

# RECENT DEVELOPMENTS IN THE DIVORCE LAW OF HONG KONG: TOWARDS MINIMAL ADJUDICATION AND CONSENSUAL DIVORCE



*Bart Rwezaura\**

## **Introduction**

In May 1995 the Hong Kong legislature enacted four major changes in the law of divorce.<sup>1</sup> As in previous years, these reforms were preceded by a period of nearly three years of review and public consultation. The changes are as follows: (1) there is now a new procedure whereby a married couple can obtain divorce by joint application to the court, on the ground that either (a) they have lived apart for one year, or (b) they have given one year's joint notice of their intention to divorce; (2) the period of living apart is now reduced from two years to one year (with consent) and from five years to two years (without consent); (3) the minimum period of desertion has also been reduced from two years to one year; and finally, (4) the time restriction to divorce for newly married couples has been cut down from three years to one year. Other changes, apart from consequential amendments, include the abolition of damages for a spouse's adultery under s 50 of the Matrimonial Causes Ordinance (MCO), and the abolition of a husband's right to damages under common law for criminal conversation ('*crim con*'). The law governing a wife's domicile has also been amended to grant a married woman independent domicile but only for purposes of divorce under Part III of the MCO. The facts of behaviour and adultery have been retained.

This paper considers the above changes and tries to relate them to the efforts made in the early 1970s to provide a divorce law that is relevant to the contemporary social needs and expectations of Hong Kong.

## **Background to the 1995 reforms**

A major change in the Hong Kong statutory divorce law took place in 1972 when the principle of breakdown of marriage was introduced.<sup>2</sup> The breakdown of marriage principle was adopted from the UK Marriage Reform Act of 1969. This principle required courts to focus on the state of the marriage and on

\* Senior Lecturer, Department of Law, University of Hong Kong. I am grateful to Rick Glofcheski and Janet Burton, for reading and commenting on earlier drafts, and to Athena Liu and George Edwards for assisting me to secure a vital reference.

<sup>1</sup> See Matrimonial Causes (Amendment) Ordinance 1995 (No 29 of 1995) ('MCAO'), enacted on 18 May 1995 but not yet in force.

<sup>2</sup> See Matrimonial Causes (Amendment) (No 2) Ordinance (No 33 of 1972) which also amended the law relating to nullity of marriage and judicial separation.

whether or not such marriage could be saved. Thus, rather than considering which spouse was to blame for the breakdown of the marriage, as was previously the case, courts were now required to evaluate the evidence as a whole in order to determine whether or not the marriage had broken down irretrievably. And where chances for reconciliation existed, parties were to be encouraged to make the attempt.<sup>3</sup>

In sum, the major objective of a good divorce law, as the English Law Commission had put it back in 1966, was to buttress rather than undermine the stability of the marriage. But where it was shown that the marriage was in fact dead, the law had to recognise this reality by providing a humane and dignified procedure for severing the legal tie between the parties. Courts were to bear in mind the importance of minimising the bitterness, humiliation, and distress that often arose from the way divorce proceedings were conducted and which were also known to have negative effects on the minor children of the family.<sup>4</sup> As part of this scheme, statutory provisions were also inserted to ensure that the spouse who was economically dependent was protected<sup>5</sup> and reasonable arrangements were made by the parties for the upbringing of the minor children of the family before the completion of the divorce process.<sup>6</sup>

Although no major changes were effected in the divorce law until the 1995 reforms, Hong Kong, like most other jurisdictions, continued to experience a rapidly rising rate of divorce. This development was seen partly as a consequence of the liberalisation of the divorce law but also as the effect of changing social expectations, rapid economic change, and the rising status of women. Therefore, although the rising rate of divorce could not be reduced to a single major cause, it was still believed in certain circles that this development was a

<sup>3</sup> Under s 15A(1) MCO, the court may adjourn divorce proceedings to enable the parties to try and reconcile. Also under s 15A(3)-(5) MCO, a prospective petitioner is permitted to continue or to resume cohabitation up to a period of six months without being considered to have condoned the fact of adultery or tolerated the respondent's behaviour or interrupted desertion, as the case may be.

<sup>4</sup> See English Law Commission Report No 6, *Reform of the Grounds for Divorce — The Field of Choice* (1966).

<sup>5</sup> Section 17A MCO aims at financial protection for the respondent in cases where the petition for divorce is based on living apart either for two (now one) or five (now two) years. Section 15B MCO also provides that, where a petition for divorce is based on the fact of living apart for five years, the respondent 'may oppose the grant of a decree nisi on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.' However, the impact of these provisions has been generally small, largely because the respondent is reasonably well protected under the Matrimonial Proceedings and Property Ordinance (MPPO). See also J M Evans, 'Recent Developments in Family Law' in Gaye van Heerden and Peter Wesley-Smith (eds), *Law Lectures for Practitioners 1978* (Hong Kong: Hong Kong Law Journal Ltd, 1978), pp 87, 89.

<sup>6</sup> Rule 9(3) of the Matrimonial Causes Rules provides that: 'Where a petition for divorce, nullity or judicial separation discloses that there is a minor child of the family who is under 16 or who is over that age and is receiving instruction at an educational establishment or undergoing training for a trade or profession, the petition shall be accompanied by a separate written statement containing the information required by Form 2B, to which shall be attached a copy of any medical report mentioned therein.' The petitioner is required to state, inter alia, in Form 2B, that the said child or children, as the case may be, are or are not suffering from any serious disability or chronic illness or from the effects of any serious illness and are or are not under the supervision of a probation officer, welfare office, or any other comparable organisation.

symptom of moral decline and presumably evidence of family breakdown.<sup>7</sup> Furthermore, the fact that the post-1972 law had retained the fault grounds, albeit hidden in the single ground of irretrievable breakdown, had the effect of keeping alive certain problems of the old system without necessarily delivering the promised benefits of the new law. During the same period strong criticism of the divorce law was voiced in England whence, as noted above, the impetus for Hong Kong's 1972 reforms had emanated. It is in the light of these concerns that the Hong Kong Law Reform Commission (HKLRC) was assigned the task of taking another look at the law of divorce in order to see if it could be reformed so as to minimise the 'unhappy social consequences which every divorce leaves in its wake.'<sup>8</sup>

The next section of this paper will consider the legal changes introduced in 1995 and this will be done against the background of the criticisms of the post-1972 law and the extent to which these changes have moved the law closer towards the objectives on which the 1972 reforms were grounded.

### **The 1995 reforms: another step forward?**

In its consultation paper published in 1991 the HKLRC identified what may be viewed as a major dilemma for family law today. This dilemma is in effect the elusive search for a law of divorce that buttresses the stability of marriage but does not do so at the cost of artificially keeping alive a marriage that has in reality broken down completely. In other words, the dilemma arises primarily as a conflict between, on the one hand, the unqualified freedom of the individual to terminate a marital relationship, and on the other hand, the society's duty to protect the other spouse and the children of the family.<sup>9</sup> Hence, when looking at the 1995 reforms it is necessary to consider the extent to which these reforms have moved the law towards resolving this important conflict.

#### *The facts of living apart*

The facts of living apart were first introduced here in 1972 by the Matrimonial Causes (Amendment) (No 2) Ordinance.<sup>10</sup> Where a petition for divorce is based on the fact of living apart for two years, the petitioner has to show that the respondent has freely consented to the decree being granted. And where

<sup>7</sup> Hong Kong divorce statistics show that between 1976 and 1986 there was an increase of 450%, accounting for a total of 4,257 decrees. As noted by the Hong Kong Law Reform Commission, given that the divorce rates were rising rapidly, it followed that the number of individuals negatively affected by divorce was also rising. See HKLRC Report, Topic No 29, *Report on Grounds for Divorce and the Time Restriction on Petitions for Divorce within Three Years of Marriage* (1992), pp 1-2 (hereinafter, *HKLRC Report*).

