The Law Reform Commission of Hong Kong

Consultation Paper

Grounds for Divorce

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CONTENTS

Introduction

Why consider the law on divorce?

The number of marriages ending in divorce has risen dramatically in recent decades.[1] As a consequence, those who must undergo the legal divorce process are no longer the "deviant" few, but a large and ever-increasing sector of our community. This dramatic rise in the number of people affected, and the unhappy social consequences which every divorce leaves in its wake, have led many jurisdictions in recent years to implement major reforms of their law in this area.[2] At this moment the English Law Commission is finalizing its recommendations for substantial changes to the law on ground for divorce.[3] The Scottish Law Commission produced a similar report only last year.[4] It is therefore timely that we re-examine the state of Hong Kong's legislation.

Terms of reference

This paper relates to one of a number of references in the area of family law which are presently being considered by the Law Reform Commission. The terms of reference for this particular topic are:

> *"to consider the ground for divorce prescribed in section 11 [of the Matrimonial Causes Ordinance] and the facts which establish that ground prescribed in section 11A of that Ordinance."*[5]

The need for wide public consultation

This is an area of the law fraught with social issues. Should the

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1 For example, figures for Europe show that the increase in the rate of divorce for the period 1960-1984 was: UK 460%, France 200%, Germany 133%, Netherlands 380% and Belgium 280%: see Law Commission of England and Wales, *Facing the Future - a Discussion Paper on the Ground for Divorce* (1988) Law Com No 170, p 8 n 54.
In Hong Kong the rise has been similarly dramatic. There were 809 decrees absolute granted here in 1976; in 1986 the figure was 4,257 - an increase of over 425%: see Appendix A at the end of this paper.

2 In a number of countries or states, the law has been reformed from a system of mixed fault and no-fault grounds for divorce to one of no-fault only: (a) where a period of separation is the only ground/fact relied on: Australia (1 year) (1975); New Zealand (2 years) (1980) and in the US - Arkansas (3 years), Louisiana (1 year), Maryland (1 year), North Carolina (1 year), Ohio (1 year) and Vermont (6 months); (b) other no-fault grounds, including "mutual consent": Sweden (1974) and in the US - Arizona, California, Colorado, Florida, Kentucky, Michigan, Minnesota, New York and Wisconsin : see *Facing the Future*, op cit n 1, nn 2, 24 and 33

3 These, together with a draft bill, are expected to be published later this year:·see "Reform should not make divorce easy" *The Times*, 9 Mar 1990

4 Scottish Law Commission, *Report on Reform of the Ground for Divorce* (1989) Scot Law Com No 1160

5 Signed by the Attorney General, Mr Jeremy Mathews and the Chief Justice, Sir TL Yang, December 1989.

law “punish” parties to “failed” marriages by continuing with “fault-based” criteria for divorce? What is the minimum period of separation for the spouses to fully consider what they are doing? How can we regulate personal relationships to minimise the consequences, both to the individuals concerned and to society at large, of “the broken home”? Should conciliation efforts be mandatory? If the law's function is to preserve social order - and “the family” is the primary structure of that order - how much further can we “liberalise” divorce law before we threaten social stability? It is within the context of issues such as these that any reform proposals must be considered.

The purpose of this paper is to examine the state of our existing law on the ground for divorce and to canvass the various options for reform. A reform model is suggested for Hong Kong, as a basis for discussion.[6] Because of the major social impact which changes to the law in this area will have, it is submitted that wide public consultation should be carried out before any reform recommendations are implemented. This might be achieved either directly, through consultation with interested groups and/or the public at large, or by way of the deliberations of a sub-committee.[7]

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6 Infra, Chapter 5.

7 The Scottish Law Commission undertook a specific public consultation exercise in 1988 when it released its discussion paper entitled *The Ground for Divorce: Should the law be changed*? (1988) Scot Law Com DP No 76. The public findings received (some of which appear to have surprised the Commission) formed the basis of the Commission's later (much revised) report: “Reform of the Ground for Divorce”, op cit n 4 (discussed below in Chapter 4).

Chapter 1

Background to the present law

1.1 In this century, we have seen a relative liberalisation of the former strictures of the law of divorce. We have also witnessed in this century what would appear to be an "exponential" increase in the rate of divorce.[8] Taken together with the ever-rising crime rate, this might tend to suggest that the structure of society is no longer as stable as it once was. At the same time, however, there have been major industrial and economic developments which have had a marked bearing on the way society now functions. It may be therefore, that rather than exacerbating or even leading the situation, the law of divorce, in becoming increasingly more "liberal", has merely reflected natural social development. In the light of this, it becomes important, before considering future reforms of our law on divorce, to examine how we have arrived, sociologically and legally, at where we are today.

Divorce: the social background

1.2 The radical social changes which we see in the society of today appear to have their origins in the industrial revolution. The rise of trade and industry brought with it a shift in the West from inherited wealth to industrial wealth. Prosperity became more generalised. This in turn seems to have caused a shift in focus away from the traditional interests, of the state and the church, to those of the individual -ie- to his "pursuit of personal happiness". Increased employment and consequent earning and spending power in modern times have contributed greatly to the relative "emancipation" of women and young people generally. It is now available to young people to set up households independently of their parents, either as single adults or as "young marrieds".[9]

1.3 In its wake, this radical restructuring of the traditional social order has brought major challenges to "traditional" social values, including those related to marriage. The notion of "marriage" has shifted away from the fundamentalist view, that it is a "duty" and is necessarily "for life", Marriage is no longer seen as primarily a viable economic institution to safe-guard the upbringing of children. Marriage today is perceived much more as a partnership of equals, whose expectations for personal fulfilment from the marriage are very high. In the words of the English Law Commission:

> *"What has been called "institutional" marriage, which largely*

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8 For example, see the figures given, op cit n 1, for various European states in the 1960-1984 period, which range from a "low" in Germany of 133% to 460% in the UK. In Hong Kong, the figure for 1976 to 1986 alone is over 425%: op cit n 1 and Appendix A.

9 See *Facing the Future*, op cit n 1, para 2.19.

entails economic functions and the provision of. domestic services, has been replaced by what may be called "companionate" marriage, which requires a continuing successful emotional relationship. The latter is obviously far more difficult to sustain than the former."[10]

1.4 It seems that this change in attitude in the West is due largely to the emergence of "female autonomy". The new-found financial independence of women, through their greater participation and more equal footing in the work-force, has meant a change in their expectations (and consequently those of society's in general) of what "marriage" means and what it should provide. A woman today is far less dependent on her husband financially than was the case in former times and therefore has a realistic choice to leave if she is unhappy. Her grandmother rarely had such choice.

1.5 The social acceptability of divorce has undoubtedly increased.[11] With the common expectation that marriage should be emotionally rewarding, it would seem that individuals are inclined to feel quite justified these days in leaving an unsatisfying relationship in order to search for another holding more promise. As a result, the marital status of "divorced" no longer carries the social stigma it once did.

Legal development of our current ground for divorce

1.6 As the divorce law of Hong Kong is based very largely on equivalent English legislation, one needs to look there for the history of its development. The earlier law on divorce in England was heavily based on religious tenets and was originally administered by the ecclesiastical courts.[12] Prior to the Divorce Reform Act 1969,[13] the law of divorce was entirely "fault based". One could only obtain a divorce by proving that a "matrimonial offence" had occurred. It was thought that establishing a standard of moral behaviour would be the best way to protect the institution of marriage and discourage the "setting up of extra-marital unions".[14] These relevant "offences" included adultery, cruelty and desertion for three years. Relief could be refused to a petitioner who had himself committed such an offence, or, indeed, if he were guilty of "condonation", "connivance" or "conduct conducing to" the matrimonial offence of the respondent.[15] Thus, theoretically, there could be no such thing as "consensual divorce". The divorce was sought by one spouse against the other in circumstances which were necessarily adversarial (at very best uncontested), with all the attendant bitterness and distress to the parties and their children which this would invoke.

1.7 Over time, as the demand for divorce increased, the short-

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10 Idem.
11 Ibid, para 2.17.
12 *Rayden and Jackson on Divorce*, 15th ed (1988), p 1.
13 The substantive law on divorce in England is now contained in the Matrimonial Causes Act 1973. In Hong Kong, we have the Matrimonial Causes Ordinance Cap 179; LHK 1983 ed.
14 *Facing the Future*, op cit n 1, para 3.6.
15 Rayden, op cit n 12, p 307.

comings of this regime became manifest. Essentially, the fault-based system "*did not accord with social reality*".[16] Even though a marriage might truly have broken down, if one of the specific matrimonial offences had not been committed, or could not be proven, the divorce was refused. On the other hand, "*there was no real barrier to consensual divorce where both parties wanted it and one was prepared to commit, or perhaps appear to commit, a matrimonial offence to supply the necessary ground.*"[17] The main failing of the system must surely have been this artificiality: was the court in any real position to allocate blame when often "both parties were at fault, and … matrimonial offences were often merely symptomatic of the breakdown of the marriage rather than the cause"[18]?

