this ground of divorce collapses. The agreement sets out the consequences that are to take effect on divorce. If a party finds that he is adversly prejudiced by some element of the agreement, he can bring this to the Courts to be reviewed.(as it happened in the Mans case). This does not imply that the party has withdrawn his consent to the divorce. The Courts,using the ordinary law of contract can effectively solve his problem(again this is what happened in the Mans case).

(39) I wish to thank Mr. Atkin for his thought provoking questions on Lindon and Bertin's op. cit,conclusion.

(40) These figures are from Lindon and Bertin, op. cit.

(41) 32% of the couples are childless.

44% of the couples have a child.

20% of the couples have 2 children

and only 4% of the couples have more than 2 children. This date was given by Massip, op. cit f.n.(8)

(42) Article 233: One spouse may petition for divorce by setting forth the fact of a set of acts, proceeding from both spouses, which make the continuation of their life in common intolerable.

Article 234: If the other spouse acknowledges the facts before the judge, the judge is to grant the divorce without ruling on the allocation of fault. A divorce granted in this manner produces the legal effects of a divorce granted for shared fault.

Article 235: If the other spouse does not acknowledge the facts, the judge is not to grant the divorce.

Article 236: The statements made by the spouses may not be used as evidence in any other legal action.

(Glendon op. cit.)

(43) Articles 233 - 235.

(44) T.G.I. Paris ord.J.A.M. 17 June 1976

(45) Decr. no.75-1124 du 5 decembre 1975.

A decret is a law that is voted by the executive. Its main purpose is to supplement laws that the legislative enacts within certain procedural details. For a better understanding of a decret please refer to art.34 and art.37 of the Code Administratif under "TitreV-Des Rapports entre le Parlement et le Gonvernment".

(46) 'huissier' is a general term given to an official who normally carries out the functions of a bailiff, distrainer.

(47) Article 242: Divorce can be sought by one spouse for acts imputable to the other spouse when these acts constitute a serious or repeated violation of the duties and obligations of marriage and render intolerable the maintenance of the life in common.

Article 243: It can be sought by one spouse when the other has been sentenced in a criminal case to one of the punishments set forth in Article 7 of the penal code.

Article 244: The reconciliation of the spouses taking place after the occurrence of the facts alleged bars them from being invoked as cause for divorce.
The judge in such case is to declare that the petition is inadmissible. A new petition can however, be presented on the basis of facts occurring or discovered after the reconciliation, the earlier facts then being admissible in support of this new petition.
The temporary maintenance or resumption of the common life are not to be considered a reconciliation if they result only from necessity or from an attempt at conciliation or from the requirements of the

upbringing of the children.

Article 245: The faults of the spouse who took the initiative in the divorce do not prevent the examination of his petition; they can however, deprive the acts with which he reproaches the other spouse of that character of seriousness which would have made them a cause for divorce.

These faults can also be invoked by the other spouse in support of a cross-petition for divorce.

If both petitions are admitted, the divorce is granted for shared fault.

Even in the absence of a cross-petition, the divorce can be granted for shared fault of both spouses if the trial reveals fault attributable to both of them. (Glendon, op. cit)

(48) The new fault ground is stated in general terms and is available on one ground. In the past the fault ground was divided into specific categories of fault. Adultery, serious violation of marital duties, (under former art.232 "exces sevices ou injures) (excesses, cruelty or abuse)), sentence for serious crime.

(49) (1) T.G.I. Creteil 3 fevrier 1977 D.S.1978 p.20.

(2) Nancy 1re Ch, 14 Mars 1979 J.C.P.11 1979 19210.

(3) Cass. civ. 2e, L, 4 janvier 1980,
J.C.P. II 5 Mars 1980.

(50) 'adulteres reciproques'

(51) op. cit. f.n. 49(3)

(52) It must be remembered this is a Cour de Cassation decision, thus the appreciation of the facts is left to the Courts below. It should be noted that under footnote (10) of art.242 it is stated that the existence of the two conditions(a serious or repeated violation of the duties and obligations of marriage and that the maintenance of life in common is rendered intolerable) are left entirely up to the lower Court judges to find on the facts before them. However, the judges must state that both these conditions are fulfilled.

(53) (1) R. Lindon, "L'Accueil fait par les tribunaux au divorce pour rupture de la vie commune", J.C.P., 1977, I, 2857.

