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THE COURT'S POWERS UNDER THE WOMEN'S CHARTER WHEN THE RESPONDENT OPPOSES A DIVORCE PETITION

This article examines the extent to which it is possible and desirable for a respondent to oppose a divorce petition under the Women's Charter. It is suggested that the present approach taken by the Singapore courts is very much dependent on the perceived role of the law and the values placed on marriage, divorce and individual autonomy.

A sad fact of life is that marriages can and do fail.[1] In the vast majority of cases when this happens, both parties accept the fact of the breakdown and seek to make arrangements for themselves and for their children, if any, by the time of the divorce petition. Even where the divorce petition is contested, the point of disagreement may not be on the fact of the breakdown itself but in the attribution of blame in causing the breakdown (as can be seen in the use of cross-petitions).

In a small minority of cases, however, divorce may be very much against the wishes of the respondent. This could, first, be because the respondent genuinely believes that, even at this late stage, reconciliation is possible and the marriage has not completely broken down. Secondly, the fact of the breakdown of marriage may be accepted, but the respondent may still not desire a divorce and thus seek to use any means to oppose the divorce petition. The reasons for doing this are varied. Some are ill-disposed towards the other spouse for his or her actions which brought about the end of their marital relationship. Some have religious or cultural opposition to a divorce. And some think they can enhance their bargaining position for a better financial or other arrangement against the spouse who is eager for divorce.

[1] The number of divorces under the Women's Charter has been increasing rapidly. There were 3,368 divorces in 1996 as compared to 1,485 in 1986, *Statistics on Marriages and Divorces* (1996). It was reported that there were 4,186 divorces under the Women's Charter last year, Koh Boon Pin, "Over 5,000 couples divorce; rise in cases" *The Sunday Times*, 27 June 1999.

This article examines the extent to which it is possible and desirable for a respondent to oppose or delay a divorce petition under the Women's Charter[2] for these reasons.[3] The equivalent English provision has been described as "the last battleground" and as likely to lead to more litigation than any other provision in their new divorce law.[4] Although there appears to be few cases on this matter in Singapore, clarity of the principles on which a respondent can seek to oppose or delay a divorce petition is no doubt desirable. If nothing else, an examination of this area of the law may serve to focus our attention on the values we as a society place on marriage, divorce and individual autonomy. Family law in particular should aim to espouse good values that people can aspire to practise.

It is not an easy task deciding what circumstances could justify sustaining a dead marriage and the weight to be given to the wishes of the spouse who wants a divorce *vis-à-vis* the spouse who does not. No simple solutions are available. The various matters which must be weighed include:

(1) objections from the respondent who does not wish the marriage to be dissolved;

(2) protection of the respondent (usually the wife) and the children of the marriage from adverse consequences flowing from the divorce; and

(3) sense of justice or propriety in allowing a petitioner who had flouted the obligations of marriage and had treated the other spouse badly to regain his freedom.

It may be useful at this point for a brief review of the development of the law on divorce under the Women's Charter.

[2] Cap 353, 1997 Rev Ed. All references to the Women's Charter herein are to this edition unless otherwise stated.

[3] Opposing a divorce petition on the basis that the petitioner has not satisfactorily proved the fact that reflects the irretrievable breakdown of the marriage will not be discussed in this article.

[4] Gillian Bishop, David Hodson, Dominic Raeside, Sara Robinson, Ruth Smallacombe, *Divorce Reform: A Guide for Lawyers and Mediators* (1996), at 124. The new law has not been brought into force yet.

I. The Law and Policy of Divorce

Judicial divorce as a means of terminating a marriage was introduced to Singapore by the Straits Settlements Divorce Ordinance in 1910.[5] This Ordinance followed the approach under the (English) Matrimonial Causes Act 1857, which allowed a spouse to be freed from the bonds of marriage only on the commission of some grave matrimonial offence by the respondent. The first ground recognised to serve this role of divorce was adultery.[6] Other fault based grounds were added in 1941,[7] namely, desertion without cause for a period of three years immediately preceding the presentation of the petition and cruelty.