1.8 In 1966, a group set up by the Archbishop of Canterbury, which had been looking into the then current law of divorce for some two years, issued a report entitled *Putting Asunder - A Divorce Law for Contemporary Society*.[19] Later that same year the English Law Commission produced its report in response: *Reform of the Grounds of Divorce - The Field of Choice*,[20] It seems that the arguments and recommendations contained within these two reports prompted the reforms of the law of divorce which now constitute our present legislation.

1.9 In essence, the reports of both groups were in agreement: that a fault-only basis for the law of divorce did not work satisfactorily. The main criticisms cited in both reports were that: the parties and the court were obliged to dwell on past delinquencies while ignoring the current state of the marriage, only exacerbating the bitterness and distress already felt by the parties; many spouses who could not get out of their marriages legally simply left them to form "stable illicit unions" with new partners; on the other hand, divorces were readily available to parties willing to commit or to appear to commit a matrimonial offence. Both groups agreed that the law should be reformed to allow marriages which had irretrievably broken down to be dissolved in a humane fashion.

1.10 In *The Field of Choice*, the English Law Commission went on to consider what should be the primary objectives of a good divorce law. These "Field of Choice criteria"[21] can be summarised as "the support of marriages which have a chance of survival", but "the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead."[22]

1.11 The recommendations put forward by the Commission to meet these aims resulted in the Divorce Reform Act of 1969. Its main reform was to

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16 *Facing the Future*, op cit n 1, para 2.3.

17 Ibid, para 2.2.

18 Idem.

19 (1966) SPCK (Chairman: The Rt Rev RC Mortimer, Lord Bishop of Exeter). The Group was initially appointed to the task in January 1964.

20 (1966) Law Com No 6, Cmnd 3123

21 Coined as such by the Commission in its later report, *Facing the Future*, op cit n 1, para 3.1.

22 *The Field of Choice*, op cit n 20, para 120(1). The more specific criteria which the Commission discussed were adopted again by the Commission in *Facing the Future*, op cit n 1, paras 2.3 and 3.1 - 3.47. They are also considered later in this paper, at Chapter 3.

remove the old “matrimonial offence” grounds for divorce (along with the former bars to relief of connivance, collusion and condonation) and to replace these with a new sole ground for divorce: “irretrievable breakdown” of the marriage. Breakdown was to be proven by the existence of one of five “facts”. Despite the apparent departure from the former wholly fault-based regime, three of these “facts” bore a striking resemblance to the former matrimonial offence grounds, namely adultery, behaviour and desertion. However the legislation did introduce two new, “no fault” facts as a basis for divorce: two years separation with the other spouse's consent to the decree, or five years separation without it. The detailed workings of these reform provisions, upon which our own system is also based, are discussed later in this paper.[23]

1.12 Since the advent of these reforms, it is significant to note that the divorce rate in England has risen quite dramatically.[24] The English Law Commission, in its recent discussion paper, obviously considered this a matter of some concern.[25] As the Commission states: “*It is tempting to blame the large increase in the number of divorces upon the reforrn of the law by the 1969 Act and to suggest that it has fundamentally weakened the institutions of marriage and the family.*”[26] The Commission cites a number of reasons which contradict this conclusion and argues that, in actuality, the change has “*taken place over a long period and cannot be measured in such a way as to give an obvious explanation of its causes.*”[27] In any event, they argue, this increase is “*not as dramatic as the divorce figures would suggest*”[28] They go on to state:

> *“[S]ince it is quite clear that the phenomenon of increased marital breakdown has been widespread and independent of changes in divorce laws, it must largely be explained by reference to·other factors, principally the demographic, socio-economic and attitudinal changes which have taken place throughout Western society during this century ... [none of which] can be affected by the substance of the divorce law as such.”* [29]

1.13 Nevertheless, the Commission explains in some detail that two factors coincidental with the 1969 reforms have had some bearing on the increased rate of divorce.[30] Before the 1969 reforms, many marriages, although permanently broken, did not end in formal divorce but in permanent separation. If formalised, these arrangements were dealt with in the magistrates court in judicial separation proceedings. This was a common resort for those in lower socio-economic groups who could not afford the expense of

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23 Infra, Chapter 2.

24 “*Since the beginning of 1971, when the 1969 Act came into force, the number of divorces each year has more than doubled*": *Facing the Future*, op cit n 1, para 2.10. The figures for England and Wales, given by the Commission at Appendix A of its report, show that (per thousand married persons) decrees absolute were granted to 25 in 1961, 74 in 1971 and 154 in 1986.

25 Ibid, paras 2.14 - 2.22.

26 Ibid, para 2.14.

27 Ibid, para 2.15.

28 Ibid, para 2.15.

29 Ibid, para 2.17.

30 For the Commission's full discussion of all the various factors which have been identified, see ibid, paras 2.14 - 2.22.

a full court divorce. Nowadays, with a more simplified procedure available,[31] divorce has become more affordable for all levels of society. Consequently, such marriages today usually end in divorce.

1.14 The other important factor of the 1969 reforms was that alternatives to the fault ground were now available. Apparently in former years "*many cases of matrimonial breakdown did not come before the courts at all, perhaps because no matrimonial offence had been established or because the potential petitioner could not face the ordeal of proving one.*"[32] With the fact of separation becoming available as a basis for divorce, this no longer had to be the case.

1.15 The Commission notes that these two factors were quite likely to lead to an evident "jump" in the divorce statistics after the 1969 reforms.[33] There was suddenly a means of satisfying the "pent-up demand for divorce" in cases where it had previously been unavailable or too difficult to obtain, but the marriage had·nonetheless irretrievably broken down. The Commission was obliged to observe, however:

> *"[I]t seems likely that divorce laws contribute to "an increasing disposition to regard divorce, not as the last resort, but as the obvious way out when things begin to go wrong."*[34] *If so they may have contributed to some extent to the increased rate of marital breakdown. "*[35]

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31 In particular, we now have the "special procedure" provisions which allow certain undefended divorces to be processed "on the documents" without any need for an open court hearing: Matrimonial Causes Rules Cap 179, LHK 1983 ed, rule 33(2A). This procedure seems to be used in approximately one-third of all undefended divorces in Hong Kong: Pegg, *Family Law in Hong Kong* (2nd ed, 1986) Butterworths, p 117. The current matrimonial proceedings legislation is discussed in more detail, infra, Chapter 2.

32 *Facing the Future*, op cit n 1, para 2.15.

33 Ibid, para 2.15.

34 *Report of the Royal Commission on Marriage and Divorce* (1956) Cmd 9678, para 70(v) (Chairman: Baron Morton of Henryton).

35 Ibid, para 2.17

Chapter 2

Our present law

2.1 The law of divorce as a whole is a broad subject, consisting of complex rules and case law. The discussion below focusses specifically on one aspect of the law, that of the ground for divorce. The relevant legislation is contained in the Matrimonial Causes Ordinance[36] and Rules.

Irretrievable breakdown and the five facts

2.2 Section 11 of the Ordinance states that the sole ground upon which a petition for divorce may be presented is that "the marriage has broken down irretrievably". Proof of this can only be given by establishing one or more of the facts set out in section 11A(1), as follows:

> *"(a) that the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent;*
> *(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;*
> *(c) that the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition;*
> *(d) that the parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition and the respondent consents to the decree being granted;*
> *(e) that the parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition."*[37]

2.3 There is a duty upon the court to inquire, "so far as it reasonably can", into the facts alleged by the parties. If the court is satisfied on the evidence that any of the facts mentioned in section 11A(1) have been established, then the court shall grant the decree nisi, unless on all the evidence it is satisfied that the marriage has not irretrievably broken down.[38] In practice though, this latter may be difficult to prove. As observed by one learned writer:

> *"[T]he true position in most cases is that however relenting and desirous of reconciliation the respondent spouse may be, the marriage cannot be said to have not irretrievably broken down*

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36 Op cit n 13.
37 Each of these five "facts" is considered in more detail below.
38 Cap 179, LHK 1983 ed, s 15(1) and (2), though note also the exception under s 15(3).

when the petitioner is not prepared to continue cohabitation." [39]

However, the converse is also true: that even if "the marriage has clearly broken down irretrievably, the court is not able to hold such unless one or more of the five facts is proven to the court's satisfaction."[40]

Adultery

2.4 In order to establish this as evidence of irretrievable breakdown, there are two facts which must be present. The first is the fact of "adultery" itself. Adultery may be defined as "*consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage".*[41] (Although in Hong Kong, we must also note the "customary marriage" exception to this contained in section 2 of the Matrimonial Causes Ordinance.) It seems that the adultery need not be proved beyond reasonable doubt, though the standard of proof is "high".[42] It may be inferred from established facts, for example love-letters[43] or a locked door.[44] Only one act of adultery is needed for the purposes of the provision.[45]

2.5 The second limb of the "adultery fact" is that "the petitioner finds it intolerable to live with the respondent". It is interesting to note that these are apparently not co-dependent; it seems there need be no causal connection between the adultery and the intolerability. The court must satisfy itself nonetheless that the intolerability is real and not merely the petitioner's bare assertion.[46]

Behaviour

2.6 The conduct complained of "must correspond in gravity to that needed to establish the former matrimonial offence of cruelty, or; expulsive conduct which would justify the other spouse leaving the matrimonial home."[47]