<sup>8</sup> See *HKLRC Report*, p 1.

<sup>9</sup> See Hong Kong Law Reform Commission, *Consultation Paper on Grounds of Divorce* (1991), pp 5-6.

<sup>10</sup> Ordinance No 33 of 1972.

the period of living apart is five years or more, there is no consent requirement. Furthermore, it has been held that, since living apart is evidence that the marriage has broken down, it is essential for the petitioner also to show that he or she has ceased to recognise the marriage as subsisting and never intends to return to the other.<sup>11</sup> This mental element need not be formed at the beginning of the separation. It can occur sometime later provided that such an intention has existed for the requisite period. Moreover, such mental condition need not be communicated to the respondent.

Although there are practical problems caused by the way courts have construed the term 'living apart' it must be remembered that, except for incurable insanity, these two facts constitute the only no-fault grounds in our law. This means that the breakdown is inferred from the fact of *living apart* and the court is not at all concerned with questions of guilt or with which spouse is to blame for the fact of separation.<sup>12</sup> Yet, these two facts have been criticised on other grounds. It has been noted, for example, that the requirement of living apart may not be a practical option particularly for economically dependent wives. Furthermore, it has been shown that when a wife is separated from her minor children for an extended period of time, the chances of securing their custody are then put at risk.<sup>13</sup> Hence, as long as living apart occurs before the post-divorce matters have been settled, a prospective petitioner may find this option rather unrealistic.<sup>14</sup> This difficulty may partially account for the preference by women petitioners in Hong Kong for 'the traditional fault based facts (of behaviour and adultery)', while the male petitioners tend to rely more heavily on the non-fault facts of living apart.<sup>15</sup>

Another criticism that is of particular importance to Hong Kong is the difficulty of establishing the precise moment when the mental element of living apart has come into existence. There is a practice in Hong Kong whereby one spouse offers to stay overseas (eg Canada or Australia) in order to comply with the immigration requirements of those countries. There are also husbands who have business commitments in the People's Republic of China (PRC) and who

<sup>11</sup> *Santos v Santos* [1972] 2 WLR 889 (CA).

<sup>12</sup> *Chapman v Chapman* [1972] 3 All ER 1089.

<sup>13</sup> This is mainly because, all things being equal, if the children are thriving or at least coping well without their mother, courts would be hesitant to disturb their current living arrangements. See K O'Donovan, 'Recent Developments in the Law Relating to Children' in Elizabeth Phillips (ed), *Law Lectures for Practitioners 1987* (Hong Kong: Hong Kong Law Journal Ltd, 1987), p 181.

<sup>14</sup> In this connection it has been noted that the high cost of accommodation in Hong Kong makes it even more unrealistic for medium income families either to live apart or to live separately under one roof before divorce is granted. See *HKLRC Report*, p 27, para 2.22 and p 71, para 6.22.

<sup>15</sup> Though apparently preferred by women petitioners, fault-based facts still accounted for a small proportion of all divorces. Hence, adultery accounted for 6.9%, desertion for 5.9%, and behaviour for 18.4%. See 'Divorce in Hong Kong — A Statistical Approach' (1982) 8 *Justitia* 77, 80.

tend to stay away from their families for prolonged periods of time.<sup>16</sup> In either case, it would be very difficult to establish precisely when one of the parties actually ceased to recognise the marriage as subsisting so as to trigger the period of living apart. This is more so especially because, as noted above, judicial opinion holds that it is not essential for the other spouse to be told of this state of mind.<sup>17</sup>

Where the petitioner relies on the fact of living apart (with respondent's consent), it is reasonable to assume that the question of when the petitioner ceased to recognise the marriage as subsisting will not be disputed by the respondent because he or she 'consents to a decree being granted.' This suggests that it is almost impossible to challenge what the parties have agreed to tell the court. Moreover, as many observers have noted, the existence of divorce by *special procedure* makes it even more difficult for the court to ascertain this mental element from the papers submitted to the Registrar.<sup>18</sup> It could be argued, then, that the better way to maintain respect for the law is to remove the need to prove this mental element.<sup>19</sup> However, until the 1995 reforms, this suggestion would have been open to objection on the ground either that the removal of the mental element amounts to granting divorce based on mutual consent or that it would render superfluous the adjudication process whereby the fact of irretrievable breakdown is determined.<sup>20</sup>

Besides the above shortcomings, the process of establishing the fact of living apart, particularly where such fact is being disputed, necessarily leads the trial court into an examination of the intimate details of the couple's private life. This is more so where the parties are living under the same roof but in different households. In Australia, for example, judges of the Family Court have adopted a practice of requiring additional evidence to corroborate the applicant's

<sup>16</sup> According to a study done by Anita Chan of the Hong Kong Catholic Marriage Advisory Council, '[t]he increase in business activities in China and the long period of separation between couples leads to increase in divorce.' See A Chan, 'Divorce and the Search for Stable Relationships,' a paper presented at the Academic Forum: Family Problems and the Law, organised by the Department of Social Work and Social Administration, University of Hong Kong and the Central Policy Unit, Hong Kong government, 9 November 1994. See also Hong Kong Family Welfare Society Annual Report (1994/95), p 22.

<sup>17</sup> See *Santos v Santos* (note 11 above).

<sup>18</sup> See B Passingham, 'The Breakdown of Marriage' in Peter Wesley-Smith (ed), *Law Lectures for Practitioners 1974* (Hong Kong: Hong Kong Law Journal Ltd, 1974), p 6; Elizabeth Phillips, 'Marriage Breakdown, Divorce and Property Adjustment' in *Law Lectures for Practitioners 1980* (Hong Kong: Hong Kong Law Journal Ltd, 1980), pp 7-8; P M Bromley & N V Lowe, *Bromley's Family Law* (London: Butterworths, 1992), p 235, and S M Cretney, *Elements of Family Law* (London: Sweet & Maxwell, 1992), pp 33-4.

<sup>19</sup> Judith Evans has argued that the courts made matters too complicated (as in *Santos v Santos* (note 11 above)) when they added a mental element to the fact of living apart. She argues that when the English Divorce Reform Act 1969 was enacted, it had been expected that the two years separation would of itself be sufficient proof that the marriage had broken down irretrievably. See Evans (note 5 above), p 91.

<sup>20</sup> Yet this is what has been happening in cases where the fact of living apart (with consent) has been relied upon and where divorce has been effected by special procedure. It seems that, in order to keep alive the legal doctrine that divorce is granted solely on the proven ground of irretrievable breakdown of marriage, courts appear to insist on this mental element whether it be real or fanciful. See also Bromley & Lowe (note 18 above), p 243.

contention that the parties are actually living apart.<sup>21</sup> Although such enquiry is not intended to discover any faults, yet it can generate its own humiliation or embarrassment, thus undermining the object of minimising distress and conflict between the parties.<sup>22</sup> This problem of proof has the effect of inducing some petitioners to opt for a quicker route of behaviour and adultery facts. Hence, studies done in England show that, in 1989, nearly 75 per cent of all petitioners in England and Wales relied on the facts of behaviour or adultery.<sup>23</sup> Comparable trends have been recorded in Scotland.

One would argue, therefore, that although the recent statutory changes have reduced the period of living apart from two years to one year and from five years to two years, this has not in itself addressed the problems raised above. Fortunately, however, this is not the only way the legislature has sought to deal with the problems caused by the fact of living apart. Another way in which the above objections have been partially addressed is the addition of two more divorce options to the existing law. The first addition is divorce by joint application based on living apart for one year and the second is divorce after one year's advance notice of an intention to divorce (without living apart). These additional avenues to divorce are considered below.