In order to succeed, the petitioning spouse must also be free of moral blame in the widest sense. First, in the sense of not being responsible for the respondent's offence and not having assisted or condoned the commission of the offence. For example, if the ground relied on is the respondent's adultery, the petitioner must not have been an accessory to, or connived at or condoned the adultery.[8] Where the petition is on the ground of adultery, unsoundness of mind or desertion, wilful neglect or misconduct conducing to the adultery, unsoundness of mind or desertion may lead to dismissal of the petition.[9] Unreasonable delay in presenting the petition may also lead to the dismissal of the petition.[10] And secondly, the petitioner must not have committed any matrimonial offence himself or herself. Thus, commission of adultery, cruelty towards the other spouse, desertion, or separation without reasonable excuse by the petitioner may lead to the petition being dismissed as well.[11]

In the years that followed, major inroads were made into this matrimonial offence theory by the recognition, first, of incurable insanity in 1941,[12] and

[5] Ordinance 25 of 1910. For more information, see Leong Wai Kum, *Principles of Family Law in Singapore* (1997), at 696-706.

[6] It is noted in passing that the early law was manifestly unequal in its application to husbands and wives. While adultery *per se* by the wife can constitute a ground for divorce; only aggravated forms of adultery by the husband will suffice (incestuous adultery, bigamy with adultery, marriage with another woman with adultery, adultery coupled with cruelty, and adultery coupled with desertion). This has been described as "Victorian morality ... as a wife was entitled to be freed from her marital obligation only when her husband had done worse than she had to allow him to become freed." Leong Wai Kum, *Principles of Family Law in Singapore* (1997), at 693.

[7] Divorce (Amendment) Ordinance 1941 (Ordinance No 25 of 1941).

[8] Women's Charter (Ordinance No 8 of 1961), s 86(2)(b).

[9] Women's Charter (Ordinance No 8 of 1961), s 86(2)(iv).

[10] Women's Charter (Ordinance No 8 of 1961), s 86(2)(i).

[11] Women's Charter (Ordinance No 8 of 1961), s 86(2).

[12] *Supra*, note 7.

even more dramatically, of living apart for seven years in 1967 as further grounds for divorce.[13] However, the approach towards divorce may be described as still very much an exercise in the attribution of moral blame rather than an inquiry into the state of the marriage.

This traditional approach to divorce was based, in summary, on the need to protect the "innocent" spouse[14] and the hope that the stability of marriages could be buttressed by placing significant obstacles in the way of unnatural termination of marriage.[15]

Dissatisfaction with the existing law and the prompting from law reforms gaining pace in other countries eventually led to a fundamental overhaul of the grounds for divorce under the Women's Charter in 1980. The grounds based on matrimonial offence were replaced with the sole ground of irretrievable breakdown of marriage.[16] This state of the marriage may be inferred from any one of five "facts" set out.[17]

The Court of Appeal in *William Cheng* v *Chai Mei Leng* observed that Parliament's clear intention in introducing the new divorce law was "to meet the prevailing mores in Singapore (and) for the termination of a marriage with minimum bitterness".[18] Although our provisions may not have reproduced the exact wording of the (English) Divorce Reform Act 1969,[19] the same policy was said to be embodied in our divorce law:[20]

13 Women's Charter (Amendment) Act 9 of 1967.

14 "Innocent" in the sense that she could not have been divorced against her wishes where she had not committed any matrimonial offence.

15 See Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Cmnd 3123, 1966), para 24.

16 Women's Charter (Amendment) Act 26 of 1980. See also *Singapore Parliamentary Debates, Official Report*, 7 September 1979, cols 413-414. The other proposal contained in the original Bill, divorce by mutual consent, was rejected by the Select Committee convened to review the Bill, *Singapore Parliamentary Debates, Official Report*, 25 June 1980, col 1461.

17 Now see Women's Charter (Cap 353, 1997 Rev Ed), s 95(1), (3). It is admitted that the element of fault is not totally eradicated in that three of the five "facts" may be traced to the former matrimonial offences: adultery by the respondent, behaviour in a way that the petitioner cannot reasonably be expected to live with the respondent, and desertion by the respondent. The current law is, therefore, a compromise between the fault and the irretrievable breakdown bases of divorce.

18 [1999] 2 SLR 487, para 9, citing *Singapore Parliamentary Debates, Official Report*, 7 September 1979, cols 413-414.

19 The Divorce Reform Act 1969 was later consolidated by the Matrimonial Causes Act 1973. References will be made to the latter Act where needed. The English law has recently been altered by the Family Law Act 1996, but the portion on divorce has yet to be brought into effect.