2.7 This fact differs from the adultery fact in one marked respect: "the question is not whether the petitioner finds it intolerable to live with the respondent, but whether he or she can be reasonably expected to do so."[48] The test is therefore objective, in that the court is to determine whether the petitioner can reasonably be expected to live with the respondent. However it is also subjective to the extent that the court assesses what is reasonable for

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39 Pegg, op cit n 31, p 72, citing *Lindsay v Lindsay,* DC, Div Jur, Action No 1569 of 1982.
40 Idem. This is apparently one of the most unfortunate short-comings of the present legislation: see infra, Chapter 3
41 *Rayden and Jackson on Divorce*, op cit n 12.
42 Pegg, op cit n 31, p 74.
43 *Wong Chan Ying Hon v Wong Chik Wai*, SC, Div Jur, Action No 236 of 1971.
44 *Lily Li v Patrick Pih Tseng Wu* [1956] HKLR 363.
45 See Pegg, op cit n 31, pp 73 and 74.
46 Ibid, p 75.
47 Ibid, p 79.
48 Ibid, p 77.

that particular petitioner.[49] The test is:

> *"[C]an this petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent? "* [50]

2.8 There is clear English authority for this "fact" to extend to the behaviour resulting from the mental or physical illness of the respondent. For example, in *Thurlow v Thurlow*[51] a decree was awarded against a respondent, who, while confined to her bed and suffering a severe neurological disorder, was guilty of violent behaviour and attempting to burn down the matrimonial home. The same principle has been applied in Hong Kong.[52]

2.9 Although in most general behaviour cases the type of behaviour cited in Hong Kong would be similar to that cited in England, some of the special circumstances of local life may give rise to different approaches: for example, over-crowded living conditions here. (It is apparently not unheard of for married couples in Hong Kong to cease having sex because there is so little privacy available in their homes.[53])

> *"[T]he extremely difficult living conditions for the majority of people in Hong Kong probably cause much more matrimonial discord that might not arise in a better environment, and in some cases cannot really be attributed to the unreasonable behaviour of either spouse."* [54]

In one local case, the divorce petition based on behaviour was refused, because the court heard that the husband, the wife and their four teenage children, shared a small stone hut with eight other people.[55]

2.10 Another feature which might suggest that a different approach would be taken by local courts is the greater prevalence here for the traditional view of the status of women. It would seem, however, that the "wife as a chattel" mentality has found little favour with local courts, particularly where force may have been used to impose male authority.[56]

2.11 It is clear that in England the relevant behaviour, for the purposes of the divorce petition, may take the form of an accumulation of isolated incidents,[57] though for some reason *"in similar cases in Hong Kong, the courts have seemed to show a reluctance towards finding behaviour to be established."*[58]

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49 Idem.
50 *Ash v Ash* [1972] 1 All ER 582.
51 [1976] 2 All ER 979, following *Katz v Katz* [1972] 3 All ER 219.
52 Eg, *Lee Yuen Sam v Lee Tang Hop Wo*, HC, Div Jur, Action No 6 of 1979.
53 Pegg, op cit n 31, p 82
54 Idem.
55 *Chan Cheng Siu Kun v Chan King Kan*, HC, Div Jur, Action No 6 of 1979.
56 Eg, *Chau Lam Luk Sung v Chau Tai Pay*, HC, Div Jur, Action No 20 of 1978.
57 *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47.
58 Pegg, op cit n 31, p 83, citing *Li Kao Feng Ning v Li Hung* LI, CA, Civ Action No 58 of 1983.

Desertion

2.12 The law in this area is complex as there are a number of elements which must be established to prove desertion: the fact of separation; the intention to live apart permanently; the absence of the other spouse's consent to the separation; the absence of reasonable or just cause for the separation; and a period of not less than two years separation immediately prior to the presentation of the petition for divorce.[59]

2.13. With regard to the element of separation, it has been said that "[d]esertion is not the withdrawal from a place, but from a state of things."[60] It is the renunciation of conjugal duties. Desertion may be established even where the parties remain living under the same roof, but they must nonetheless be living in "separate households."[61] The intention to live apart permanently must also exist, and this must be communicated to the other spouse.[62] This may however be negatived by supervening events rendering the deserting spouse incapable of the requisite intention, for example, the onset of mental breakdown.[63]

2.14 There is no desertion if the parties agree to separate, and the agreement may be express or implied. The test is whether there is a causal link between the separation and the other party's consent to it; if there is, then the separation is consensual. However, if the consent is subsequently withdrawn, then "desertion will begin to run if other elements are present.[64]

2.15 If the party who leaves has no reasonable cause for doing so, this may constitute desertion. However, "just cause" might be shown if the other party's conduct was "so grave and weighty as to make married life impossible."[65] Also, a respondent would have had just cause to leave his spouse in order to protect himself or their children.[66] Even in cases where the respondent is mistaken about the truth of his "just cause" to leave, if his belief were honest and reasonable, then his leaving would not have been desertion. A common instance of this type of case is where the respondent believed mistakenly that his spouse had committed adultery.[67]

2.16 The minimum period of the desertion is only two years, as with the "separation with consent" fact. If this were not the case, the petitioner alleging desertion would be disadvantaged in comparison to petitioners who can rely on separation with consent.[68]

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59 Ibid, p 84.

60 *Pulford v Pulford* [1923] P 18, per Lord Merrivale P.

61 Eg, in *Hopes v Hopes* [1948] 2 All ER 920 (CA), though the couple slept in separate rooms and the wife would not wash or mend for her husband, she was found not to have deserted him as he ate with the family and used rooms in common with them.

62 *Beeken v Beeken* [1948] P 302.

63 Pegg, op cit n 31, p 85. Though it remains open to the court to treat the period of desertion as continuing nonetheless: see s 11A(2) of the Ordinance.

64 Ibid, p 86.

65 *Dyson v Dyson* [1953] 2 All ER 1511, per Barnard J.

66 Eg, *G v G* [1964] 1 All ER 129 (violent outbursts of anger which frightened the children).

67 Pegg, op cit n 31, p 88.

68 Idem.

2.17 There is also a separate form of desertion known as "constructive" desertion: where the spouse who actually leaves the matrimonial home does so because "*he or she is driven out by the expulsive words or the expulsive conduct of the other*".[69] It is the spouse who remains in the matrimonial home, and not the spouse who leaves, who is said to be in "constructive" desertion. The expulsive conduct must be "*grave and weighty*"[70] and must be intended,[71] so that it would be reasonable for the spouse who leaves to believe he is being told to go. It seems also that the gravity of the conduct involved in constructive desertion (though not simple desertion[72]) would be sufficient for the petitioner to plead instead the behaviour fact referred to above. The significance of this is that there would be no need therefore for the petitioner to wait the two years required to plead constructive desertion.[73]

2.18. Desertion is said to be terminated once one of the elements described above no longer applies: the parties resume living together; the intention to desert is no longer present; the other party now consents to the separation; or, subsequent to the desertion, "just cause" for the party to have left arises.[74]

Separation for two and five years

2.19 To rely on the fact of separation, the petitioner must establish that the parties have been separated for at least two years and that the respondent consents to the decree being granted, or that the parties have been apart for at least five years where there is no such consent. In considering whether the separation fact is established, the court is not concerned with matters of fault between the parties.[75]

2.20 The legislation states that "a husband and wife shall be treated as living apart unless they are living with each other in the same household."[76] It seems that it is possible for the parties to be maintaining separate households while still living under the same roof.[77] It has been stated that "the courts are examining a state of affairs which exists between the parties; and the question is, are they or are they not still living with each other in one household as a married couple, albeit in a state of chronic discord?"[78]

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69 Ibid, p 89.

70 *Saunders v Saunders* [1965] P 449.

71 There has been some judicial controversy as to the burden of proof on this point. "*For a long time, the courts supported the view that [intention] could be proved by the petitioner relying on a presumption that the respondent intended the natural and probable consequences of his conduct. The presumption was rebuttable, but the Privy Council in Lang v Lang ([1955] AC 402) considered that such was only rebutted on proof of a contrary intent, not merely on' a hope or desire that the other would stay*": Pegg, op cit n 32, p 89.

72 *Stringfellow v Stringfellow* [1976] 2 All ER 539 (CA).

73 Pegg, op cit n 31, p 90.

74 Idem.

75 Idem.

76 Cap 179, LHK 1983 ed, s 11A(3).

77 *Hopes v Hopes,* op cit n 62; *Mouncer v Mouncer* [1972] 1 All ER 289.

78 Pegg, op cit n 31, pp 92-93.

2.21 In addition to the factual separation, the party petitioning for divorce must also establish a certain mental element -ie- that he has “ceased to recognize the marriage as subsisting and never intend[s] to return to the other.”[79]

2.22 The consent required, if the two year separation period is to be sufficient for divorce, roust be positive consent, not mere acquiescence.[80] The Matrimonial Causes Rules even provides a specific form for the consent to take.[81]

Reconciliation

2.23 There are various provisions in the legislation which aim to encourage reconciliation between the parties, both before and during the course of the proceedings.