#### *Divorce by application*

The new s 11B of the MCO now provides that parties can apply jointly for a decree of divorce if they have lived apart for one year. On the other hand, if they do not wish to separate they may submit a joint notice of intention to divorce and one year later jointly apply for a divorce decree. In both cases the procedure

<sup>21</sup> As noted by Frank Bates, the need for such corroboration has in some cases involved the parties' children having to give evidence that their parents were not having sexual intercourse during the relevant times. (See *In the Marriage of Cusano* [1976] FLC 90-112.) And *In the Marriage of Potter* [1976] FLC 90-146, lodgers had to testify that, although the parties were living in the same house, they slept in different rooms and both had formed relationships with other people. See Frank Bates, *An Introduction to Family Law* (Perth: Law Book Co Ltd, 1987), p 152.

<sup>22</sup> The decision in *Chiu Chee-kan v Chiu Kung Tien-ming*, CA, Civ App No 121 of 1991 provides a local example of how this problem occurs. In this case the husband petitioned for divorce, relying on the fact of living apart for five years. The wife, however, disputed this ground, arguing that the couple had never lived apart. And, in the course of establishing that the couple were living together, the court had to admit detailed evidence concerning the parties' private lives. Similarly, in *Yuen v Yuen*, HCt, Divorce Action No 35 of 1978 the husband, who based his petition on the fact of living apart for five years, was unsuccessful because the wife was able to show that she occasionally prepared meals for him during the two years before he finally left the matrimonial home. The court relied on *Mouncer v Mouncer* [1972] 1 WLR 321, where it was held that the rejection of a normal physical relationship coupled with the absence of normal affection was not enough to establish the fact of living apart.

<sup>23</sup> See Bromley & Lowe (note 18 above), p 238 and J Brown & H Jones, 'Looking to the Future: A Summary' [1995] Fam Law 286. See also *HKLRC Report*, p 38, para 3.4. It is estimated that in England divorce by special process takes about six months: see S Cretney, 'The Divorce White Paper — Some Reflections' [1995] Fam Law 302. The apparent popularity in England of these two facts has been taken as evidence that divorcing couples do manipulate the law to fit their desire for a speedy divorce. And yet, as noted by the English Law Commission, 'it is not possible to prevent parties obtaining immediate consensual divorce so long as immediate divorce is available upon fulfilment of certain requirements' (*Facing the Future* (note 31 below), cited in *HKLRC Report*, p 1, n 1). In contrast to the English statistics, the fact of living apart for two years has been more popular in Hong Kong than the facts of behaviour and adultery.

is the same, that is by joint application, except that the parties rely on somewhat different facts. In what follows, I examine the effect of s 11B on the existing law.

### Old fact but new procedure

As noted above, the introduction of divorce by application was intended to reduce the stress and anxiety generated by adversary court hearings particularly where the respondent did not wish or would not have wanted to contest the petition. The HKLRC recommended, therefore, that an optional procedure be introduced whereby parties would make a joint application for divorce without the requirement to appear in court.<sup>24</sup> Moreover, there would be no need to provide detailed evidence that the marriage had broken down irreparably.<sup>25</sup> Thus where the applicants intend to rely on the fact of living apart (with consent), all that is expected of them is to show that they have lived apart for one year immediately before their application and that they sincerely believe that their marriage has broken down irreparably.

After a joint application is submitted, the District Court Registrar is required to examine the application to satisfy himself that it is properly made and contains all the information to be included in Forms 2C and 2D (MCR). If everything is in order the Registrar 'shall give directions for trial by entering the cause in the special procedure list.'<sup>26</sup> Here again, the effect of this rule is to dispense with the need for applicants to appear in court or to submit bundles of evidence concerning why they believe that their marriage has broken down. Under these circumstances, it is expected that the emotional as well as financial cost of litigation will be considerably reduced; and it is also hoped that the resulting savings can be usefully applied in supporting families.

It is significant to mention at this juncture that the new procedure of divorce by joint application is an extension of the existing system called divorce by *special procedure* which currently accounts for about 33 per cent of all divorces in Hong Kong.<sup>27</sup> As this paper will argue, the expansion of special procedure will move the law further away from divorce by adjudication towards administrative divorce. But first I must consider the new fact of divorce by mutual consent.

<sup>24</sup> See *HKLRC Report*, p 85, para 8.20 and p 92, paras 9.5–9.6.

<sup>25</sup> Based on the proposed amendment to the MCR the process will be initiated by a joint application to the court stating that 'the said marriage has broken down irretrievably' and praying that 'the said marriage be dissolved.' There is no requirement to give any reasons for breakdown of the marriage. See MCR proposed General Form of Joint Application, Form 2C made under rule 9(2).

<sup>26</sup> See the proposed rule 33(2B) of the MCR which provides that: 'Where in the case of a joint application is pending, the registrar shall give directions for trial by entering the cause in the special procedure list if he is satisfied that the joint application is properly made with the information required by Form 2C has been given and the application is accompanied by a separate written statement containing the information required by Form 2D.' Note that the proposed form 2D requires a statement as to the arrangements made by the applicants for their children.

<sup>27</sup> See L Pegg, *Family Law in Hong Kong* (Singapore: Butterworths Asia, 3rd ed 1994), p 122; Phillips (note 18 above), p 7.

### Divorce by mutual consent: a sixth fact?

Divorce by mutual consent after one year's notice aims at addressing the practical difficulties encountered by petitioners who wish to rely on the fact of living apart. As I have shown above, the new procedure dispenses with a court trial, thus obviating the stresses and anxieties associated with the adversary procedure. It does not require parties to live apart and this removes the temptation to commit perjury concerning either the mental element associated with living apart or the length of the period of living apart. Furthermore, the new procedure provides a real option to those parties who, because of financial or other reasons, do not wish to live apart before judicial divorce is granted.<sup>28</sup> It is envisaged that by continuing to live in the same household couples will have greater opportunity to rearrange their lives and to plan properly for their children in advance of a divorce decree.<sup>29</sup> And as will be noted below, there are greater possibilities here for couples to evaluate the likely consequences of a divorce on their future lives and this presumably will enhance the likelihood for reconciliation.

The sixth fact also introduces into the existing law a new notion of consent divorce. This notion is more radical than the consensual divorce available after a two year (now one year) period of living apart. Under the new system parties who wish to rely on this fact will not be required to prove specifically to the court that their marriage has broken down irretrievably before divorce can be granted. As noted by the HKLRC, the new fact permits 'parties to divorce by mutual consent after a period of one year's notice to the court ...'<sup>30</sup> It seems, therefore, that the new provision avoids not only the difficulty of proving the fact of living apart, as it is currently defined, but also permits couples who do not wish to live apart to continue living together until the decree of divorce is granted. What the new approach implies therefore is that the parties are now to be trusted to determine for themselves the fact that their marriage has broken down irreparably. In other words, the legal conclusion that the marriage has broken down will be inferred from the very fact that the parties have not withdrawn their joint notice of intention to apply for divorce.

When this divorce model was first proposed by the English Law Commission it was described as 'a process over time.'<sup>31</sup> The Commission stressed that the

<sup>28</sup> As one of the persons consulted by the HKLRC put it: 'In an overpopulated environment such as Hong Kong very few couples, unless they are among the super rich, can afford to live apart, that is in separate buildings, until all financial arrangements following divorce are decided. This leads to couples who have decided to divorce sharing the same premises, and having to satisfy a judge that they have separate households which is totally impracticable especially if there are children of the family.' See *HKLRC Report*, pp 87-8, para 8.27.

<sup>29</sup> But some commentators think that it is unrealistic to expect many couples to do any of these things. See eg M D A Freeman, 'England: Back to Basics' (1994-95) 33 *University of Louisville Journal of Family Law* 329-52.

<sup>30</sup> See *HKLRC Report*, p 93, para 9.8 and pp 86-8, paras 8.24-8.28.

