

THE LAW REFORM COMMISSION OF HONG KONG

CONSULTATION PAPER

**TIME RESTRICTIONS ON PETITIONS FOR DIVORCE
WITHIN THREE YEARS OF MARRIAGE**

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Chapter 1

Introduction

1.1 In recent years a number of jurisdictions have set about reforming their laws on divorce.¹ The Hong Kong Law Reform Commission is currently reviewing various aspects of our law.² One of these is the area of marriages of short duration and the restrictions imposed on obtaining a divorce in these circumstances. The purpose of this consultation paper is to examine the efficacy of these restrictions as they presently stand.

Terms of reference

1.2 In its terms of reference on this topic the Law Reform Commission has been asked to consider:

“the existing restriction on petitions for divorce within 3 years of marriage imposed by section 12 of [the Matrimonial Causes] Ordinance³ and to recommend such changes in the law as may be thought appropriate.”⁴

Format of the paper

1.3 Following this Introduction, Chapter 2 looks at the issue in its context, namely the general law of petitioning for divorce.

1.4 In Chapter 3 the operation of the restriction is explained. Divorce petitions may only be presented within three years of marriage if “exceptional hardship” to the petitioner or the “exceptional depravity” of the respondent can be shown. Chapter 4 discusses the extent to which the restriction is effective in meeting the stated objectives of our current divorce law. The conclusion reached is that reform of this aspect of the law may be necessary.

¹ For example, both Australia and New Zealand have changed their “mixed fault and no-fault” system of ground for divorce to one based on the strict “no-fault” criteria of separation: Australian Family Law Act 1975 (1 year separation); New Zealand Family Proceedings Act 1980 (2 years separation). The Law Commissions of both England and Scotland are contemplating the introduction of major reforms to their laws of divorce: see Law Commission of England and Wales, *Facing the Future - a Discussion Paper on the Ground for Divorce* (1988) Law Com No 170 and the resulting Report, *The Ground for Divorce* (1990) Law Com No 192; also the Scottish Law Commission, *Report on Reform of the Ground for Divorce* (1989) Scot Law Com No 116.

² See also the Commission's *Consultation Paper on Grounds for Divorce* (September 1990).

³ Cap 179 LHK, 1983 ed, (“MCO”).

⁴ Signed by the Attorney General, Mr Jeremy Mathews, and the Chief Justice, Sir TL Yang in December 1989.

1.5 In Chapter 5 the reform alternatives are examined. This chapter also notes what restrictions on petitioning for early divorce, if any, exist in other jurisdictions similar to our own. Chapter 6 proposes various reform options for Hong Kong. These are put forward for discussion and comment. A number of questions are asked within this chapter which are intended to highlight the major issues in this area of the law.⁵ It is hoped that the comments received in response to this paper would include particular consideration of these issues.

⁵ These questions are based on a questionnaire used by the English Law Commission in its review of the equivalent English legislation in the early 1980's: see the Report of the Law Commission of England and Wales, *Time Restrictions on Presentation of Divorce and Nullity Petitions* (1982) Law Com No 116, pp 72-73.

Chapter 2

Petitioning for Divorce

2.1 When considering the issue of restricting divorce where the marriage is one of short duration, perhaps the restriction ought first to be considered within the wider context of divorce law generally. The following paragraphs briefly outline the present state of the law, particularly in relation to the criteria applied to determine whether or not a couple may (otherwise) divorce, ie- the grounds for divorce.⁶

Present policy

2.2 The “avowed policy”⁷ of the present law of divorce is to allow the empty legal shell of a marriage which has broken down irretrievably to be destroyed “with the maximum fairness, and the minimum bitterness, distress and humiliation” to the parties concerned.⁸ This statement of policy emerged during a movement to reform the law of divorce in England in the late 1960's. The resulting reforms became embodied within legislation which remains largely intact today and upon which our own provisions in Hong Kong are based. The “avowed policy” marked a radical shift away from the previous divorce regime, with its heavy emphasis upon the “fault” of the parties and its essentially punitive approach to the granting of divorces.