2.24 The petitioner is required to obtain a solicitor's certificate as to whether, prior to the commencement of proceedings, the solicitor discussed the possibility of reconciliation with the petitioner.[82] However, as one learned writer has observed, the solicitor does not have to discuss this with the client, as indeed he may consider it futile, especially if the parties have been separated for some time.[83]

2.25 Section 15A(1) of the Ordinance empowers the court to adjourn the proceedings at any stage if it feels that "there is a reasonable possibility of a reconciliation between the parties to the marriage.” The court “may adjourn the proceedings for such period, as it thinks fit to enable attempts to be made to effect such a reconciliation.” Arguably though, by the time the case has reached the hearing stage chances of a reconciliation are remote. Further, it is asking a great deal of the court to perceive, particularly where most of the proceedings are conducted by way of written statements, whether a real chance of reconciliation exists.

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79 Ibid, p 94, citing *Santos v Santos* [1972] Fam 247.
80 *McG (formerly R) v R* [1972] 1 All ER 362.
81 Cap 179, LHK 1983 ed, rule 14(5) and form 4.
82 S 18B(b) of the Ordinance and rule 12(3) form 2A.
83 Pegg, op cit n 31, p 96.

Chapter 3

Is reform necessary?

Does the present law meet its objectives?

3.1 In its discussion paper the English Law Commission considered at some length the various theoretical criteria which would go into the making of a good divorce law.[84] They cited the objectives identified in their earlier report which ultimately led to the 1969 Divorce Reform Act. These they termed the "Field of Choice criteria." It would seem that they are equally applicable today, as then, as a litmus test for the effectiveness of our present legislation.

"To buttress the stability of marriages"

3.2 The main failure of the former "fault only" law was identified as being its artificiality.[85] Although it was ostensibly a "fault only" regime, couples could effect immediate consensual divorce by either "volunteering" to commit the required offence or by "dressing up" innocent circumstances so that a relevant offence (for example, adultery) could be inferred. In the present legislation, the emphasis on the "irretrievable breakdown" of the marriage is intended to prevent this abuse. Accordingly, in addition to alleging the fact of adultery, the petitioner must find it intolerable to live with the respondent. Similarly, in behaviour cases the petitioner must allege also that he cannot reasonably be expected to live with the respondent.

3.3 It has been noted however that "virtually any spouse can assemble a list of events, which, taken out of context, can be presented as unreasonable behaviour sufficient on which to found a divorce petition."[86] In adultery cases, a respondent's admission in respect of even an unnamed third party is sufficient. This is why adultery is considered to be an "easy option" for many divorcing couples.[87]

3.4 The magnitude of this potential for abuse is evident when one considers the English statistics. In 1985, petitions there based on behaviour constituted 40% of total petitions, while those based on adultery accounted for 29.7%. The median time for the processing of these petitions, from petition to divorce, was 8 months and. 7.2 months respectively. These figures seem to indicate that, in England at least, the efforts of the 1969 reforms to buttress the institution of marriage in this respect have, in practice, made little difference. The English Law Commission has observed:

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84 "Facing the Future", op cit n 1, paras 3.1 - 3.5.
85 Ibid, para 3.8.
86 Idem.
87 Idem.

"Experience from abroad, together with that in this country would tend to suggest that it is not possible to prevent parties obtaining immediate consensual divorce so long as immediate divorce is available upon fulfilment of certain requirements, because determined parties will succeed in satisfying the conditions." [88]

3.5 The second way in which the present law endeavours to meet the objective of buttressing marriage is contained in its provisions to promote reconciliation between the parties. The intention is to "ensure that the legal process of divorce does not deter the parties from attempting reconciliation or diminish any chance, however small, of its success."[89] It would seem however that certain aspects of the present law doom this particular intention to failure.

3.6 The requirement that a solicitor file a certificate stating whether or not he has discussed the possibility of reconciliation with his client does not actually impose an obligation on the solicitor to have done sol Theoretically he could simply certify that he has not discussed reconciliation with his client and still satisfy the requirement.[90]

3.7 The court is obliged, if there is evidence to suggest that reconciliation between the parties is a possibility, to adjourn the proceedings until that avenue has been explored. It is clear however that there is little opportunity for the court to do more than look at the documents presented to it in order to assess the possibility of reconciliation. Furthermore, any real usefulness of either this or the solicitor's certificate provision, in promoting reconciliation, have been almost entirely negated by the advent of the "special procedure"[91] divorce. This has led the English Law Commission to recommend the repeal of their equivalent certificate provisions, as serving no useful purpose.[92]

3.8 The third method by which the present legislation seeks to facilitate reconciliation is by allowing parties to attempt trial reconciliations for up to six months, without it cancelling the time which may have already "accrued" towards a separation period required for divorce. Similarly, periods of living together which are less than six months since the last act of adultery· or incident of behaviour are discounted. The Law Commission described the effectiveness or otherwise of these reforms as "impossible to estimate",[93] though they must certainly have been a considerable improvement on the earlier law which effectively prohibited such attempts, because of the risk of losing any right of action at all. Nonetheless, as the Scottish Law Commission has noted, it is still unfortunately true that "[a]s the end of this period approaches the law provides an incentive to separate."[94]

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88 Idem.
89 Ibid, para 3.11.
90 Ibid, para 3.9.
91 Ie, divorce "on the papers" rather than by court appearance.
92 Idem.
93 Idem.
94 "The Ground for Divorce: Should the Law be Changed?" op cit n 7, p 4.

3.9 In its working paper, the English Law Commission appears to conclude that, even if the above provisions were in themselves more effective in promoting reconciliation, various other factors in the present divorce process tend very strongly to discourage it:

> *"First, the need to prove a fact, particularly if behaviour is used, can force the petitioner into an entrenched and hostile position from the outset. If the marriage has not broken down already, the allegations made may alienate the respondent to such an extent that irretrievable breakdown then occurs. Secondly, once the petition is filed the divorce may be obtained relatively quickly with little opportunity for reflection…the proceedings can develop a momentum of their own. Thirdly, some spouses may be unable to find alternative accommodation or rearrange the occupation of their existing home unless they are divorced. Some, perhaps especially wives, may therefore be driven to divorce simply in order to achieve a separation. Any chance, however small, of reconciliation after a cooling-off period is lost. Finally, any time limit on the period during which the parties may live together after a fact has arisen can cause difficulties for a spouse who is genuinely ambivalent about ending the marriage."* [95]

3.10 In relation to the "buttressing of marriage", a more philosophical question is whether indeed this remains a proper objective of the law. With the modern movement away from the State-endorsed "religious duty" notion of marriage, to one of it being part of "the individual pursuit of personal happiness", does the State any longer have a valid role in endeavouring to buttress the institution of marriage?

3.11 This would appear to be a relevant issue, because the modern rise in the divorce rate can often lead to calls from some conservative quarters to "toughen up" the divorce laws and to make them more, not less, restrictive, so that divorces are not so "easy to get" as they are now. The divorce rate appears to be seen as certain evidence of modern moral decline and the thinking appears to be that if people who wish to divorce can be made obliged to stay together, then "marriage" and society in general will return to its former "stability". Surely the fallacy of this view is clear: "divorce laws as such can never prevent spouses who have the means to do so from leaving home or couples who wish to do so from separating by consent."[96]

3.12 The contrary argument also has been put that, "in today's plural and secular society, many people will respect the value of family life without subscribing to the Christian system of morality which formed the basis of the earlier law."[97] This argument would appear to be particularly appropriate for Hong Kong. Indeed, as we have seen in the earlier discussion, there are many factors underlying the rise in the divorce rate, most of which stem, paradoxically, from a higher expectation than ever of the satisfaction to be

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95 "Facing the Future", op cit n 1, para 3.11.

96 Ibid, para 3.6.

97 Idem.

derived from the marriage state.

"To enable the 'empty shell' of the marriage to be destroyed"

3.13 The substance of the law of divorce is the dissolution of the legal tie of marriage. No matter how restrictive a divorce law might be, it cannot prevent couples separating if a marriage has irretrievably broken down. The present law recognises this fact by allowing one party to obtain a divorce against the other without consent or any "matrimonial offence", if the couple have been separated for five years or more. (Although even this is not conclusive. The divorce may be refused if the respondent is able to establish that financial or other hardship would ensue and that in all the circumstances it would be wrong to dissolve the marriage. This situation is rare however).[98] Five years is however a very long time to wait for the finalising of the divorce decree and ancillary matters. This would seem to be why modern divorce applications are so rarely grounded on this fact.[99]

3.14 Furthermore, "whether a spouse can succeed in ending a marriage without waiting may well depend on a wholly arbitrary range of factors, unrelated to whether the marriage has irretrievably broken down or which of them is more to blame for the fact that it has done so."[100] It would seem that the "unhappy marriage" of the fault and no-fault criteria for divorce has resulted in some very perverse rulings in divorce proceedings.[101] This leads to the conclusion that although the present law ultimately may meet this objective of allowing the empty shell of the marriage to be destroyed, the manner in which it does so may no longer accord with social reality.