(2) R. Lindon,"L'Accueil fait par les Tribunaux au divorce pour rupture de la vie commune" (Deuxieme suite),J.C.P., 1978, I, 2886.

(3) F. Furkel, "La clause de durete est-elle un mal necessaire?" D.1977, Chron.83.

(4) R. Lindon, L'Accueil fait par les Tribunaux au divorce pour rupture de la vie commune (suite)" J.C.P., 1977, I, 2865.

(5) Massip,"Le divorce pour separation de fait et la pratique des tribunaux,"D.S.1978, Chron 81

(6) Andre Breton, "Jurisprudence en Matiere de divorce(causes)"I.R.D.S. 1978, 9.

(7) Grosliere - D.S. 1978 Chron.628.

(This list if of articles that have been written after the coming into effect of the law).

(54) Article 237: A spouse may petition for a divorce on the grounds of a prolonged disruption of life in common, when the spouses live factually separated for six years - (writer's translation)

Article 238: The same is the case where the mental faculties of the other spouse have been as seriously impaired for a period of six years that the community of life no longer exists between the spouses and cannot, according to the most reasonable conjectures, be reestablished in the future.

The judge may on his own motion dismiss this petition,

without resorting to the provisions of article 240, if the divorce would entail the risk of too serious consequences for the illness of the other spouse.

Article 239: The spouse who petitions for divorce for disruption of the life in common is to assume all of the costs of the suit. In the petition he is to specify the means through which he will fulfill his obligations to his spouse and children.

Article 240: If the other spouse establishes that the divorce would entail, either for him, taking account of his age and of the duration of the marriage, or for the children, material or moral consequences of exceptional hardship, the judge is to dismiss the petition. He can even dismiss it on his own motion in the situation provided for in article 238.

Article 241: The disruption of the life in common can be invoked as a ground of divorce only by the spouse who presents the initial petition, called the principal petition.

The other spouse can then present a petition, called the cross-petition,(demande en revendication') by alleging the fault of the spouse who took the initiative. This cross-petition can only be for divorce and not for legal separation. If the judge accepts the

cross-petition, he dismisses the principal petition, and grants the divorce on the ground of fault of the spouse who took the initiative.

(Glendon, op.cit).

(55) See, Lindon, op. cit f.n.(53)(4); Breton, op.cit f.n.(53)(6); Massip op.cit f.n.(53)(5).

(56) J.A.M. Belfort 9 Juin 1976, J.C.P.11 1976 18454.

(57) T.G.I. Pontoise 28 March 1977, J.C.P. 1977,18657

(58) (a) T.G.I. Paris, 4 april 1977, J.C.P. 1 1977 P.2865, annexe 11 etude Lindon.

(b) Cass. civ. 2^{e} R, 30 january 1980 J.C.P. april 1980.

(59) Cour d'Appel Paris, 1979, J.C.P. 11 19064.

(60) op. cit. f.n.(58)(b)

(61) idem.

(62) 1979 J.C.P. 11, 19064-19065, note Lindon.

(63) 'living apart' here is used to mean not living under the same roof - must be living in two separate residences.

(64) See Massip op. cit. f.n. (53)(5)

(65) It should be noted that the Courts until the Cour de Cassation decision, supra, were looking for the intention of the parties - the subjective element. Thus until recently (30 January 1980) the only approach of the Courts was to ascertain the intention of the parties.

(66) Massip, op. cit. f.n.(53)(5)

(67) In the Cour d'Appel decision, supra(f.n.59) the Cour stated that the 'intention' of the party demanding the divorce on these grounds was necessary. It is well established now, that only the intention of one of the parties to cease life in common is necessary to invoke this ground.

(68) T.G.I., Paris 20 December 1976, 1977 J.C.P. 11 18599.

(69) In other words, this relationship between the spouses could cast no doubts that there was in reality a separation.

(70) T.G.I. Paris 7 February 1977, 1977 J.C.P. 11 18599, note Lindon, D.I.R. 9 obs - Breton op. cit.

(71) ibid, the husband said that he maintained good relations with his wife so that he could persuade her to accept his petition for divorce.

(72) op. cit. (f.n.) 70.

(73) T.G.I. Paris 18 January 1977, 1977 J.C.P. 11, 18599, 3^{e} espece

(74) Breton, op. cit. f.n. (53)(6) at p.10.