The current grounds for divorce

2.3 In line with the “avowed policy” of the law, the sole ground for divorce is the “irretrievable breakdown” of marriage.⁹ This is established by proof of one or more of the following “facts”:¹⁰

- (a) adultery (that the respondent has committed adultery and that the petitioner finds it intolerable to continue living with him);
- (b) unreasonable behaviour (that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to

⁶ The extent to which our present law on grounds for divorce succeeds in meeting its established objectives and to what extent reforms may be necessary in this area have been given preliminary consideration by the Hong Kong Law Reform Commission in a separate consultation paper, op cit n 2. As some of the aspects of divorce law addressed in that paper overlap with the concerns of this one, the findings in *Grounds for Divorce* are referred to in the following paragraphs of this paper.

⁷ Law Commission of England and Wales, op cit n 5, para 2.1.

⁸ *The Field of Choice* (1966) Law Com No 6, cmnd 3123, para 15.

⁹ MCO, s 11.

¹⁰ MCO, s 11A (1).

live with him);

- (c) desertion (that the respondent has deserted the petitioner for a continuous period of at least 2 years prior to the petition);
- (d) 2 years separation with consent (that the spouses have been separated for at least 2 years and the respondent consents to the divorce);
- (e) 5 years separation (that the spouses have been separated for at least five years).

2.4 Whenever a divorce petition is presented there is a duty upon the court to inquire, “so far as it reasonably can”, into the facts alleged by the parties.¹¹ If any of the “facts” necessary to evidence irretrievable breakdown can be made out to the satisfaction of the court then a decree nisi will be granted to the parties in the first instance.¹² The decree nisi will usually not be made absolute until 3 months after its grant.¹³

Is reform necessary?

2.5 Our current law on grounds for divorce is thought to be in need of reform in a number of respects.¹⁴ It is apparent that despite its intention to create a less punitive system and the inclusion of non-fault criteria for establishing divorce, our law retains to a large extent the “fault” element of the earlier regime, namely in the adultery, behaviour and desertion “facts” above. It has been shown that this retention of fault in divorce proceedings greatly exacerbates the “bitterness, distress and humiliation” felt by parties who undergo the divorce process and this is especially true of the children to the marriage.¹⁵

2.6 This situation is particularly significant when one considers that two of the “facts” to evidence breakdown which are based on “fault”, namely the adultery and behaviour facts, will allow the parties to seek and obtain an “immediate” divorce, when compared to the two- or five-year wait if the “non-fault” separation facts are cited. For this reason it would seem that only the minority of couples seek divorce on the present separation facts, the large majority resorting instead to allegations of fault against the other spouse.¹⁶

2.7 Through these limitations of the system in practice, it would seem that the “avowed policy” of our present divorce law is not being achieved. In its

¹¹ MCO, s 15(1)

¹² MCO, s 15(2).

¹³ MCO, s 15(5).

¹⁴ See the consultation paper of the Hong Kong Law Reform Commission, op cit n 2, especially pp 25-38. See also the papers of the English and Scottish Law Commission, op cit n 1.

¹⁵ See Hong Kong Law Reform Commission, op cit n 2, paras 3.23 to 3.25.

¹⁶ This trend is particularly apparent in the United Kingdom: see the figures given the papers of the English and Scottish Commissions, op cit n 1.

consultation paper, the Hong Kong Law Reform Commission proposed that our present law on grounds for divorce be amended to reduce the separation periods required under the present no-fault facts, to separation for one year with consent and separation for two years if there were no consent. This proposal is similar to that put forward by the Scottish Law Commission.¹⁷ As they too have reasoned, immediate divorce would still be available under the adultery and behavior facts, but the reduced separation periods would hopefully encourage more couples to use these alternative non-fault criteria.¹⁸

2.8 This discussion of relative separation periods should be borne in mind, as an argument is presented later in this paper that any time restriction or time bar on presenting petitions for divorce should in some way be related to the separation periods provided under the general law of divorce.

¹⁷ Op cit n 1.

¹⁸ The present “desertion for two years” fact, with all its attendant legal complexities, could be abolished as parties would be able to cite instead simple separation for two years without consent.