<sup>31</sup> See Law Commission of England and Wales, *Facing the Future — A Discussion Paper on the Grounds for Divorce*, No 170 (London: HMSO, 1978), para 3.48.



model gave parties a chance to reflect carefully on their marriage for a period of one year and where this was possible they could be counselled and encouraged to reconcile.<sup>32</sup> As noted by Bromley & Lowe, it was envisaged that, between the lodging of the notice of intention to divorce and the granting of the decree, 'the parties could be offered counselling or conciliation and the court should make orders relating to children, financial provision and property adjustment.'<sup>33</sup> It might be argued, therefore, that the one year period is for consideration and reflection and is intended to enable parties, where this is possible, to be reconciled; if reconciliation is not possible, this time will be used to settle financial and property matters and the upbringing of their children, if any.

It is perhaps useful to mention here that this model appears to assume that counselling services will be readily available, that the spouses will be willing to take advantage of these services, and, above all, that marital cohabitation during the twelve months period will be peaceful and practicable.<sup>34</sup> In England and Wales, where this proposal was first mooted, doubts have been widely expressed regarding the budgetary implications of this proposal.<sup>35</sup> It remains to be seen how Hong Kong will assist couples during the twelve months while they wait for the decree. Yet, unlike England and Wales where this model is intended to replace the entire law of divorce, the Hong Kong legislature has merely added it to the existing system of mixed fault and no-fault divorce. This suggests that couples will be free to choose from the available options what best suits their circumstances. However, in the event that the sixth fact becomes very popular, and I believe it will be, existing family support services will have to be expanded and strengthened in order to cope with such demand. Yet, on the other hand, the new system of divorce has other implications. One of the implications, examined below, is how the various models of divorce will co-exist with one another and interact over time.

### How will the divorce models interact?

The consequence of retaining most of the post-1972 divorce law is that Hong Kong has now at least four models of divorce law on offer. These are: (1) consent

<sup>32</sup> It is envisaged that on the lodging of the notice of intention to divorce a couple will be given a 'comprehensive information pack explaining inter alia the purpose of the period of consideration and reflection, the effects of divorce and separation, the powers of the court, and the nature and purpose of counselling, reconciliation and mediation': Bromley & Lowe (note 18 above), p 243.

<sup>33</sup> See *ibid*, p 243.

<sup>34</sup> In the case where one or both spouses are violent this possibility is unfortunately not open to them. Thus in her paper on divorce Anita Chan has noted that domestic violence is a prominent factor contributing to marital breakdown. According to Chan, in a survey of active cases reported to the Marriage Mediation and Counselling Services (MMCS) there was a total of 55 cases, accounting for 24% of the total caseload, involving domestic violence. See Chan (note 16 above).

<sup>35</sup> See Freeman (note 29 above) at p 340 and Thelma Fisher, 'Training for Family Mediation' (1995) *Fam Law* 570

divorce adopted from Chinese customary law provided under Part V of the Marriage Reform Ordinance (MRO); (2) the fault-based grounds of divorce under s 11A of the MCO (that is, adultery, behaviour, and desertion); (3) the no-fault facts model of living apart; and finally, (4) divorce by mutual consent based on the notion of process over time (that is, the sixth fact).

Looking at the new changes and what has been left unchanged, it is clear that the Hong Kong legislature has tried very hard to satisfy conflicting interests within the community. For example, those who think that the answer to high divorce rates lies in having a law that makes divorce very difficult to obtain will find solace in the fault facts that have been retained together with the adversary procedure.<sup>36</sup> At the other end of the scale are those who favour unilateral divorce on demand without any waiting period and with minimum procedural hurdles. These have been offered a compromise option of divorce based on mutual consent, but in which there is a small amount of court participation. This option, as noted above, is based on the idea that if both parties 'genuinely desire to end their marriage, why should society punish them by requiring [them to remain married]?'<sup>37</sup> However, rather than getting divorce on demand and unilaterally, it will be given only if both parties consent to it and after a twelve months period of consideration and reflection.

Between these two positions are those who prefer the no-fault grounds such as living apart, but would like to see the court actively involved in the process leading to divorce. There may be those who, for psychological reasons, do consider such judicial participation as vital even if it amounts to a symbolic rubber-stamping of the couple's own decision.<sup>38</sup> This group has an option in s 11A(2)(c) and (d) of MCO which allow divorce by petition rather than by application. This paper will now consider how these models will co-exist and interact and further how this process will affect the future development of our divorce law.

### The expansion of administrative divorce

One of the effects of the sixth fact and indeed of the entire system of divorce by application (rather than by petition) is to dispense with a court trial which also entails the filing of detailed evidence concerning marriage breakdown. As noted above, divorce by joint application is an extension of the divorce by

<sup>36</sup> For example, Rev Fung Chi-wood of the Democratic Party attempted to amend the Bill so that the time restriction on divorce for a newly married couple would be set at two years instead of one year but this amendment was defeated by 27 votes to 20. See L Won, C Ng, L Wong, & F Wai-Kong, "Quickie" Divorces Get Approval' in *South China Morning Post*, 18 May 1995.

<sup>37</sup> Quoted from one respondent: see *HKLRC Report*, p 85, para 8.18.

<sup>38</sup> It has been noted, for example, that there are those who consider it 'desirable to eliminate unnecessary and unnerving court appearances by the parties in undefended cases, and those who believe that a marriage is still a sufficiently important social institution to warrant its termination by judicial rather than administrative process': see Phillips (note 18 above), p 7.

special procedure.<sup>39</sup> The process of special procedure is set in motion by the petitioner's written request for directions for trial, filed with the District Court and supported by affidavit together with any corroborative evidence on which the petitioner intends to rely. These papers are then examined by the Registrar and, if he is satisfied, directions for trial are given by entering the cause in a special procedure list.<sup>40</sup> Thereafter, the Registrar will evaluate the documentary evidence and again, if he is satisfied that all the formal requirements have been complied with and that the petitioner has sufficiently proved the contents of the petition, the Registrar shall file a certificate to that effect.<sup>41</sup> The final step after the filing of the certificate is to fix a date when a District Court Judge will formally pronounce a decree of divorce in open court.<sup>42</sup>

Special procedure was first introduced in England in 1973 and, until 1977, was exclusively applied to undefended petitions relying on two years' separation. In 1977 it was extended to all undefended petitions and, as several observers have noted, special procedure is no longer special but has become a well trodden path to divorce.<sup>43</sup> Before 1973 it had been observed that, in most undefended divorce actions, a lot of unnecessary time and money were routinely wasted in open court trials. These trials also generated anxiety and embarrassment for petitioners and their witnesses. It was with these concerns in mind that special procedure was introduced into the divorce law of England.

Yet special procedure seems to have achieved more than what the Divorce Reform Act of 1969 would have hoped to accomplish. It has in effect abolished judicial inquiry by introducing a quasi-administrative divorce procedure. Thus Cretney is right when he notes that divorce by special procedure may appear in legal theory to be the outcome of a judicial process but it has 'few of the attributes traditionally associated with adjudication.'<sup>44</sup> Under these circumstances it is unrealistic, therefore, to expect the court either in Hong Kong or England to 'inquire so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent' as provided by s 15

<sup>39</sup> Divorce by special procedure was introduced into Hong Kong in 1974 and is available where: (i) the petition is undefended; (ii) the behaviour fact is not the one alleged in the petition; (iii) there are no children of the family in relation to whom s 18 of the MPPPO applies, and (iv) where costs have been claimed against the respondent and any other party to the proceedings, the court has received acknowledgment of service containing a statement that he does not intend to defend the proceedings (see MCR, rr 33 and 47A).

<sup>40</sup> See MCR, r 33(2A).