(75) "..... la separation de fait implique seulement la disparition de la communaute de vie sur le plan materiel et aussi sur le plan affectif".op.cit. f.n. 58(b)

(76) The little star* signals points of interest on the particular facts of the case. In the chart reference to: W = Wife and H = Husband.

(77) T.G.I. Grasse. Gaz. Pall 1977 1, Som. p.208, see Lindon op. cit. f.n.(53)(2)

(78) Cass. civ. 2e, R, 16 juillet 1979, J.C.P. 7 Novembre 1979, 322.

(79) Cass. civ. 2^{e}, R., 16 janvier 1980, J.C.P. 19 Mars 1980.

(80) Carbonnier, Massip, G. Cornu, Grosliere, Marty et Raynaud, Brazier notably. See also Massip op. cit. for list of articles they have published.

(81) Massip op. cit f.n. 53 and Lindon op. cit. f.n.53.

(82) Massip op. cit. f.n.53.

(83) Simply explained there exist two sorts of pensions:-

(1) "pension légale" - to which every one is entitled to

(2) "pension conventionnelle" - if the husband dies after having divorced his wife, she is not entitled to his pension.

(84) Massip op. cit.

(85) Breton, op. cit. f.n. 53.

(86) please refer to Annexe 11.

(87) Furkel, op. cit, f.n. 53

(88) Lindon, op. cit, f.n. 53(4)

(89) Cour d'Appel Paris, 19 mai 1978,
D.S. 1978 p.588 note Massip.

(90) ibid.

(91) Massip, op. cit. f.n. 53.

(92) Glendon, op. cit. at 227

(93) Lindon op. cit. f.n. 53(2)

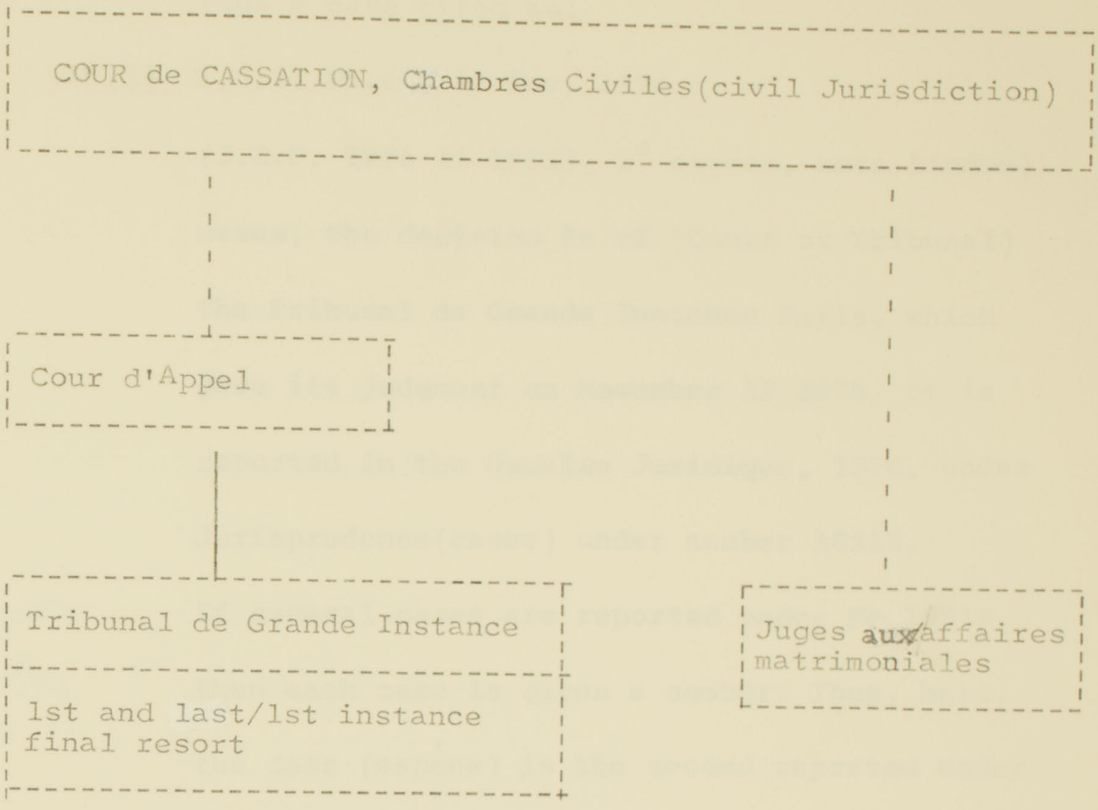
(94) Cour d'Appel de Paris 1re Ch,
16 fevrier 1979, D.S. 1980 590.