Chapter 3

The present restriction

The relevant legislation

3.1 Section 12 states:

“(1) Subject to subsection (2), no petition for divorce shall be presented to the court before the expiration of the period of 3 years from the date of the marriage (hereafter in this section referred to as “the specified period”).

(2) A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent ...”

3.2 Applications for leave to petition for divorce are usually heard by a judge in chambers. These hearings are however subject to appeal, although the appeal court will generally accept the findings of the judge at first instance, unless these are shown to be clearly wrong.¹⁹

History

3.3 Our Hong Kong provision restricting petitions for divorce is based on the former equivalent English provision.²⁰ It is perhaps significant that the time restriction on seeking divorce early in marriage was not always a part of English law and indeed has a relatively short history. The restriction only came into being with the enactment of the Matrimonial Causes Act of 1937. The main thrust of that Act was to widen considerably the then grounds for divorce: to the existing ground of adultery was added the further grounds of cruelty, three years' desertion and incurable insanity.²¹

3.4 The time restriction did not appear in the original Matrimonial Causes Bill. Its subsequent inclusion seems to have been a compromise measure to ensure the passage through the House of Commons of the Bill

¹⁹ Pegg, *Family Law in Hong Kong* (2nd ed, 1986) Butterworths, p 70.

²⁰ Contained in the Matrimonial Causes Act 1973, s 3. It should be noted however that the English restriction has been amended to an absolute time bar on petitions for divorce within the first year of marriage. This reform of the law followed the findings of the Law Commission of England and Wales in its 1982 report, *op cit* n 5.

²¹ These remained the grounds for divorce until the Divorce Reform Act of 1969 which came into force in 1971.

extending the grounds for divorce.²² When the restriction was initially put forward for inclusion in the Bill, it took the form of an absolute bar on divorce during the first five years of marriage. However this position changed when the Bill was put before the House of Lords. They insisted on a further compromise: that the time period be reduced from five to three years and that the bar on petitioning for divorce should not be an absolute one. Their Lordships reasoned that *“the cases where divorce was sought early in the marriage were very often the worst cases coming before the court.”*²³ With this the discretion to permit divorce in cases of exceptional hardship and exceptional depravity was introduced.

Rationale

3.5 It is recognised that the rationale behind restricting the availability of divorce where the couple have only been married for a short time is one of public policy.²⁴ The reasoning seems to be that a restriction *“is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult early years.”*²⁵ The restriction poses an obstacle to the hasty ending of an early marriage which, during an imposed period of reconsideration, might eventually be salvaged. It also deters hasty re-marriage. Nonetheless the issues are not simple: on the one hand it seems that the law should not prevent the dissolution of marriages which are no longer viable, however on the other, *“the law should not try to attain the aspiration of making marriages work or last; to do so is in the nature of trying to close the stable door after the horse has bolted.”*²⁶

“Exceptional hardship”

3.6 There are two exceptions to the rule that no petition for divorce may be presented within three years of marriage: the first of these is the case of “exceptional hardship” to the applicant. The hardship suffered by the applicant must be “something out of the ordinary”,²⁷ although the test is nonetheless a subjective one. The court is to consider the effect of the alleged conduct on the particular petitioner regardless of how the same conduct would affect the reasonable petitioner.²⁸

3.7 A Hong Kong example of this principle is the case of *Kwan Bui Lock v Isabelle Stamm Lock*,²⁹ where the applicant husband had become extremely nervous and depressed and had developed a speech problem after

²² Law Commission of England and Wales, Working Paper No 76, *Time Restrictions on Presentation of Divorce and Nullity Petitions*, para 6.

²³ *Idem*. See also: *Hansard* (HL) vol 105 (1936-37) cols 730-848, esp per Lord Atkin who described the initial provision as “terrible” and “a kind of 12 1/2 per cent. discount offered to the opponents of the Bill”, *ibid*, cols 755 and 758.

²⁴ Law Commission of England and Wales, *op cit* n 5, para 2.14.

²⁵ *Idem*.

²⁶ *Ibid*, para 2.12.

²⁷ *Fay v Fay* [1982] AC 835 (HL).

²⁸ Pegg, *op cit* n 19, p 70.