<sup>41</sup> See the proposed addition to r 47A which states that '(1A) As soon as practicable after a cause has been entered in the special procedure list, the registrar shall consider the evidence filed by the joint applicants and — (a) if he is satisfied that the joint applicants have sufficiently proved the contents of the joint application and are entitled to a decree [of divorce], the registrar shall make and file a certificate to that effect; and (b) if he is not satisfied he may either give to the joint applicants an opportunity of filing further evidence or reject the joint application.'

<sup>42</sup> Note that there is no requirement for both parties or either of them to appear before the divorce decree is pronounced.

<sup>43</sup> See Bromley & Lowe (note 18 above), p 235; Cretney (note 18 above), p 34; and Phillips (note 18 above), p 7.

<sup>44</sup> Cretney (note 18 above), p 34.

MCO.<sup>45</sup> It seems inevitable that the extension of special procedure to cover all applications under s 11B MCO has widened the scope of the existing administrative divorce by including parties with minor children.

*Expansion of mutual consent divorce*

When all the existing divorce models and procedural options are examined together, it becomes clear that the recent reforms have expanded the available options for consent divorce. Until 1995 we had divorce by mutual consent based on the fact of separation for two years, now reduced to one year, and divorce under Part V of the Marriage Reform Ordinance. The latter option is still available to couples who have contracted a Chinese customary marriage or a modern marriage (ie validated marriages) before 7th October 1971 and have registered such marriage under Part IV of the MRO (ie ss 14-22).<sup>46</sup> The third option which is now available under s 11B (see s 7 MCAO) permits divorce either after one year's notice to the court or after living apart for one year.

The possible effect of widening the scope of consent divorce is that the fault facts such as behaviour, adultery, and desertion will continue to lose their attraction as a way to divorce. Indeed this prospect can be demonstrated by taking the Hong Kong divorce statistics of 1980, 1982, 1988, and 1990. These figures show that separation for two years accounted for 51 per cent of all divorce petitions. On the other hand, adultery and desertion scored a small average of 4.5 per cent during the same period. Hence, considering that the period of separation has now been reduced from two years to one year and a more practical and economical procedure for divorce has been introduced (ie an expanded special procedure), it is highly likely that potential applicants will find the fact of living apart much more attractive than ever before.<sup>47</sup> And others who can take advantage of the sixth fact will happily do so. After all, it is not obligatory for them to live in the same household. Thus, unless the joint notice is subsequently withdrawn, parties can separate if they wish without prejudicing their chances to obtain divorce after twelve months of prior notice. This prediction is further reinforced by a Hong Kong survey that found overwhelm-

<sup>45</sup> See s 15, MCO. It has been recommended by the English Matrimonial Causes Procedure Committee that s 1(3) MCA (the HK equivalent of s 15 MCO) be repealed because 'judges have virtually lost all control over undefended cases.' See Bromley & Lowe (note 18 above), p 239 and n 20. But those who have attacked this procedure have argued that it amounts to something like obtaining divorce by post and have doubted whether this can be regarded as fulfilling the object of buttressing, rather than undermining, the stability of marriage. See *ibid*, p 239 and Phillips (note 18 above), pp 7-8.

<sup>46</sup> Section 16 MRO provides that parties may give a joint notice to a designated public officer of their intention to dissolve their marriage. The officer to whom such notice is given has the duty to interview the parties so as to satisfy himself that they 'freely and voluntarily desire to dissolve their marriage' (MRO, s 17(2)(c)). Once this condition is satisfied, the officer signs the prescribed form in duplicate and issues a copy to each of the parties. The final procedure is accomplished when an agreement or memorandum is signed by both parties and attested to by two witnesses. This memorandum must be registered under s 20 of the MRO after which the divorce becomes effective.

<sup>47</sup> One solicitor has reported that many of his clients had been waiting for the new provisions to come into force. 'They hope their divorces can go through quicker.' See Q Chan, 'Easier Divorces Delayed,' *South China Morning Post*, Monday 4th, 1995, p 2.

ing support, among certain social groups, for a mutual consent divorce after one year's notice. Such support was found particularly among the younger and more educated respondents who were also in the higher income bracket.<sup>48</sup>

On the basis of the foregoing developments, it can be argued that the general direction of Hong Kong divorce law is a movement away from intensive adjudication but towards an administrative-oriented divorce based on minimum judicial participation and a greater recognition that couples are to be trusted to determine when their marriage has broken down irreparably. This development suggests that, in the coming years, as the participation of lawyers in the process leading to divorce becomes gradually reduced, our attention must now be focused on the post-divorce matters such as financial provisions, property, and the protection of vulnerable family members from the avoidable negative effects of divorce.

### From three years to one year bar

Until its amendment in May 1995 s 12 of the MCO provided that a petition for divorce shall not be presented before the expiration of three years unless prior leave of the court has been obtained. Leave of the court is granted on the basis of 'exceptional hardship' suffered by the petitioner or 'exceptional depravity' on the part of the respondent. The three year restriction has now been reduced to one year while the grounds on which the court relies to grant leave to petition have been retained. The restriction on divorce during the early years of marriage is based on the untested assumption that, unless restricted, some newly married couples would have little incentive to overcome the marital difficulties that occur early in their marriage and to which most couples are prone and are generally expected to endure. It is for this reason that the restriction is considered to be an important device for assuring the stability of marriages by affording such couples time and opportunity to reflect and try to overcome their 'temporary' difficulties. This restriction is also viewed as 'a useful safeguard against irresponsible or trial marriages ...'<sup>49</sup>

This bar to divorce was first introduced in England by the Matrimonial Causes Act of 1937. In fact, it was introduced at the last minute apparently to appease the more conservative legislators who believed that the enactment of additional grounds would encourage divorce, thus undermining the stability of the marriage.<sup>50</sup> Following a study and recommendation of the English Law

<sup>48</sup> See *HKLRC Report*, pp 103–4. Note also that account must be taken of parties who divorce under Part V of the MRO.

<sup>49</sup> See *HKLRC Report*, p 54, para 4.5. But as noted by Phillips, 'most young couples do not consult a solicitor before entering into a marriage': note 18 above, p 3.

<sup>50</sup> Since divorce was previously available only on the ground of adultery, the introduction of cruelty, desertion, and incurable insanity was viewed in some quarters as likely to undermine the stability of marriage by widening the basis on which divorce could be granted. See L Stone, *Road to Divorce: A History of the Making and Breaking of Marriage in England* (Oxford: Oxford University Press, 1995), pp 398–401.

Commission, the three year restriction was reduced to one year by the Matrimonial and Family Proceedings Act of 1984.<sup>51</sup> However, the period of one year was made absolute by taking away the discretionary powers of the court to grant leave in cases falling within the two exceptions. During its investigations, the Law Commission had found that, far from fulfilling the aims of a good divorce law, the restriction actually 'caused bitterness, distress and humiliation by forcing petitioners to wash their dirty linen in public.'<sup>52</sup> This occurred mainly because, in their effort to establish a case for leave to petition within three years, certain applicants had been tempted 'to exaggerate allegations with the result that any hope ... of reaching settlement was jeopardised.'<sup>53</sup> Judges had also been critical of the fact that the notions of exceptional hardship and exceptional depravity were open-ended and tended to change with the changing social norms, thus creating difficulties for courts when called upon to apply them.<sup>54</sup> Other evidence showed that, in jurisdictions such as Scotland where such restriction had never been introduced, there was no marked difference in the rate of divorce during the early years of marriage.<sup>55</sup>

It was in the light of this background that the HKLRC was asked to consider the existing restriction on petition for divorce within three years of marriage imposed by s 12 of the MCO. After reviewing and evaluating the rationale for this restriction, its historical origins, and the various criticisms made of it, and after putting into account the views of the public, the HKLRC recommended that the 'present three year time restriction on petition for divorce, contained in section 12(1), should be reduced to one year.'<sup>56</sup> As noted earlier, this recommendation has now been enacted into law. It should be stressed also that, unlike the English statute, which has created an absolute bar of one year, the Hong Kong provision has retained the court's discretion to grant leave to petition in appropriate cases. According to the HKLRC, although there are problems inherent in the present provisions relating to hardship and depravity, these exceptions should nonetheless be retained.<sup>57</sup>

With regard to why the restriction to divorce was retained, it appears that the HKLRC was swayed by the 54 per cent of the respondents in the telephone survey who 'thought that a restriction period of some sort should be maintained.' This figure might be compared with 35 per cent of the respondents who

<sup>51</sup> See s 1 of the Matrimonial and Family Proceedings Act 1984 (substituting a new s 3 of the MCA 1973). See also Bromley & Lowe (note 18 above), p 186.