ANNEXE I

Sir Otto Kahn - Freund's[1] book is a good starting point for the person not familiar with the French judicial system. However, some basic elements of the French Court structure will be given, as this knowledge will help better understand the terms used in the paper and their connotations.

The various divisions of the French Courts will be referred to by their original designations. It is submitted that the using of the corresponding common-law Court designations would impose certain connotations which do not exist under the French judicial system.[2] The most important factor being that while the Courts are organized in a hierarchical order, their decisions are not binding. However, the decision of the Cour de Cassation, the final Court of appeal on questions of law has a very persuasive if not binding force. It has no jurisdiction to review questions of fact; the lower Courts have the 'sovereign power' of deciding on questions of fact.[3]

The most simple manner of describing the organization of the Courts is by diagram.



Methods of appeal

- - - - - - appeal to Cour de Cassation

———————— appeal to Cour d'Appel.

The standard French method of citation will be used.

All cases and articles referred to are reported in the various editions of:

(a) Recueil Dalloz-Sirey (D.S.or sometimes cited as D.)

(b) La Semaine Juridique (is referred to as J.C.P. - Jurisclasseur Périodique is further divided into parts I Doctrine, II Jurisprudence etc).

Thus a case cited as:

(1) T.G.I. Paris, 12 Nov. 1976

(J.C.P. 1976 11 18513, 2^{e} espece, note Lindon)

means, the decision is of (Court or Tribunal) the Tribunal de Grande Instance Paris, which gave its judgment on November 12 1976. It is reported in the Semaine Juridique, 1976, under Jurisprudence(cases) under number 18513.

If several cases are reported under No.18513, then each case is given a number. Thus, here, the case (espèce) is the second reported under No.18513. If there is a case commentary, the author who writes the commentary is cited along with the case.(note Lindon).

(2) J.A.M. refers to Juges aux affaires matrimoniales, Cass.Civ. to Cour de Cassation Civil.

(3) D.1978. I.R. 11 refers to the Dalloz-Sirey, informations rapides, 1978 at page 11.

For a detailed explanation of the French way of citation and a list of the various French publications in abbreviated form, please refer to Kahn-Frennd, supra.

Footnotes:

(1) Kahn-Freund, Claudine Levey and Bernard Rudden (preface by Audre Tunc), A Source Book on French Law System - Methods, Outlines of Contract, Clarendon Press Oxford, 1976.

(2) Op.cit.

(3) Cass. Civ. 2e, R, 16 janvier 1980

ANNEXE II

Case Number	Age of Women *(age of Husband Case No.15)	Duration of Marriage (up to date of petition)	Period of time living separate lives
No.1	78 years old	56 years	-
No.2	63 years old	-	19 years
No.3	61 years old	38 years	10 years
No.4	-	-	over 9 years
No.5	69 years old	44 years	14 years
No.6	53 years old	26 years	8 years
No.7	-	33 years	22 years
No.8	-	30 years	6 years
No.9	72 years old	30 years	13 years
No.10	-	18 years	7 years
No.11	-	37 years	20 years
No.12	68 years old	46 years	10 years
No.13	72 years old	42 years	24 years
No.14	-	37 years	15 years
No.15	*60 years old	36 years	10 years(approx)
No.16	65 years old	41 years	15 years
No.17	57 years old	31 years	9 years
No.18	56 years old	33 years	over 6 years
No.19	72 years old	38 years	25 years
No.20	54 years old	34 years	-

Case Number	Age of Women *(age of Husband Case No.15)	Duration of Marriage (up to date of petition)	Period of time living separate lives)
No.21	68 years old	13 years	8 years
No.22	62 years old	39 years	9 years
No.23	67 years old	45 years(approx)	12 years
No.24	(8 years older than husband)	-	over 10 years
No.25	71 years old	-	approx.33 years
No.26	66 years old	32 years	13 years
No.27	64 years old	46 years	13 years