20 *Supra*, note 18. It was also said in *Cheong Kim Seah* v *Lim Poh Choo* [1993] 1 SLR 172, at 183, that the "policy and philosophy" of the divorce law under the Women's Charter is the same as that in England.

> There can be no doubt that the object of the 1980 amendment to the Women's Charter, to quote from the English Law Commission's Report was: 'a good divorce law ... to (i) buttress, rather than to undermine, the stability of marriage, and (ii) when, regrettably, a marriage has irretrievably broken down to enable the empty shell to be destroyed with the maximum of fairness, and the minimum of bitterness, distress and humiliation.'[21]

The acceptance of this policy has a profound effect on our conception of the proper role of family law towards an unhappy marriage and the value we place on the preservation of marriage. It is not suggested that the present policy chosen for our divorce law is a poor one, only that the implications of such a choice should be acknowledged. The rest of this article seeks to do that by examining the effect of this policy on the respondent's ability to oppose a divorce petition.

II. Women's Charter and the (English) Matrimonial Causes Act 1973 Compared

A. *"Just and Reasonable" as Allowing the Presumption of Irretrievable Breakdown of Marriage to be Rebutted*

Section 95(2) of the Women's Charter was probably modelled on but worded differently from section 1(3) of the (English) Matrimonial Causes Act 1973.[22] Although both provisions state that the court hearing the petition is required to inquire, so far as it reasonably can, into the facts alleged by the parties, the Women's Charter provision ends with the added requirement that the court make the decree for dissolution of the marriage if it is "satisfied that the circumstances make it just and reasonable to do so". The interpretation of these words is problematic.

One suggestion made is to interpret these words as allowing for the proof that, despite showing one of the "facts" in section 95(3) of the Women's

[21] The report referred to is Law Commission, *The Field of Choice*, *supra*, note 15, para 15. Until its deletion by the Women's Charter (Amendment) Act 30 of 1996, the former Women's Charter (1985 Rev Ed), s 85, required "the court ... [to] act and give relief on principles which ... are, as nearly as possible, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings". See Chan Wing Cheong, "Latest Improvements to the Women's Charter" [1996] SJLS 553, at 594-595.

[22] *William Cheng* v *Chai Mei Leng, supra*, note 18, para 7.

Charter, the marriage has actually not broken down irretrievably.[23] The basis for this suggestion is that under section 1(4) of the (English) Matrimonial Causes Act 1973, a decree of divorce may be refused, even on proof of one of the "facts", if the court is satisfied that the marriage has not broken down irretrievably.

However, it is noted that it has been said of the English law that proof of a "fact" raises a strong presumption that there has been a breakdown which is irretrievable, and that it is rarely possible for the respondent to prove otherwise. Apparently, there has only been one reported English decision, described as "a wholly exceptional one", where the court had refused a decree because it was not satisfied that the marriage had irretrievably broken down.[24]

Hence, although the English provision seems to place a legal obstacle to unilateral divorce, this may be more theoretical than practical. Marriage is in practice a relationship which is easily terminable. This is in line with their stated policy of ending marriages quickly and painlessly once the decision to terminate it is made.

On the other hand, it may be argued that no marriage has irretrievably broken down so long as one party genuinely wishes reconciliation.[25] However, the approach favoured in Singapore is the English approach. Breakdown of the marriage is irretrievable, in short, if one party insists that it is.[26] In *Ramasamy* v *Ramasamy*, it was said:[27]

> ... it is sufficient if the marriage is a detested shackle in the eyes of either party and that it is not necessary that it should be so in the eyes of both parties to the marriage. When a petition is presented on the ground of ... separation, the fact that the respondent wishes to

23 Leong Wai Kum, "A *Turning Point* in Singapore Family Law: Women's Charter (Amendment) Bill 1979" (1979) 21 Mal LR 327, at 331.

24 SM Cretney, JM Masson, *Principles of Family Law* (1990), at 99. The case referred to is *Biggs* v *Biggs* [1977] Fam 1.

25 See *eg, Tay Sock Hua* v *Yeo Lian Hock* [1994] 1 SLR 423, at 424: "Where the possibility of reconciliation exists, the court must not be over eager to dissolve a marriage because it may not be just and reasonable to do so, especially where there are children, and their interests is the concern of one party."