<sup>52</sup> *Ibid.*

<sup>53</sup> See *ibid.*

<sup>54</sup> See Ormrod LJ in *C v C* [1980] Fam 23, 26–7. Furthermore, the idea of mechanically restricting divorce for three years when the marriage has irretrievably broken down also contradicts the principle of divorce based on the single ground of irretrievable breakdown. For a good critique see B F Boulter, 'Section 3 of the Matrimonial Causes Act 1973 and the Exceptional Hardship' [1983] Fam Law 51–3.

<sup>55</sup> *HKLRC Report*, p 58, para 5.5; see also Pegg (note 27 above), p 126.

<sup>56</sup> See *HKLRC Report*, p 93, para 9.9.

<sup>57</sup> See *HKLRC Report*, p 88, para 8.31.

thought that the restriction should be abolished altogether. It seems, however, that the most important consideration was that, despite the objections held against the time restriction, it continues to perform political as well as educational roles. As the English Law Commission put it, it is not good for the law to encourage 'an attitude of mind in which divorce comes to be regarded not as the last resort, but as the obvious way out when things go wrong.'<sup>58</sup> Thus, if one considers the fact that the new amendments have made divorce less difficult to obtain, the preservation of the time restriction, particularly in its reduced form, might be seen merely as an additional precaution against possible criticism from those opposed to a greater liberalisation of divorce law. As noted earlier, this might account for the retention of the fault facts (ie adultery, desertion, and behaviour) as well as the adversary procedure in cases where special procedure is not applicable.

Before concluding this section I must comment on the relationship between (what is now) the one year restriction to divorce and consensual divorce based on the sixth fact (ie one year's notice without separation). As the law now stands, it is legally possible for a newly married couple to give notice of their intention to divorce shortly after their wedding day and yet continue to cohabit as husband and wife. Unless the notice is withdrawn, the couple will be entitled to a decree of divorce after the expiration of twelve months. The same can be said of divorce based on living apart for one year or divorce based on one year's desertion. In all these cases, the one year restriction to divorce seems to be irrelevant because in the end the two periods of one year do cancel one another out.

On the other hand, petitioners intending to rely on the fault 'grounds' of behaviour or adultery could use such facts to establish exceptional hardship or exceptional depravity. This will become more likely especially because, in future, fewer petitioners are going to rely on these facts and those who do will presumably have strong evidence to support their case. Where a petitioner has strong evidence to support his or her case, such evidence is likely to constitute a strong ground on which to base a case for exceptional hardship or exceptional depravity. This possibility creates grave doubt as to the practical value of the time restriction particularly in cases where the spouses continue to live together. It might be argued, following Pegg, that since the time restriction has been drastically lowered, there seems to be no serious need or justification for retaining this restriction.<sup>59</sup> Therefore, as noted earlier, the possible reason for retaining the restriction is that it serves a political, if not also a symbolic, function of creating an appearance that divorce has not become too easy and that the law does buttress the stability of marriage.

<sup>58</sup> See English Law Commission Report No 166 quoted in Bromley & Lowe (note 18 above), p 186, n 12.

<sup>59</sup> Pegg (note 27 above) p 126.

### From two years to one year desertion

Section 11A(2)(e) MCO now provides that divorce may be granted if the petitioner can show that 'the respondent has deserted the petitioner for a continuous period of at least 1 year immediately preceding the presentation of the petition.' Before the 1995 amendments the period of desertion was two years. Traditionally, the desertion fact consists of two major elements. The first is the fact of desertion and second is that such desertion must have persisted for a stipulated period. To establish simple desertion, the petitioner must show that the respondent has left the matrimonial home with the intention of living apart permanently, without justification and without the petitioner's consent. However, where the respondent's conduct towards the petitioner is such that the petitioner is justified to leave the matrimonial home, this would then become constructive desertion. As noted by Lord Merrivale, 'desertion is not the withdrawal from a place, but from a state of things.'<sup>60</sup> With the introduction of the behaviour fact, however, constructive desertion has lost much of its importance. This is because a 'constructively' deserted spouse can now successfully rely on behaviour instead of waiting for the stipulated period.<sup>61</sup>

Therefore, in its report the HKLRC recommended that the desertion fact should be abolished, particularly because 'the consequence of reducing to two years the separation period for divorce where the respondent does not consent, the fact of desertion for a period of two years, as is presently framed, would be rendered obsolete.' Moreover, as noted above, this fact would be used only in those few cases where the petitioner cannot rely on the behaviour fact and/or where the parties are living apart and do not consent to divorce being granted. The recommendation of the HKLRC to abolish desertion as a fact seems to have been initially accepted by the government as the MCO Amendment Bill did not contain desertion. However, and for reasons that remain undisclosed, the final version of the MCAO contained desertion with a reduced period of one year.<sup>62</sup>

Yet based on the divorce figures of 1980, 1982, 1988, and 1990, desertion, like adultery, accounted for a tiny average of 4.5 per cent of all divorce petitions. Therefore, given its past unpopularity and bearing in mind the more recent liberalisation of the law of divorce, it is very likely indeed that desertion will become obsolete. Here again, one wonders why it has not been abolished. But as noted above, this reluctance to eliminate fault from the law is to some extent

<sup>60</sup> See *Pulford v Pulford* [1923] P 18, 21.

<sup>61</sup> But there are still a few cases where the conduct will not qualify as behaviour sufficient to drive the petitioner out of the matrimonial home but is nonetheless expulsive. See *Khan v Khan* [1980] 1 WLR 355 where the husband is reported to have told his wife in front of her father that she was not to come back to him.

<sup>62</sup> I had expected to find a clue from the proceedings of the LegCo but unfortunately these records are yet to be published.



due to the public opinion survey that indicated a preponderance of local opinion in favour of retaining an element of fault in the divorce law.<sup>63</sup> If this is the major reason, then it must be assumed that, as the community's views on divorce change, the reasons for it will dissipate.

### **Abolition of damages for adultery and crim con**

Under English common law damages for criminal conversation (ie crim con) could be claimed by a husband against his wife's paramour. However, the wife did not have a similar cause of action against her husband's lover. Although such actions were abolished in England by the Matrimonial Causes Act of 1857, there has been some uncertainty as to whether or not this cause of action is still open to Hong Kong husbands.<sup>64</sup> Therefore, to remove this doubt the HKLRC recommended the abolition of this cause of action. With regard to statutory damages for adultery, both spouses had a right to damages under the now repealed s 50 of the MCO. After considering the historical background as well as the assumptions underlying this statutory provision, the HKLRC also recommended its abolition. To that effect a new s 50 MCO now provides that, after the commencement of the ordinance, no action shall lie for adultery or criminal conversation.