"To ensure marriages are dissolved with maximum fairness" and so as to "avoid injustice to an economically weak spouse"

3.15 One of the main motivations behind the introduction of the "irretrievable breakdown" formula was to overcome the unfairness of the earlier legislation which branded one of the parties to the marriage as "guilty", when in reality both were likely to have contributed to its demise. However, in commenting on the success of this endeavour, the English Law Commission stated in its report:

> *"The radical theoretical shift from the offence principle to the breakdown principle has not become apparent in practice. The law tells the parties, on the one hand, that the sole ground for divorce is irretrievable breakdown and, on the other hand, that unless they are able to wait for at least two years after separation, a divorce can only be obtained by proving fault. Not surprisingly, the subtlety that the facts are not grounds for divorce, but merely*

98 Ibid, para 3.12.
99 Ibid, Appendix 1.
100 Ibid, para 3.12.
101 Eg, see the discussion of the cases given, ibid, p 16 n 73.

evidence of breakdown, is seldom grasped. The first three facts are still regarded as matrimonial offences, and the separation facts as last resort grounds for those who cannot prove fault or prefer to wait for a less acrimonious divorce." [102]

3.16 This perpetuated unfairness seems to manifest in various ways. First, the view of the marriage taken by the present legislation may be too simplistic. It would seem that those parties who base their petitions on the fault criteria are somehow more "blameworthy" than those who cite separation. This may not be the case in practice, as the parties' choice of grounds may be influenced by factors quite outside the apparent facts relied on (for example, the particular socio-economic group to which the parties belong, as has been concluded by the English Commission).

3.17 The fault ground/fact which stigmatises the respondent as the guilty party may be merely a symptom and not the cause of the breakdown. Also, the legislation as drafted and interpreted does not necessarily imply the absolute fault which the commonly ascribed labels "adultery" and "unreasonable behaviour" seem to infer. For example, petitions based on behaviour have been granted where the respondent has been suffering from physical or mental illness. "Thus, a finding that the behaviour ground is fulfilled is not necessarily a finding of fault on the part of the respondent, but rather a finding of the petitioner's inability to withstand his behaviour and hence of the incompatibility of the parties."[103] The same applies to petitions based on adultery - indeed it would seem that there need be no causal link between the respondent's act of adultery and the fact that the petitioner finds it intolerable to live with the respondent.[104]

3.18 Secondly, this unfairness is compounded by the fact that the respondent may not have the opportunity to 'give his side of the story' and explain or refute the allegations made against him. To defend a divorce would be a very expensive undertaking as legal aid is rarely available in these cases. Furthermore, the respondent may actually want the divorce, but resent having to accept the one-sided and possibly exaggerated picture of the facts as presented to the court by the petitioner. This may adversely affect the parties' attitudes in the ancilliary proceedings, and indeed in their post-divorce relationship generally. In the end, it is likely to be their children who will, as innocent by-standers, suffer the most.

3.19 This leads also to a consideration of how the legislation as presently drafted affects the respective bargaining powers of the parties. As the English Law Commission has stated:

"A spouse who can present an immediate petition because the other's conduct falls within [the behaviour or adultery facts] is in a strong bargaining position if the respondent wants an immediate divorce but has no fact upon which to rely. Similarly, where the

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102 Ibid, para 3.15.
103 Ibid, para 3.17.
104 Idem.

parties have been separated for two years, the one who does not need a divorce is afforded a bargaining advantage by having the power to refuse consent. It is unfair that the law should distribute the "bargaining chips" in this way when ... the respondent is not necessarily more blameworthy than the petitioner." [105]

3.20 At the time of the 1969 reforms in England, one of the major areas of concern was the plight of the middle-aged dependent housewife whose husband leaves her.[106] Certain provisions were therefore incorporated into the reform legislation in an effort to protect the "economically weak spouse."[107] These include the right of the court to dismiss the petition in cases were the divorce could cause grave financial or other hardship to the respondent and, in all the circumstances, it would be wrong to dissolve the marriage.

3.21 A second safeguard is that the court is able to postpone the granting of the decree absolute until it is satisfied, either that the petitioner should not be required to make financial provision for the respondent, or that financial provision, if required, is "reasonable and fair or the best that can be m de in the circumstances."[108]

3.22 It seems that in practice however these protections are rarely invoked by the court.[109] It may be that they are not sufficient as protections in any event. First, it is usually the marital breakdown, and the separation which follows, rather than the divorce itself, which impose the financial hardship on the dependent spouse.[110] Secondly, the safeguards can only be invoked in cases where the petitioner has grounded the action on the "no fault" fact of separation. This seems to imply that protections should not be available to a dependent respondent where any other fact is alleged. This may not always be fair, for, as the English Law Commission states, "there is no guarantee at all that the apparently fault-based facts accurately represent the true responsibility for the breakdown of the marriage."[111]

"To promote minimum bitterness, distress and humiliation"

3.23 A primary reason for the introduction of the "no fault" separation facts in the 1969 reforms was the hope that·couples would now be able to avoid the acrimony present in "fault based" proceedings.[112] It seems however that despite the initial promise, the majority of couples still resort to basing their proceedings on allegations of fault,[113] particularly "behaviour."[114]

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105 Ibid, para 3.20.
106 See "The Field of Choice", op cit n 20, paras 38-46.
107 See MCO Cap 179, LHK 1983 ed, s 17A.
108 See MCO, s 17A(3).
109 Facing the Future, op cit n 1, paras 3.28 - 3.34, esp n 149.
110 Indeed, the intention behind the legislation appears to have been limited to the protection of, for example, the loss of the right to a widow's pension: ibid, n 148.
111 Ibid, para 3.31.
112 See "The Field of Choice", op cit n 20, paras 92-3.
113 For example, 71% of the divorce petitions in England in 1985 were based on fault facts: "Facing the Future", para 3.22.
114 For example, in 1985, 40% of divorce decrees (provisional) in England where based on this

3.24 It would seem that this state of affairs is extremely unfortunate as research findings reveal that this, more than any of the other facts to ground divorce, is the most likely to engender bitterness and hostility between the parties.[115] Obliging one party to produce a list of incidents of past behaviour against the other, even if the allegations are true, "is to encourage her to dwell on everything about the marriage and the respondent which is bad and therefore to encourage a resentful and uncompromising attitude [on his part]."[116] This is even more likely if the allegations made are one-sided or exaggerated or untrue. "The defender may resent the allegations made against him or her but may well be advised that there is no point in defending. To a feeling of bitterness may be added a feeling of injustice.[117]

3.25 For the couple's sake, many of the incidents dredged up may best be forgotten. More importantly perhaps is the effect on their children. Evidence has shown that the nature of the post-divorce relationship between the parents is crucial in the adjustment of the children to the divorce.[118] This being the case, it is most unfortunate if the legal process itself tends to "provoke or exacerbate unnecessary antagonism between the parties.[119]

"To protect the interests of children"

3.26 In discussing the background to the 1969 reforms in this area, the English Law Commission states:[120]

> *"The need for the law to protect the interests of children whose security and stability is threatened by their parents' divorce has long been recognised. This is one of the reasons why the Morton Commission did not recommend relaxation of divorce laws. However by the 1960s the "general orthodoxy" among social scientists was that "a bad marriage was worse for children than the divorce". The Law Commission in The Field of Choice was careful to reject any generalisation on this point and to conclude that in some cases it would be better if their parents were to stay together and in other cases if they were to divorce. It was recognised however that restrictive divorce laws did not make the parents stay together and that it was the separation rather than the divorce which was usually damaging to the children. … Thus, restrictive grounds for divorce do not necessarily safeguard the interests of the children of the parties".*

3.27 However the state of the law can, as mentioned in the preceding section, have considerable influence on the post-divorce relationship of the

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fact: "Facing the Future" op cit n 1, n 128.

115 Ibid, para 3.25.

116 Ibid, para 3.27.

117 "The Ground for Divorce: Should the law be changed?", op cit n 7, pp 2-3.

118 "Facing the Future", op cit n 1, paras 3.22, 3.27 and 3.39.

119 Ibid, para 3.22.

120 Ibid, para 3.37.

parents, which in turn affects the children's adjustment to the divorce. A law which promotes bitterness between the parents cannot be in the best interests of the children. The state of our present divorce law is such that the majority of couples are still choosing fault-based facts (particularly "behaviour" which seems to be the most damaging to the parties' relationship) upon which to ground their petition. The adversarial nature of the proceedings not only obliges the parents to take sides but is likely to draw the children into this as well, particularly where custody battles ensue.[121] Not only do custody contests increase the insecurity felt by children, but the conflict of loyalties which arises may impair their relationship with both parents. Further, in an adversarial atmosphere, the parent who loses the contest for custody may feel so resentful that he decides to cut himself off completely and thus loses contact with his children.

3.28 From the discussion above it seems clear that the interests of the children to the marriage are often not met under the law as it presently stands. Until there is less incentive for petitioners to base their divorce proceedings on "fault" (to thereby obtain a quicker divorce) presumably this situation will only continue.

"To be understandable and respected"

3.29 In its discussion paper on the topic, the Scottish Law Commission put forward the argument that the present law is misleading:

> *"It pretends that there is one ground for divorce - irretrievable breakdown - whereas in reality there are five grounds - three based on matrimonial offences and two based on periods of separation ... the law could and should be put on a more honest and straight forward basis."* [122]

However, in its report, the Commission concluded that "it did not matter if the law was misleading in this respect"; that "it was just a matter of words which did not affect what actually happened."[123]

3.30 In another respect though the law does not find favour. Both the Scottish Law Commission and the English Law Commission agree that the present divorce regime may encourage the parties to commit perjury.