²⁹ (Unreported) District Court MP 106 of 1979.

his wife's admitted adultery. Medical evidence was produced that the husband's condition was likely to continue to worsen until the marriage was dissolved. The court accepted that, due to the husband's condition, he would suffer exceptional hardship if he had to wait until the marriage was three years old before being able to apply for divorce.

“Exceptional depravity”

3.8 It would seem that this has always been difficult to establish and that the courts “*have found it difficult to describe any particular conduct as exceptionally depraved*”³⁰ particularly in the light of changing norms of behaviour in recent years. It would seem that it is not confined to sexual depravity and perversions and that even “extremely bad adulterous conduct” would not suffice.³¹ In one case,³² the court was unable to find the respondent's homosexual behaviour to be “exceptionally depraved”. However the applicant wife succeeded in obtaining leave to petition for divorce on the ground that her knowledge of the truth about her husband would continue to cause her exceptional hardship so long as the marriage continued.

Reconciliation prospects and children

3.9 There are other matters which the court must take into consideration when the application for leave to divorce presented. Section 12 continues:

“... but in determining the application the judge shall have regard to the interests of any child of the family ... and to the question whether there is reasonable probability of a reconciliation between the parties during the specified period.”

3.10 There is some weight attached to the question of whether attempts at reconciliation have been made. An application was refused in a Hong Kong case where a Chinese husband, who alleged that his wife had committed adultery with two European servicemen, made it clear to the court that he would not consider any attempt at reconciling with his wife because of the loss of face that this would entail (in this particular situation).³³

³⁰ Pegg, op cit n 19, p 69.

³¹ *Working Paper on Time Restrictions*, op cit n 22, para 20.

³² *C v C* (1980] Fam 23

³³ *Chan Wing Ming v Chan Li Li* [1957] HKLR 474.

Chapter 4

Problems with the present law

4.1 A number of problems have been identified with the workings of the present law in this area.³⁴ These are discussed below.

Out of step with the philosophy of modern divorce law

4.2 As we have already noted, the rationale behind restricting divorce for marriages of short duration is clearly one of public policy. At present couples are obliged to stay together in the early years of marriage, even where the relationship is a troubled one, in the hope that over time they will resolve their differences. Furthermore, the criteria which is applied under the exceptions of hardship and depravity seem to relate mostly to the “fault” of the respondent.

4.3 This is the present state of the law despite the fact that the sole ground for divorce is irretrievable breakdown of marriage and that the expressed intention of the law is to allow the empty shell of the broken marriage to be destroyed with the minimum of bitterness, distress and humiliation to the parties.³⁵ It could be argued that not only is the law inconsistent in this regard, but also that the emphasis upon the “fault” of the respondent in the exception cases serves to entrench the old fault-based formula for divorce and flies in the face of more modern “non-fault” trends.³⁶

Promotes “bitterness, distress and humiliation”

4.4 The requirements of establishing either “exceptional hardship suffered by the petitioner”, or “exceptional depravity on the part of the respondent”, oblige the petitioner to make extremely damaging allegations against the other spouse in order to convince the court that the case is an exceptional one. The English Law Commission comments:

“Thus, although the present law of divorce is designed to minimise “bitterness, distress and humiliation”, it seems that the making of the allegations thought to be necessary to ensure that leave is given often causes considerable bitterness, distress and humiliation even to the extent of jeopardising any reasonable settlement between the parties about financial provision and

³⁴ See especially the comments of the English Law Commission in its Working Paper, op cit n 22, paras 46-55 and in its Report, op cit n 5, paras 2.3-2.8.

³⁵ *The Field of Choice*, op cit n 8, para 15.

³⁶ See further Law Commission of England and Wales, op cit n 5, para 2.16.

*arrangements for custody of and access to children.”*³⁷

4.5 Can the “ill-will and suffering”³⁸ which may be generated by the present application procedure be entirely justified when the main achievement of the restriction is to “defer rather than to deter”³⁹ divorce?