It cannot be disputed that the abolition of the right to claim damages in respect of a spouse's adultery is long overdue. Before 1971 when s 50 of the MCO was amended, only a husband could claim such damages. An amendment in 1971 granted wives an equal right to claim the same remedy. It was presumably thought then that, if a husband could claim some proprietary interest in the wife, it was only fair that the same right be extended to the wife. The better way, however, would have been to abolish this cause of action altogether. This would have been consistent with other reforms that were being undertaken about this time, such as the abolition, in 1972, of the husband's right to claim restitution of conjugal rights.<sup>65</sup> Indeed, because the two causes of action are so closely related it might have been an oversight that one was abolished and the other extended to wives.

In the meantime, pressure to abolish the cause of action continued to mount from many sides. The opponents argued that the notion that a husband (or indeed a wife) had proprietary interests in the wife could not be maintained in the 20th century. This was more so considering the fact that in 1971 the Married Persons Status Ordinance was enacted to boost the legal status of

<sup>63</sup> See *HKLRC Report*, para 6.9 and Appendix C, where it is stated that the 'public ... still believe in marital faults and an absolute majority want to retain adultery, ... behaviour and desertion as reasons for a petition': p 104.

<sup>64</sup> See *Gensburger v Gensburger* [1968] HKLR 403; E Phillips, 'Damages for Adultery' (1981) 11 HKLJ 54; Pegg (note 27 above), pp 85-6.

<sup>65</sup> See s 21, Matrimonial Proceedings and Property Ordinance.

married women to reverse the negative effects of English common law. Besides the foregoing argument, it was stated that such a claim for damages was inconsistent with the principle of irretrievable breakdown of marriage because the 'loss of the wife's consortium may be due to the voluntary act of the wife and her adultery an incident of the breakdown of marriage.'<sup>66</sup> It is under these circumstances that the HKLRC recommended the abolition of this ancient cause of action.

Perhaps to reflect the above policy, it is now provided that a husband who alleges adultery in a divorce petition is no longer required to make the alleged adulterer a co-respondent unless he names that person in the petition or the court directs otherwise.<sup>67</sup> The new rule makes no distinction between spouses. Before this amendment, the wife, unlike the husband, was not required to make the alleged adulteress a co-respondent unless the court, in its discretion, considered it appropriate to direct her to do so.<sup>68</sup> This change in the rules has also done away with what seemed to be a conflict between s 14(2) MCO and r 13(1) MCR.<sup>69</sup> It is perhaps fitting to mention also that the requirement to cite a third party in petitions based on adultery was removed in England in 1991.<sup>70</sup>

### Independent domicile of wife

Section 11C(2) of the MCAO (1995) provides that with effect from the coming into force of the ordinance the domicile of a married woman 'shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.'<sup>71</sup> The rule that on marriage a wife automatically acquires the domicile of the husband dates back to the time when the effect of marriage at common law was that for many purposes the legal personality of the wife was either suspended during marriage or was 'incorporated and consolidated into that of the husband.'<sup>72</sup> As noted

<sup>66</sup> See Pegg (note 27 above), p 86.

<sup>67</sup> This replaces r 13(1) of the MCR.

<sup>68</sup> Section 14(2) provides that 'on a petition for divorce presented by the wife in which adultery is alleged the court may, if it thinks fit, direct that the alleged adulteress be made a co-respondent.' This is different from s 14(1) which makes it mandatory for the husband to name the third party unless special grounds exists for the court to waive the requirement.

<sup>69</sup> Whereas s 14(2) MCO in effect provides that a wife is not required to make the alleged adulteress a co-respondent, r 13(1)(b) MCR states that 'where a wife's petition alleges adultery with a woman named, the alleged adulteress shall be made a respondent in the cause.' This suggests that the wife is under this obligation only when she alleges adultery with 'a woman named' but not otherwise. In the case of a husband, the avoidance from citing the name of the adulterer does not exempt him from the requirement unless the court permits.

<sup>70</sup> But see Bromley & Lowe (note 18 above), p 188, n 6, who think that the abolition might be ultra vires s 49 of the parent act (ie the MCA 1973).

<sup>71</sup> This section is based on s 1(1) of the Domicile and Matrimonial Proceedings Act of 1973 which came into force on January 1974. But unlike the English provision, which is universally applicable, the Hong Kong section is restricted to matters falling under Part III of the MCO.

<sup>72</sup> Cited in Bromley & Lowe (note 18 above), p 105.

above, in relation to crim con, the legal effects of marriage under common law have been removed over the years by a series of statutory provisions both in England and in Hong Kong.<sup>73</sup> However, because of the wide-ranging and pervasive effects of common law and also because of the rather piecemeal and selective manner in which the effects of common law on married women have been removed, some of its legal consequences have continued to elude even the genuine efforts of committed reformers.<sup>74</sup> Thus, from time to time, and when occasion provides, these remaining relics of English common law are spotted and expunged from the corpus of family law.<sup>75</sup> Lush is therefore quite right when he argues that the rule that a husband and wife are one person in law 'still prevails as a rule in those matters wherein it was established at common law and has not been abrogated by statute.'<sup>76</sup> The rule at the present day lifts its head hydra-like and is on occasions applied with surprising results.<sup>77</sup>

Before the amendment of the law governing a wife's dependent domicile, the court's jurisdiction in divorce proceedings was based on any one of the following three criteria; (1) that both parties were domiciled in Hong Kong; (2) that either of the parties had a substantial connection with Hong Kong at the date of the petition; and (3) that in the case of proceedings brought by the wife, that the wife was resident in Hong Kong at the date of the petition and has been ordinarily resident in Hong Kong for the period of three years immediately preceding the date of the petition; or where the wife has been deserted or her husband had been deported from Hong Kong and the husband was immediately before the desertion or deportation domiciled in Hong Kong.

It will be noted here that the first criterion relies on the rule that on marriage the wife automatically acquires the domicile of the husband. However, the acquisition of a foreign domicile of choice by the husband who has deserted his wife or who has been deported from Hong Kong will normally trigger an automatic change in the wife's domicile even though she has not actually left Hong Kong. In these circumstances, and to enable the wife to have access to Hong Kong courts, the second criterion is designed to enable such a wife to petition for divorce should any of these events take place. The effect of the

<sup>73</sup> See the Married Persons Status Ordinance.

<sup>74</sup> This point is best demonstrated by the fact that, despite the abolition of actions for criminal conversation, the husband's common law action for harbouring and enticement has escaped the attention of the legislature. See Ng Man-kin, 'Damages for Harbouring and Enticement,' *Hong Kong Lawyer* (August 1995), p 17.

<sup>75</sup> The rule that on marriage a wife acquires the domicile of her husband, and her domicile follows her husband's, was finally abolished in England in 1974. But before its abolition the rule had been a target for severe criticism from every quarter. For example, Lord Denning described it in *Gray v Formosa* [1963] P 259, 267 as 'the last barbarous relic of a wife's servitude' and McClean thought that its abolition in 1974 'was long overdue': see J D McClean, *Morris: The Conflict of Laws* (London: Sweet & Maxwell, 4th ed 1993), p 26.

<sup>76</sup> Indeed, even this 1995 amendment is a good example of piecemeal legislation in the sense that it limits the change only for the purposes of divorce and not for any other purpose. See 11C(2) MCO as amended by s 7, Ordinance No 29 of 1995.

<sup>77</sup> *Husband and Wife* (4th ed) cited in Bromley & Lowe (note 18) p 106.

amendment therefore is to remove the first and third criteria by providing that the court will assume jurisdiction for divorce if either party to the marriage is domiciled in Hong Kong at the date of the petition or application. The second basis on which the court will assume jurisdiction is habitual residence by either party for a continuous period of three years immediately before the date of the petition or application. It need not be stressed here that married women have a right to an independent domicile not only for purposes of divorce but also for all other purposes. Let us hope, therefore, that this 'barbarous relic of the wife's servitude' will be removed from the Hong Kong law as soon as possible.