> *"[T]he fact need bear no relationship to the real reason why the marriage broke down. Petitioners will choose a particular fact for practical reasons or on legal advice ... Thus, it is clear that the law in practice is quite different from the law on the statute book. This is not simply an academic problem because the inconsistency is*

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121 It is significant that custody or access is more likely to be contested in behaviour cases than in all others: ibid, para 3.25.

122 "The Ground for Divorce: Should the law be changed?" op cit n 7, pp 1-2.

123 "Reform of the Ground for Divorce", op cit n 4, para 2.15.

apparent to and causes confusion to litigants." [124]

"For some couples the choice is bet·ween being honest and getting a divorce after two years or telling lies and getting a divorce immediately." [125]

As the English Law Commission concludes on the point:

"This clear divergence between law and practice can only bring the law of divorce and the administration of justice generally into disrepute." [126]

Conclusion: the need for reform

3.31 It is apparent from the preceding paragraphs that, although the 1969 reforms of the English legislation brought about great improvements on the previous regime, the present system, which is that also applicable to Hong Kong, still fails to satisfy much of the established criteria for a good law of divorce.

3.32 In particular, it is clear that the current law of divorce does not reflect the current reality of divorce. The prevailing need seems to be for a quick resolution to the proceedings. Within the confines of the law as it presently stands, this need is pursued by the parties even at the risk of promoting bitterness and distress between them by resorting to a fault-based petition over a non-fault one.

3.33 The English Law Commission has summarised its objections to the present law in this way:

"Above all, the present law fails to recognise that divorce is not a final product but part of a massive transition for the parties and their children. It is crucial in the interests of the children (as well as the parties) that the transition is as smooth as possible, since it is clear that their short and long-term adjustment depends to a large extent on their parents adjustment and in particular on the quality of their post-divorce relationship with each parent. Although divorce law itself can do little actively to this end, it can and should ensure that the divorce process is not positively adverse to this adjustment … There seems little doubt that the present law is guilty of just this." [127]

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124 "Facing the Future", op cit n 1, para 3.46.
125 "The Ground for Divorce: Should the law be changed?" op cit n 7, p 5
126 Op cit n 1, para 3.46.
127 Op cit n 1, para 3.50.

Chapter 4

Divorce in China

4.1 The preceding chapters have traced the development of our western-based law of divorce. By contrast, divorce law in China has developed quite differently.

4.2 In the traditional Chinese setting, the interests of the clan were paramount and these dominated over the interests of the individual.[128] In particular, it was the parents who had "customary legal rights to choose the spouses of their children and to control their family affairs, including marriage, maintenance and (so far as the law permitted) divorce."[129]

4.3 Before the political changes of this century, marriage in China was "a very formal business."[130] There were two classes of wives: the "tsai" or first wife and subsequent "tsips" or concubines. Marriage to the "tsai" was preceded by a formal betrothal which was initiated by the respective parents and was negotiated through intermediaries. Betrothal was concluded by the exchanges of symbolic gifts, usually six in number. At the marriage itself, the bride was usually carried to her new home in a ceremonial red chair. A public dinner followed and the bride would pay formal respects to the ancestors of her new family. The taking of a "tsip" was generally less formal and by custom required the consent of the "tsai".

4.4 Marriage in traditional China was usually dissolved by "mutual consent between the parties".[131] However it could also be dissolved unilaterally, though by the husband only, on the following grounds:[132]

- unfilial behaviour, or disrespect shown by the wife to the husband's parents
- the wife's barrenness
- the wife's adultery
- some repulsive disease suffered by the wife
- the wife's jealousy
- her garrulousness, or loquacity
- theft of her husband's goods.

4.5 Although these grounds were wide in scope, it seems that divorce

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128 Greenfield, "Marriage by Chinese Law and Custom in Hong Kong" (Vol 7) ICLQ 437, at 443. "The clan in China was of great antiquity, and, up to modern times, of pre-eminent practical importance": ibid, p 442.

129 Idem.

130 Ibid, p 443.

131 A traditional practice apparently dating back to the Han dynasty: see Pegg, op cit n 31, p 110.

132 These grounds would seem to have been available under traditional law since ancient times: see idem.

was not common: “the expenses of a second wedding would be great, indeed too much for the poorer husband. The richer one could always buy himself a concubine.”[133]

4.6 With the advent of the political changes in China in the twentieth century, the “modern form” of marriage developed which did away with much of the old formality of the traditional marriage. By the time of the Marriage Laws of the People’s Republic 1950 the principles of free choice of partners, strict monogamy, equality between the spouses and the necessity for state registration of the marriage came to be adopted.

4.7 The current law was enacted thirty years later.[134] It reiterates these principles and states in relation to grounds for divorce:

> *“**Article 24** Divorce shall be granted if the husband and wife both desire it. Both parties shall apply to the marriage registration office for divorce. The marriage registration office, after clearly establishing that divorce is desired by both parties and that appropriate arrangements have been made for the care of any children and the disposition of property, shall issue the divorce certificates without delay.*
>
> ***Article 25** If one party alone desires a divorce, the organization concerned may carry out mediation or the party may appeal directly to a people's court to start divorce proceedings.*
>
> *In dealing with a divorce case, the people's court should carry out mediation; divorce shall be granted if mediation fails because mutual affection no longer exists.”*

4.8 There are two restrictions on these grounds for divorce: consent must be obtained if the spouse is a soldier on active duty[135] and a husband may generally not divorce his wife if she is pregnant or within one year of her giving birth.[136]

4.9 The provisions clearly recognise that, despite the arrangements for custody, children of the marriage remain the responsibility of both parents who still both “have the right and duty to bring up and educate their children.”[137] Both are responsible for “the child's necessary living and educational expenses.”[138]

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133 Ibid, p 111.

134 Marriage Law of the People's Republic of China (adopted at the Third Session of the Fifth National People's Congress and promulgated by Order No 9 of the Chairman of the Standing Committee of the National People's Congress on September 10, 1980, and effective as of January 1, 1981).

135 Ibid, Art 26.

136 Ibid, Art 27.

137 Ibid, Art 29. The provision goes on to state that in principle the mother should have custody of breast-fed children after divorce. However, once the child has been weaned, if a custody dispute arises between the parties, the people's court will determine the issue “in accordance with the rights and interests of the child and the actual conditions of both parents.”

138 Ibid, Art 30.

4.10 With regard to the property of the couple, if they fail to reach agreement at the time of their divorce then the people's court will decide the disposition of the property between them.[139] Either party may be called upon to "render appropriate financial assistance" to the other if, at the time of divorce, the other "has difficulty in supporting himself or herself."[140]

It can be seen from the foregoing paragraghs that the law in China appears to have taken a major shift from the old, broad, husband-oriented grounds for divorce to a system where "fault" as such is not stated to be relevant. Arguably then the modern Chineses approach is further ahead in terms of liberalising this aspect of the law than our law in Hong Kong seems to be.

139 Ibid, Art 31.
140 Ibid, Art 33.

Chapter 5

The options for reform - The alternative models

5.1 The laws of different countries reflect a variety of approaches to the issue of grounds for divorce. If there is a basic common factor between the approaches, it appears to be the extent to which the "fault" of the respondent is or is not required to be shown. Most systems fall within one of the following three categories: a "fault" regime which, as in our former system, requires the respondent to have committed some matrimonial offence before any right to a divorce arises; a combination of both fault and "no fault" criteria, as in our present system: and a "no fault" regime which grounds the divorce upon neutral criteria, such as the separation of the parties for a defined period.

5.2 It is clear that in recent years there has been a general shift away from strict fault-based divorce.[141] Indeed many of the countries whose divorce systems have developed similarly to our own are at present considering adopting, if they have not already done so, systems of divorce which are as neutral in approach and as non-adversarial in procedure as possible.

5.3 The following paragraphs examine various models of the law of divorce which are either in place now in the countries concerned or are, as yet, merely proposals for reform. The suitability or otherwise of each of these systems for Hong Kong is discussed.

"Fault/no-fault amalgam" - the Scottish model

5.4 The present Scottish system of ground for divorce is, like our own system in Hong Kong, based on the equivalent English legislation. In 1988 the Scottish Law Commission published, for the purposes of public consultation, a discussion paper entitled, "The Ground for Divorce: Should the law be changed?"[142] The paper set out various objections to the existing law[143] and proposed two alternative models which it felt would meet these objections.

5.5 The first suggested model was a simple fixed period of separation[144] similar to that now in place in both Australia and New Zealand (which is discussed below). The second model put forward for public comment was "divorce after the lapse of a period of time from the giving of notice of intention to divorce."[145] In providing justification for these proposals the Commission stated:

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141 Ibid, para 4.3.
142 Op cit n 7.
143 Ibid, pp 1-6.
144 Ibid, pp 7-11.
145 Ibid, pp 11-13.

"Our preliminary view is that the law would be improved if either of these options were adopted, at least if the period of separation or notice were comparatively short. Either of these options would meet most of the criticisms of the law mentioned earlier. Of the two options, the second would probably be better. It would not require proof of separation, it would not cause hardship to those who would find it difficult to separate in advance of a divorce, it would not contain an incentive to separate and it would not contain an incentive to lie about the period of separation. It would not contain the seeds of legal difficulties of what is meant by separation".