Difficulties in maintaining judicial consistency

4.6 The English Law Commission has commented⁴⁰ that there is a real problem in this area with divergence in judicial practice. As one judge has remarked:

*“... The principal difficulty lies in knowing what standards to use in assessing exceptional hardship and what is meant by the phrase exceptional depravity. Both involve value judgments of an unusually subjective character ... moreover, standards in society in these matters are not stable and are subject to considerable changes over comparatively short periods of time ... the change in the basis of divorce from the matrimonial offence to irretrievable breakdown with the expectation of relatively easy divorce may have increased the hardship involved in waiting for the specified period to elapse.”*⁴¹

4.7 The wide discretion available to the court in determining whether circumstances are “exceptional” or constitute “exceptional hardship” or “exceptional depravity” also causes difficulty for applicants. There seems to be general uncertainty as to which particular cases fall within the exceptions. As a result, potential applicants are often discouraged at the outset from making their applications, or, if they choose to persevere, there seems to be a tendency for them to make extreme allegations in an effort to ensure that the application will succeed.⁴² Following its public consultation on the topic, the English Law Commission concluded:

*“Although some divergence in judicial approach is inevitable in any system dependent upon the exercise of a discretion, lack of certainty on the scale which comments suggested seems to us to be manifestly unsatisfactory.”*⁴³

Ineffective in meeting its objectives

4.8 As has been noted above, one of the main objectives of the restriction seems to be that by making divorce more difficult to obtain it will help

³⁷ Ibid, para 2.5. (Emphasis added).

³⁸ Ibid, para 2.8.

³⁹ Idem.

⁴⁰ Ibid, para 2.6.

⁴¹ C v C [1980] Fam 23, pp 26-27, per Ormrod LJ.

⁴² Idem.

⁴³ Idem.

to “buttress the institution of marriage”.⁴⁴ However, as has been argued above, the restriction may merely assist to “defer” not to “deter” divorce.⁴⁵

4.9 In Scotland, where there is no similar time restriction to that in England, it would seem that the divorce statistics bear out the argument that the restriction does little in practice to “save” marriage.⁴⁶ There it has been argued that there is little to suggest that the time restriction has encouraged spouses to “face and resolve their differences in the period of adjustment which necessarily follows marriage”.⁴⁷ On the contrary, the argument is made that “where the spouses’ incompatibility is revealed in the early days of marriage, the balance of social advantage clearly lies with the speedy termination of the marriage.”⁴⁸ In pragmatic terms, the basic issue may be whether the existence of the restriction makes any material contribution to supporting “live” marriages and burying “dead” ones.⁴⁹

4.10 An interesting point which came out of the English Law Commission’s study of this area was that many people, regardless of their particular educational or socio-economic background etc, were in fact quite ignorant of the restriction provisions and expressed surprise to their solicitors when seeking advice on divorce.⁵⁰ If this is in fact the case, this must constitute a clear counter-argument to the supposed “social deterrent” value of the restriction.

⁴⁴ See *The Field of Choice*, op cit n 8, paras 13-19.

⁴⁵ Law Commission of England and Wales, op cit n 5, para 2.8.

⁴⁶ Report of the Scottish Law Commission, *Divorce - The Grounds Considered* (1967) Cmnd 3256.

⁴⁷ Ibid, para 30.

⁴⁸ Idem.

⁴⁹ See Law Commission of England and Wales, op cit n 5, para 2.10.

⁵⁰ Ibid, para 2.15.

Chapter 5

Options for reform

Retain the present law

5.1 Earlier discussion in this paper identified a number of possible shortcomings of the present law in this area. Nonetheless, it may be a general public perception that some form of restriction or bar is necessary on the availability of divorce in the earliest years of marriage. If this is the case then the issue remains whether the present legal approach, that of restricting divorce petitions in general but allowing them in certain circumstances and of specifying a restriction period of three years, is the most appropriate one. Contrasting the present law with other options may clarify this issue.

Shorten the restriction period

5.2 The present period of restriction on petitioning for divorce three years after the date of marriage. In its consideration of whether this period was too long, the English Law Commission identified the need to seek a balance between two extremes. In their view, if such a time limit is accepted as necessary, the appropriate time limit is one which would -

“...neither impose unnecessary hardship on people whose marriages have genuinely and irretrievably broken down and who may be in a severe state of distress as a result, nor make divorce so rapidly available that marriage becomes a mere transient state capable of being repudiated at whim.”⁵¹

5.3 It is recognised however that the decision to select a particular time period for the restriction is an arbitrary one.⁵² How does one quantify what the “minimum” duration of marriage should be? To express the issue in another way, how long should the law require a couple to stay together to “make a go of their marriage” before allowing them to terminate it and seek happiness elsewhere?