### **Role of mediation in the changing context of divorce**

Although mediation is not strictly considered part of the Hong Kong divorce law, its role is recognised and indeed sometimes anticipated in divorce legislation. For example, s 15A(1) MCO provides that a court hearing a petition for divorce may adjourn the proceedings to enable parties to effect reconciliation where such possibility exists. Also under s 18B, MCO and r 12(3), MCR a solicitor acting for a petitioner is required to file a certificate indicating whether or not 'he has discussed with the petitioner the possibility of a reconciliation and given the names and addresses of persons qualified to help effect a reconciliation.' Furthermore, s 15A (3)–(6) of the MCO provides in effect that a petitioner who continues or resumes cohabitation for up to six months, presumably in the hope of being reconciled, may still rely upon the facts of adultery, behaviour, or desertion provided that, in the case of desertion, the period of living together will not be counted.

When the above provisions were reviewed by the HKLRC together with the views of the public, it was concluded that these provisions were largely ineffective for a number of reasons. These reasons included the fact that, apart from the limited availability of these services, that which was available was not widely known to potential users. It was also observed that the legal provisions intended to encourage reconciliation arise at a time when parties have already decided to go for the divorce anyway and are thus unwilling to be reconciled. Based on these findings, the HKLRC noted that 'as the number of divorces increase, the need for such services will continue to increase.'<sup>78</sup> It was therefore recommended that priority be given to the public promotion of services available for marriage counselling, mediation, and conciliation and further that consideration be given to future expansion and development of these services.<sup>79</sup>

<sup>78</sup> See *HKLRC Report*, p 90, para 8.39.

<sup>79</sup> See *ibid*, p 93, para 9.11.

It is significant that the HKLRC did not suggest additional statutory provisions to give the existing rules some teeth, such as making mediation obligatory in certain cases.<sup>80</sup> It is also important to stress here that mediation can play an important role not only as a means of reconciling parties but also to assist those who are determined to end the marriage to deal rationally and efficiently with the consequences of divorce. As noted above, mediation services will be particularly appropriate in cases where parties have given a notice of intention to divorce. This is arguably the best time to assist them and their minor children before one year has elapsed.<sup>81</sup> Moreover, mediation will become all the more important given the fact that the legal battle for divorce has practically been replaced by disputes over property, financial provision, and orders for the care and upbringing of children of the family. Although this issue is outside the scope of this paper, it is nonetheless important to remember that the entire question of post-divorce relief must always be seen as part of any meaningful reform of the law of divorce in any jurisdiction.

### Overview and conclusion

This paper has examined the extent to which the 1995 amendments have contributed towards the long standing goals of a good divorce law. These are (1) to buttress the stability of marriage and (2) when such marriage has broken down irretrievably, to enable the empty shell to be buried with maximum fairness and minimum bitterness, distress, and humiliation, regard being had to the best interests of the minor children, if any, of the family. From 1972, when the principle of breakdown of marriage was adopted in Hong Kong, the divorce rate has continued to rise. It is very unlikely that this trend will be reversed. No doubt, therefore, the object of buttressing the stability of marriage, if this is measured only in terms of divorce rates, has not been achieved. However, while this may be so, one must begin to doubt the assumption that the law of divorce can buttress the stability of marriages when the causes of instability are usually wider than the scope of family law.

It will be remembered that in 1937 legislators in England inserted restrictions such as the three year rule in the MCA, and in 1969, as the divorce law was further liberalised, additional provisions were made to encourage parties to

<sup>80</sup> This possibility was first raised in the HKLRC Consultation Paper. See note 9 above, p 5. However, some might consider this requirement as inviting unwarranted regulation of family life by government, particularly where such regulation is not demonstrably beneficial to the community. Thus a recent study in England has shown that lawyers do not favour compulsory mediation although some would be happy to recommend it where the divorcing parties have minor children. See P McCarthy & J Walker, 'Mediation and Divorce Law Reform — The Lawyer's View' [1995] Fam Law 361.

<sup>81</sup> Hot debates are raging in England about the nature and adequacy of mediation services that are to accompany the proposed divorce model. The proposed English model is similar to the new sixth fact of Hong Kong which allows divorce after one year of filing a joint notice of intention to divorce. See Freeman (note 29 above), pp 336–42.

reconcile. Superior courts also added to this effort of buttressing marriage by building up an array of esoteric case law elaborating on the 'grounds' of divorce. The unintended effect of the artificiality and complexity of the law of divorce may have served to line the pockets of divorce lawyers but did not stop parties from divorcing. Perhaps not surprisingly, this development also created a situation where most married couples preferred not to defend. As Hoggett & Pearl have rightly observed, one of the major features of the 1970s that 'militated against attempts to restrict divorce was the impossibility of forcing respondents to defend.'<sup>82</sup> This development, predictably, undermined the notion of competition and disputation on which the adversary system is primarily founded. The result was that trials became not only boring but also were viewed, even by the judges, to be a waste of time and money.

In due course the special procedure was brought in to provide a much-needed escape out of the stalemate and also to save public funds. In England, the special procedure became so popular that it was extended to cover all undefended cases and today it is taken to be the normal road to divorce. The Hong Kong legislature, though previously hesitant to apply it to all undefended cases, has now decided to extend the ambit of the special procedure to cover applications under s 11B MCO. Therefore, despite the restrictions, it has been almost impossible to use the law to hold back the tide of divorce. As this paper has shown, the law of divorce has merely been reacting to social change rather than directing that process. And the reluctance of the legislators to move beyond public opinion has now led to an accumulation of overlapping models of divorce law, some of which are either redundant or nearly obsolete. Moreover, due to the diversity of opinion within the community about the role of marriage, the position of women, and more generally over relations within the family, it has remained politically expedient to maintain the impression that divorce is difficult to obtain and, if it must be granted, only after an exhaustive judicial inquiry into the couple's private lives.

The foregoing overview tends to the conclusion that, if the law cannot stop the tide of divorce, then it must, at least, make the divorce process efficient, economical, and as humane as possible. This paper has shown that Hong Kong law has been moving, since 1972, not only away from fault to a no-fault divorce, but also from judicial divorce to administrative divorce. Moreover, since the sixth fact will most probably become popular along with its built-in special procedure, it might be argued that mutual consent divorce based on minimum judicial inquiry will be the dominant divorce model of the future. And although this is by no means desirable, it is also unrealistic and futile to erect mechanical barriers in the way of divorce when experience in other jurisdictions show that, if determined, parties will always find the means, no matter how restrictive the

<sup>82</sup> Brenda M Hoggett and David S Pearl, *The Family, Law and Society: Cases and Materials* (London: Butterworths, 1991), p 217.

divorce law may be. Whatever the case may be, this development suggests that divorce by mutual consent under Part V of the MRO, ostensibly based on Chinese customary law, has now closed ranks with the new notion of consensual divorce introduced in 1995.

As in other jurisdictions, Hong Kong may have reached a stage where the battle for divorce is about to end but only to be replaced by an even more animated conflict over money and children. As noted by Glendon, the process of secularisation and deregulation of family law which began in Western Europe since the Reformation has, in most jurisdictions, been accompanied by varying degrees of 'state interest in the economic and child-related consequences of marriage dissolution'.<sup>83</sup> It remains to be seen whether divorcing couples, especially those who give notice of intention to divorce, will be assisted in arriving at a settlement that is both efficient and fair. It is submitted that mediation and counselling services should become integrated with divorce and both must be seen as a single process, albeit consisting of several stages. As the law moves towards a practical and efficient divorce process, the obligation to protect the victims of divorce will be greater. This may require not only the expansion of counselling and other mediation services but also the establishment of a more efficient and cost-effective system of regulating ancillary matters.

<sup>83</sup> M A Glendon, *Abortion and Divorce in Western Law* (Cambridge, Mass & London: Harvard University Press, 1987), cited in Hoggett & Pearl (note 82 above), p 197.