5.6 The Commission invited public response on the following specific questions:

"1. Is it worth proceeding further with consideration of possible reform of the ground for divorce at this time?

2. (a) Would you approve of a law under which the sole ground for divorce was a period of separation?
(b) What do you think would be an appropriate period?

3. (a) Would you approve of a law under which the sole ground for divorce was the expiry of a period of time after one party had given official notice of an intention to seek a divorce?
(b) What do you think would be an appropriate period?

4. Have you any other comments relating to reform of the ground for divorce?" [146]

5.7 After considering the public responses, the Commission released its report, "Reform of the Ground for Divorce"[147] in 1989. The Commission had now modified its standpoint and the reforms put forward in its report were far less "radical", to use the Commission's own term, than those proposed in the discussion paper. The Commission apparently had received a wide range of responses, from, at one extreme, calls for divorce on demand at a registrar's office, to, at the other, a return to the old pre-War regime where "the only grounds for divorce were adultery and desertion and where not even extreme cruelty was a ground for divorce."[148]

5.8 In essence, the Commission's modified reforms consisted of simply retaining the mixed fault and no-fault system, while reducing the periods of separation from two and five years to one and two years respectively. The Commission summarised its proposals in this way:

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146 Ibid, p 20.
147 Op cit n 4.
148 Ibid, para 1.3.

"The ground for divorce in Scotland should continue to be the irretrievable breakdown of the marriage. It should be possible to establish irretrievable breakdown only by proving

(a) adultery

(b) intolerable behaviour

(c) separation for one year plus the other party's consent to divorce, or

(d) separation for two years…

The disappearance of divorce for desertion is consequential on this [(d) above]." [149]

5.9 The Commission saw the following advantages in these proposals: it would not alter the basic structure of the existing divorce law; it was unlikely to "go beyond what is acceptable to a broad spectrum of responsible opinion;"[150] the new separation periods would answer the criticism that the present periods are too long; on the other hand, victims of serious matrimonial offences would not be prejudiced; perhaps most importantly, this new regime should divert many actions away from the divisive "behaviour" ground towards the neutral separation grounds[151].

5.10 It must be admitted that, although this proposal is clearly a compromise solution and would continue to entrench some of the "fault" elements in the present law, it would nonetheless also remedy most of its failings. For the reasons discussed more fully below, it is the submission of this paper that this reform model would, at least in the short term, be a more appropriate one for Hong Kong to adopt than the more radical options for reform outlined below.

"Separation only" - the Australasian model

5.11 The former divorce regimes of both Australia and New Zealand were similar to our present one. However both jurisdictions have reformed the "mixed" system (of fault and no-fault facts) to a system where the sole method of proving irretrievable breakdown is the fact of separation. The Australian change was introduced in the 1975 Family Law Act and specifies a period of one year's separation. In New Zealand, the Family Proceedings Act of 1980 defined the relevant period as two years.

5.12 The advantage of the no-fault, separation-only ground is that it focusses the proceedings on an objective, morally neutral fact, not on allegations of misconduct by one party about the other. As a consequence, the divorce process in itself is unlikely to provoke feelings of hostility between the parties, in contrast to fault-based actions under our own system. As we have seen in the foregoing chapters, this is a major factor in what determines a "good" divorce law. It also has the virtue of simplicity. As the English Law Commission has stated, "where separation is the sole ground, the divorce law

149 Ibid, paras 1.1-1.2.

150 Ibid, para 1.12.

151 Idem.

is simple and easily understood and the divorce process can be cheap and unacrimonious."[152]

5.13 However, this system which applies in Australia and New Zealand is not without its disadvantages. In cases where one party has been guilty of very bad conduct towards the other, the victim is unable to use such conduct as a ground to escape the marriage and must instead wait out the full term of required separation. This may not be of such concern in Australia, where the separation period is only one year, but this must be surely a valid argument in the New Zealand case.

5.14 Another concern is the fact that separation itself must be achieved before the parties are in a position to seek divorce. Economic limitations may make actual separation difficult to achieve and may affect the bargaining power between the spouses. As the English Commission has observed:

> *"In times or places of housing shortage, particularly in the rented sector, this clearly operates differently as between different socio-economic groups and as between husbands and wives. Thus, spouses with dependent children without alternative accommodation are prejudiced and the ability to separate becomes a "bargaining chip."* [153]

5.15 The Australian and New Zealand legislation endeavours to remedy this by expressly providing for the possibility of the parties being "separated" but still living "under one roof."[154] This approach does not find favour with the English Commission however:

> *"Under present English case law[155] it is theoretically difficult to establish separation under one roof. Although this could be changed by statute, it is highly likely that any new definition would soon give rise to difficulties which would have to be resolved by litigation. No doubt a body of case law would soon be built up, which would add undesirable complexity to divorce law and be of benefit only to lawyers. If it became necessary to check whether the requirements of separation under one roof were fulfilled by oral hearing in every case, then this would involve additional expense, which could not easily be justified. On the other hand, if the parties' assertion that they have been living separately under one roof is to be accepted without any form of verification, the whole requirement of [one or two years'] separation becomes something of a charade."* [156]

5.16 It is for these reasons that, despite its neutral stance, a divorce system based on the "separation only" fact, may not be suitable for Hong Kong.

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152 "Facing the Future", op cit n 1, para 4.9.
153 "Facing the Future", op cit n 1, para 4.10.
154 For example, the Australian Family Law Act 1975, s 49(2).
155 And also that of Hong Kong: see Pegg, op cit n 31, pp 92-94.
156 Op cit n 1, para 5.11.

The high cost and the shortage of accommodation here would severely restrict some spouses, particularly those in lower socio-economic groups, from effecting actual separation. If the courts are obliged instead to use strained and artificial logic in order to hold that a separation has occurred, it might be preferable to do away with this requirement altogether and to simply opt for "giving notice" as in the systems outlined below.

"Process over time" - the English model

5.17 In its discussion paper,[157] the English Law Commission proposed radical changes to its present system of mixed fault and no-fault criteria for divorce. The model proposed has been termed the "process over time". Briefly, the basic ground for divorce, of irretrievable breakdown, would remain, but there would be no requirement to establish any particular fact as the basis for divorce.

5.18 Proceedings would be commenced by one or both parties giving notice and filing a statement with the court that the marriage had irretrievably broken down. An initial court hearing might take place. At the end of a given transition period, the divorce decree, termed a "dissolution of marriage", would be available as of right. The period of transition proposed in the Commission's paper is nine or 12 months.

5.19 During the course of this period the parties would be encouraged to seek conciliation in order to resolve all of the matters upon which they must agree, such as custody, maintenance and division of matrimonial property. If they cannot reach agreement between themselves these matters will be decided by the court before the grant of dissolution is given.

5.20 The Commission justifies its radical departure from the former system by the following reasoning:

> *"The main advantage of such a scheme is that it combines the logical position that the only true test of breakdown is that one or both parties consider the marriage at an end, with the need to provide a period of reflection and transition. Once it is accepted that the present system provides neither a real test of breakdown nor any real obstacle to divorce for most people, then the proposed procedure can be seen as an improvement. Because divorce would not be available immediately, it would not be "too easy". Attention throughout the process would be focussed on the continuing obligations of the parties in respect of their children and financial arrangements. The object would be to enable both parties to maintain their relationship with their children, while making the necessary arrangements for the future in as civilised a manner and timespan as can be achieved."* [158]

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157 Ibid.

158 Ibid, para 5.25.

5.21 The reasons given by the Commission are undoubtedly justified, however one wonders how such a system would fare in cases where the parties are diametrically opposed to one another and abundant conciliation services are not available. This latter consideration may be particularly relevant to Hong Kong.

5.22 The overall effect of these proposals for reform would be to drastically alter the basis of the present divorce law in England. It will be interesting to see, when the Commission publishes its final report,[159] whether, as in Scotland, the general public is more conservative than the Commission in its reform aspirations.

"Unilateral demand" - the Scandinavian./Californian model

5.23 The way this system operates is that divorce is available immediately upon one party unilaterally declaring that the marriage has irretrievably broken down.

5.24 This system of divorce would appear to have two major defects: it does not provide the parties with much opportunity for reflection before the matter is processed and, in giving little time for the parties to adjust to the fact of the divorce, it necessitates that the ancilliary matters, such as custody, maintenance and the division of matrimonial property, be resolved separately, and usually after, the divorce itself.

5.25 There seems to be a general perception that such a system, which is essentially "divorce on demand", would make drastic inroads into the protections to the institution of marriage which are provided in the present regime. The English Commission did however make the point that divorce under our present adultery and behaviour facts can strongly resemble immediate unilateral demand, "given the disincentives to defending and the lack of serious questioning of the petitioner's allegations."[160] Though the Commission goes on to concede that:

> *"Nonetheless, it is unlikely that public opinion would accept a simple system of immediate divorce on unilateral demand ... because the present system appears to provide some moral basis for divorce and some test of breakdown."* [161]

Presumably this would apply equally to the public opinion of Hong Kong.