5.4 During its deliberations the English Law Commission canvassed an argument that the period of the time restriction should correspond with the minimum period of separation required to establish a ground for divorce (ie - at present two years⁵³). The rationale for this approach was that not only would this ensure consistency within divorce legislation, but it would also counter “the

⁵¹ Op cit n 5, para 2.29.

⁵² See the discussion of the Commission in its Working Paper, op cit n 22, para 78.

⁵³ MCO, s 11A(1)(d)

strongest objection to the present rule”, that “it may operate to keep in existence, contrary to the parties’ wishes, the legal shell of a marriage which has irretrievably broken down.”⁵⁴ If it is accepted that a period of separation is cogent evidence of marital breakdown and that a substantial period of time separated indicates that the breakdown is irretrievable, then arguably the law is inconsistent in requiring of spouses, as it presently does, a longer period of separation where the breakdown has occurred shortly after the marriage.

5.5 On the other hand however, the Commission seemed to accept that:

*“... the policy factors which should govern the selection of the period of separation sufficient to raise an inference of breakdown are not exactly the same as those which should govern the selection of a minimum period from the date of the marriage within which divorce should be regarded as exceptional, the more so since petitions may well be based on a “fact” other than separation.”*⁵⁵

5.6 Nonetheless, if the decision is ultimately an arbitrary one, the tying of the shortened period of the restriction to the minimum separation period would at least provide some rational justification for the particular time limit chosen.

Impose an absolute time bar

5.7 Adopting this option would mean that no petition for divorce could be presented under any circumstances before the expiration of a specified period, presumably one substantially shorter than the present three years (ie- say one or two years from the date of marriage). It would be necessary to reduce the period as imposing a bar would alter the present law in a crucial respect: the present relief afforded in the exceptional cases of the hardship and depravity of the respondent would no longer be available.

5.8 This was the option favoured most by the English Law Commission who reasoned:

“The justification for a time restriction is one of public policy; it would devalue the institution of marriage to make divorce readily obtainable within days of the marriage. The present law is on this view based on a sound principle but is objectionable because of the unsatisfactory nature of the exceptions whereby the court may allow a petition to be presented ... Although it would be possible to construct other exceptions, none of them is entirely satisfactory. The law would on this view be simpler and more

⁵⁴ Working Paper on Time Restrictions, op cit n 22, para 78.

⁵⁵ Idem.

*comprehensible if it asserted the general policy by means of an absolute bar on divorce in early marriage.*⁵⁶

5.9 The issue remains as to how the law would deal with the hardship cases which no doubt would still arise. If no relief is to be offered by way of exceptions to the general rule, then this in itself provides a cogent argument for keeping any such absolute bar as short as possible.

Abolish the restriction

5.10 One of the strongest arguments in favour of the restriction is that it should “buttress the stability of marriage”. By obliging couples to stay married to each other during the “difficult early years” the restriction theoretically discourages hasty divorce and remarriage.⁵⁷ On the other hand the restriction cannot prevent couples who wish to separate from doing so. It can therefore be argued that *“the restriction only preserves, for an arbitrary period of time, the legal bond between some couples whose marriage has in fact broken down”*⁵⁸ and as a result, *“the main effect of the present restriction is to delay rather than prevent divorce.”*⁵⁹

5.11 This seems to be borne out by divorce statistics. A comparison of the divorce figures in England and Wales with those of Scotland, where there is no time restriction on divorce petitions, has revealed that -

*“... in England and Wales the number of divorces in the first three years of marriage is low compared with that for subsequent years of marriage and that ... the proportion is lower than in Scotland for the same period. In England and Wales the figures, however, increase rapidly in the forth[sic] and subsequent years; and by the seventh year the proportion of marriages ending in divorce in [England and Wales and Scotland] ... has become almost equal.”*⁶⁰

5.12 The Scottish experience seems to suggest, contrary to what one might expect, that large scale resort to divorce immediately after marriage is not a necessary or probable consequence of the absence of the restriction on divorce.⁶¹ As the English Commission was obliged to conclude, this “may well be thought to weaken the force of the argument that the three year restriction has a positive role in buttressing the institution of marriage.”⁶²

5.13 Another argument in support of abolishing the restriction is its apparent inconsistency with the overall policy of present divorce legislation. If the basic principle of the law is that divorce should be available whenever a

⁵⁶ Ibid, para 80.

⁵⁷ Ibid, para 61.

⁵⁸ Ibid, para 50.

⁵⁹ Idem.

⁶⁰ Ibid, para 49.

⁶¹ Ibid, para 61.

⁶² Ibid, para 49.

marriage has broken down irretrievably, why should it matter whether the marriage has been in existence for three months or three years?

“Parliament has decided that two years’ separation suffices to establish a prima facie case of breakdown. Why, then, should divorce be withheld in some cases because of the irrelevant fact that the parties have been married for less than three years? Again, if the petition based on the “fact” that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him, a court would no doubt properly take the duration of the marriage into account in deciding whether or not that fact has been established ... If the court is satisfied, taking into account the whole of the circumstances, that the petitioner cannot reasonably be expected to live with the respondent, why should divorce be postponed?”⁶³

5.14 In its discussion of this proposal the English Law Commission sounded a note of warning concerning the implications of this issue for immigration practice. They noted that there is a possible danger, if the restriction is removed and divorce theoretically becomes available the day after the wedding (ie if the divorce “facts” of unreasonable behaviour or adultery can be made out), of the possibility of a rise in incidences of “marriages of convenience” and perhaps the emergence of a new class of “professional bridegrooms” who might sell their services to those abroad seeking citizenship.

5.15 In considering how appropriate this option might be for Hong Kong, the issue of immigration status might also be one of particular concern here, especially as 1997 approaches. One must note however the English Law Commission does not explain why this particular type of abuse has not already appeared in Scotland, where there no equivalent restriction on divorce but where one might, equally, apply to obtain a United Kingdom passport. Further, it might also be the case that professional bridegrooms are operating within the current system in any event by somehow making use of the exception provisions under the three year rule.

Other jurisdictions

5.16 It may be of use to this discussion to consider how other similar legal jurisdictions have dealt with this issue.

5.17 In England and Wales the present legislation relating to grounds for divorce is essentially the same as that applying here in Hong Kong (which has been outlined in brief earlier in Chapter 2 of this paper. However the former three year restriction on petitions for divorce was abolished in 1984 and was replaced by an absolute bar on divorce within the first year of marriage.⁶⁴ This change to the law followed the recommendations of the English Law

⁶³ Ibid, para 47.

⁶⁴ See the Matrimonial and Family Proceedings Act 1984, s 1, which amended s 3 of the Matrimonial Causes Act 1973.

Commission in its Working Paper⁶⁵ and Report⁶⁶ which have been referred to above.

5.18 The Scottish position is that there no bar or restriction on divorce petition within the early years of marriage. It appears that such a provision was considered at the time that the Scottish law on divorce was being brought into line with that of England and Wales under the Divorce (Scotland) Act 1976.⁶⁷ However it was concluded that such a provision was not necessary as the actual operation of the restriction “gave little support to the view that the existence of a time restriction made any material contribution towards the objectives of a good divorce law”⁶⁸ Thus, although the present grounds for divorce are similar to our own in Hong Kong, in Scotland a couple may seek a divorce from the earliest days of their marriage.

5.19 Singapore, by comparison, has a similar ground for divorce system to Hong Kong⁶⁹ and the same three year time restriction on the presentation of divorce petitions.⁷⁰

5.20 Australia and New Zealand have both reformed their systems of grounds for divorce to “no fault”, “separation only” systems.⁷¹ In Australia the couple must be separated for one year while in New Zealand the period is two years. In neither regime is there a bar or restriction upon seeking divorce in the early years of marriage (although in Australia conciliation is compulsory if the couple have been married for less than two years).