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159 This is reportedly due to be issued in the very near future: see op cit n 3.

160 "Facing the Future", op cit n 1, para 5.20.

161 Idem.

“Mutual consent” taking the adversarial sting out of the “amicable” divorce

5.26 There must be many instances of divorce, particularly in the separation-consent cases, where, although the marriage between the couple has broken down irretrievably, they do not harbour ill-will towards each other and would prefer to petition jointly for divorce. The present system necessitates that one be seen to be petitioning against the other. This is totally artificial, and adds unnecessary distress, where the couple are divorcing in truth by mutual consent. Surely the time has come for the introduction of some procedure which would accommodate this.

Chapter 6

Discussion and suggested recommendations

6.1 It is probably the case that the general public looks at our increasing crime rate and our increasing divorce rate and assumes therefore that “Modern Society” is increasingly “degenerating”. With this in mind, any proposals to further “liberalise” the law of divorce may be greeted with some hesitation, if not downright objection.

6.2 Undoubtedly there has been a dramatic rise in the rate of divorce in recent years, in both the numbers and proportions of marriages being terminated. We have also seen, however, that this increase in the rate of divorce may be largely as a result of massive economic and social changes which have taken place over the last century, in particular, the emancipation of women.

6.3 It has been argued earlier in this paper that, rather than indicating a decline in the status of marriage as an institution, the divorce figures reflect our modern society's increased expectations of the personal happiness and fulfilment to be derived from being married. It is perhaps with this more positive approach in mind that we should be considering what, if any, reforms are required to the current law on the ground for divorce.

6.4 The most basic issue which we encounter in this area is: what is the proper role of the law in regulating personal social relationships? The studies already undertaken by other law reform agencies have unmasked the fact that whatever legal regime for divorce is put in place, couples will, in most cases it seems, use the system to one end: to obtain the quickest and fairest divorce they can.

6.5 In order to achieve this within the law as it presently stands, petitioners appear to be resorting to “over use” of the fault-based facts, simply to speed up the divorce process. Unfortunately, this is highly likely to increase the bitterness and animosity between the parties and put their post-divorce relationship in jeopardy, which is particularly serious for the children involved. It seems that unless and until the no-fault facts make divorce as readily available as the fault facts do, parties will still cite fault regardless of the unhappy consequences.

6.6 This then is the current state of sociological affairs. It seems that the law does not match the reality. It may be that this begs the question: should the law still be perpetuating its former stance of seeking to impose some kind of moral structure in this area (ie - of ground for divorce - as distinct from the considerations of collateral matters such as custody and matrimonial property arrangements), or should it simply be used pragmatically, to cater to a modern

"consumer" demand for "the quick, clean divorce"?

6.7 Another approach is to ask how the law can best facilitate what has become an unfortunate fact of modern life -the ever-increasing incidence of divorce. A divorce must surely be one of the most stressful and damaging experiences that a couple or a family could ever go through. As the English Law Commission has emphasised, it is not simply "a day in court" but a whole "process" of painful change and adjustment which will affect the parties for years to come, if not for the rest of their lives.

6.8 In former times, the law in this area was seen as the means of strictly enforcing the notion of the "sanctity" of marriage: the law of divorce with its emphasis on matrimonial offence was therefore essentially punitive in nature. Parties who wilfully flouted its rulings were considered to be a deviant minority and were accordingly stigmatised. With divorce becoming more and more common-place, this view is becoming more and more out-moded. It must surely be the case now that society accepts that the law should be used to mitigate the harmful effect of divorce, rather than to continue to exacerbate it.

6.9 The law is needed to dissolve the legal tie of marriage between the parties and to ensure that matters regarding the welfare of the children and fair distribution of the matrimonial assets are attended to. Another quite crucial function of the law in this area, which is not always recognised, is that it provides a form of "rite of passage" if you like, so that the parties have a definite point from which to let go of their old lives and to start over afresh. The issue then is: to what further extent than at present, can the law fulfil these functions and assist the parties to resolve their divorce situation with as little harm as possible?

6.10 In Chapter 2, we examined the workings of the present legislation on ground for divorce. We saw that many of the rules which have developed are complex and sometimes their strictures can lead to what seem to be perverse results which fly in the face of the "irretrievable breakdown as sole ground" formula.

6.11 In Chapter 3 the effectiveness of the present law was tried against its objectives. The present mixed fault/no-fault regime was found to have a variety of short-comings. The principal one, as stated above, is that the separation periods required in the no-fault separation grounds are such as to discourage petitioners from using them, despite their less odious consequences, and to opt instead to struggle to fit the facts of their own particular case into one of the fault-based categories.

6.12 Chapter 4 outlined the history of the law of divorce in China. Chapter 5 we examined the different paths to reform which have been developing in western jurisdictions where the law of divorce has been similar to our own.

6.13 In the light of the various objections raised in this paper to the present law on ground for divorce, the following reform recommendations are

presented for discussion.

The way forward: irretrievable breakdown revisited

6.14 It is submitted that in this area of ground for divorce the most appropriate model for Hong Kong to adopt would be that proposed by the Scottish Law Reform Commission: namely, the retention of the existing structure of mixed fault and no-fault criteria for establishing "irretrievable breakdown", but with a reduction in the separation periods from two years with consent and five years without it, to one year and two years respectively. There would consequently be no need to retain the desertion fact as, even without consent, only two year's separation would be required.

6.15 Accordingly, our reformed law on grounds for divorce would include the following provisions:

> - that a court hearing a petition for divorce would hold the marriage to have broken down irretrievably if the petitioner satisfied the court of one or more of the following facts-
>
> (a) that the respondent had committed adultery and the petitioner found it intolerable to live with the respondent;
> (b) that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent;
> (c) that the parties to the marriage had lived apart for a continuous period of at least 1 year immediately preceding the presentation of the petition and the respondent consented to a decree being granted;
> (d) that the parties to the marriage had lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition.

6.16 Various reasons can be given as to why this might be the most appropriate reform model for Hong Kong. It would answer the chief criticism of the present law: that the length of the separation periods currently provided under the law are so long that couples are discouraged from using these as means to ground divorce, preferring instead to cite the hostility-fuelling "fault" facts which will afford them a quicker divorce. As a consequence any ameliorating effects which our separation provisions might bring to the law of divorce are defeated in practice by the provisions themselves.

6.17 At the other extreme however we have seen that divorce models founded on "separation only" criteria may also present difficulties, particularly for Hong Kong. In order to divorce couples must effect separation, as only on this fact can their divorce be based (even if one of the parties has committed adultery or is guilty of unreasonable behaviour). In Hong Kong accommodation is in short supply and what there is very costly. The courts here, as in other jurisdictions, might endeavour to get around this by offering a more flexible interpretation of "separation", by providing for a form of separation "under one

roof". However, as the majority of families in Hong Kong are obliged to live in relatively cramped conditions in any event, physical realities may necessitate such a liberal interpretation of "separation under one roof" as to render any such limitation meaningless.

6.18 A further reason in support of the proposed reform is that it would be a moderate one, providing a "half-way house" between our present system and the more radical "non-fault" systems. Though moderation in reform may not be an end to be pursued in itself, our preliminary view is that a moderate reform is preferable to a radical one in this area of the law since it remedies much of what is wrong with our present legislation without turning it completely on its head. This argument must be particularly cogent for a topic such as this one where public opinion is bound to cover a wide spectrum of views. As the Scottish Commission has itself stated:

> *"[I]t is clear from the comments which we received and from the results of a public opinion survey which we commissioned that more radical reform, while it would be strongly supported by many, would be equally strongly opposed by many others. No reform of the divorce law will please everyone ... We believe that the modest reform which we recommend in this report will go a long way to meet the main criticism of the present law and will meet with general support from a broad middle band of responsible opinion."* [162]

6.19 Even were there to be a majority of popular opinion in favour of an entirely "non-fault" system of grounds for divorce, presumably this would not go so far as to accept an "immediate divorce on demand" situation, or, if so, not without some built-in safeguards to protect against ill-considered, pre-emptive divorce. The most obvious form of safeguard would be to impose conciliation requirements upon the parties, as has been recommended in England. However, this presumes that there are extensive conciliation services already in place or, if not, that there is a commitment to establish them. On this basis, it would seem that the non-fault alternatives would be unlikely options for Hong Kong.

Joint application for divorce

6.20 In addition to adopting the Scottish approach to the present ground for divorce, a further change could be introduced to allow spouses to make joint applications for divorce where they both consent. This would allow, where the circumstances are appropriate, for a non-adversarial approach to be taken to the law of divorce.

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[162] "Reform of the Ground for Divorce", op cit n 4, para 1.3.

APPENDIX

Hong Kong Divorce Statistics

(YEAR)	(PETITIONS FILED)	(DECREES ABSOLUTE)
1973	793	493
1974	789	714
1975	893	668
1976	1054	809
1977	1372	955
1978	1728	1420
1979	2018	1520
1980	2421	2087
1981	2811	2060
1982	3120	2673
1983	3734	2750
1984	4764	4086
1985	5047	4313
1986	5339	4257
1987	5747	5055
1988	5893	5098
1989	6275	5507

(Figures supplied by Judiciary)