5.21 In Canada the ground for divorce under federal legislation⁷² the “breakdown of a marriage”⁷³ which is established either by one year's separation or by the respondent having committed adultery or “treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.”⁷⁴ Under this regime also there appears to be no bar or restriction on seeking divorce early in the marriage.

5.22 Under the Marriage Law of the People's Republic of China⁷⁵, it is stated that divorce “*shall be granted if husband and wife both desire it.*”⁷⁶ If divorce is sought by only one of the parties, “*the party may appeal directly to a people's court to start proceedings.*”⁷⁷ In dealing with divorce cases, the

⁶⁵ Op cit n 22.

⁶⁶ Op cit n 5.

⁶⁷ See the discussion contained in the English Law Commission's Working Paper, op cit n 22, paras 42-44.

⁶⁸ Ibid, para 44.

⁶⁹ Although the specified separation periods differ: in Singapore separation with consent requires 3 years separation (cf 2 years in Hong Kong), while separation without consent requires 4 years (cf 5 years in Hong Kong).

⁷⁰ Women's Charter, Cap 353.

⁷¹ These reforms were effected by the 1975 Family Law Act in Australia and by the Family Proceedings Act 1980 in New Zealand.

⁷² Divorce Act 1985.

⁷³ Ibid, s 8(1).

⁷⁴ Ibid, s 8(2).

⁷⁵ Promulgated by Order No 9 of the Standing Committee of the National People's Congress on September 10, 1980.

⁷⁶ Ibid, art 24.

⁷⁷ Ibid, art 25.

people's court *"should carry out mediation"* but *"divorce shall be granted if mediation fails because mutual affection no longer exists."*⁷⁸ The restrictions applicable on seeking divorce under the Chinese system include that "a husband may not apply for a divorce when his wife is pregnant or within one year after the birth of the child"⁷⁹ but do not include any restriction or bar on seeking divorce early in the marriage.

⁷⁸ Idem.

⁷⁹ Ibid, art 27.

Chapter 6

Discussion and suggested recommendations

6.1 The arguments for and against the various reform options have been outlined in the earlier chapters of this paper. From these we have suggested below five particular options for reform, together with a number of relevant issues.⁸⁰ Comments relating to any matters raised in this paper, and especially in relation to the matters mentioned below, would be welcome.

Retain the present law

6.2 Under the present law, petitions for divorce cannot be presented within three years from the date of marriage unless there are exceptional circumstances. Should any change be made to this existing rule? Should a restriction rather than a bar be retained? Is the time period of three years the most appropriate one? Are the present exceptions to the rule, of exceptional hardship to the petitioner or the exceptional depravity of the respondent, adequate?

Shorten the restriction period to one or two years

6.3 Another possible option is to retain the present restriction provision but to reduce the period of the restriction. An argument given earlier in the paper is that the time period should be reduced to correspond to the minimum separation period required to establish a ground for divorce (at present two years). This would remove the inconsistency in the law as it stands which, in effect, subjects young marriages to a particularly onerous test of “irretrievable breakdown”, perhaps without justification, when the period prescribed is in reality only an arbitrary one.

6.4 Should the period be even shorter? If the period were reduced to say one year, would there be any need to retain the discretion to permit divorce earlier than this in exceptional circumstances?

⁸⁰ Despite the problems which arise through the operation of the present law in this area, it seems probable that there is a general view that some form of bar or restriction on the availability of divorce in the earliest years of marriage is necessary to buttress the stability of marriage generally. In the light of this, the reform option of abolishing such a restriction altogether has not been included amongst the various reform options suggested in this chapter.

Impose an absolute time bar of one or two years

6.5 As we have seen, there may be a danger inherent in the “absolute time bar” option of removing the relief available presently under the law for genuine hardship cases. What then would be the most appropriate time period for the bar if this option were to be adopted?

Other issues

6.6 Are there other issues which should be taken into consideration when formulating any proposals to reform the law in this area? For example, should the criteria necessary for establishing the “irretrievable breakdown” of the marriage be any different in cases where the marriage is only one of short duration? How relevant, if at all, is the issue of conciliation efforts made between the parties? To what extent should the fact that there are children of the marriage affect the spouses' right to seek divorce?