26 *Cheong Kim Seah* v *Lim Poh Choo, supra*, note 20, at 184; *William Cheng* v *Chai Mei Leng, supra*, note 18, paras 44-46. Waiting periods will apply, namely three years must elapse between the date of the marriage and the date of presentation of the petition, and living apart for a minimum of 4 years immediately preceding the presentation of the petition if there is no consent to divorce from the respondent, Women's Charter (Cap 353, 1997 Rev Ed), ss 94(1), 95(3).

27 [1978] 1 MLJ 99.

> continue with the marriage can never be a valid ground for disallowing the petition.

A different role then must be found for the phrase "just and reasonable" in section 95(2) of the Women's Charter.

B. *Withholding Decree Despite Irretrievable Breakdown of Marriage*

Section 95(1) of the Women's Charter is clear enough that the basis of a divorce petition can only be that the marriage has irretrievably broken down.[28] However, the added requirement that the court considers if it is just and reasonable to terminate the marriage suggests that the fact of breakdown of the marriage may not inevitably lead to its immediate dissolution. The court must also be satisfied that it is "just and reasonable" to grant the decree.

Subsection (4) appears to elaborate on the relevant considerations in coming to a determination of this question, but ends by positing the phrase that the court shall dismiss the petition if it is "wrong" to dissolve the marriage:[29]

> In considering whether it would be just and reasonable to make a decree, the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved, and it may make a decree nisi subject to such terms and conditions as the court may think fit to attach; but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage, the court shall dismiss the petition.

In comparison, section 5 of the (English) Matrimonial Causes Act 1973 states:

> (1) The respondent to a petition for divorce in which the petitioner alleges five years' separation may oppose the grant of a decree 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.

[28] This is supported by the heading which states: "Irretrievable breakdown of marriage to be sole ground for divorce".

[29] Women's Charter (Cap 353, 1997 Rev Ed), s 95(4).

(2) Where the grant of a decree is opposed by virtue of this section, then ... the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.

The similarity between the two sets of provisions is obvious, but there are important differences too. Some of these differences discussed below had already been noted in the local cases.

1. *Scope of application of local version is broader*

It was noted in *Cheong Kim Seah* v *Lim Poh Choo*[30] that the "significant difference" between the Women's Charter and the (English) Matrimonial Causes Act 1973 is that while section 5 of the (English) Matrimonial Causes Act 1973 is restricted in its application to the "fact" of five years' separation, section 95(4) of the Women's Charter is not so limited. The latter applies to all the "facts" on which the court may hold that the marriage had broken down irretrievably.

2. *Burden of proof on respondent*

Another difference in the two provisions is that under section 5 of the (English) Matrimonial Causes Act 1973, it is specifically provided that the respondent may oppose the grant of a decree of divorce on proof of certain circumstances.[31] Section 95 of the Women's Charter on the other hand is not so explicit. However, it was also held in *Cheong Kim Seah* v *Lim Poh Choo*[32] that notwithstanding this lack of specificity, it is the respondent's responsibility if he wished to oppose a petition to prove that it would be unjust and unreasonable to make a decree in all the circumstances.

30 *Supra*, note 20.

31 See also *Reiterbund* v *Reiterbund* [1974] 1 WLR 788; *Rukat* v *Rukat* [1975] Fam 63. It was decided by the Court of Appeal in *William Cheng* v *Chai Mei Leng*, *supra*, note 18, paras 8-10, that it is not a matter of discretion for the court in deciding if the petition should be dismissed.

32 *Supra*, note 20, at 180.

3. *Basis and effect of opposing petition*

Under the (English) Matrimonial Causes Act 1973, the basis for opposing the divorce petition is that the dissolution of the marriage will result in grave financial or other hardship[33] to the respondent and that it would be wrong to dissolve the marriage. If this is successfully shown, the petition shall be dismissed.

The Women's Charter, referring to roughly the same range of circumstances for consideration,[34] appears to posit the decision as being "just and reasonable to make a decree" and later, the same decision negatively, that it should dismiss the petition "if it should appear ... wrong to dissolve the marriage". And that is how the courts have approached it, often taking the two phrases together. Hence, the matter to be decided is whether it was not just and reasonable to grant the decree *and* that it was in all the circumstances wrong to dissolve the marriage.[35]

This interpretation may be supported on the basis that our legislature may not have intended to depart significantly from the English provision. The use of the phrase "just and reasonable" was only to broaden the range of relevant considerations of the court and not to restrict it to "grave financial or other hardship" as under the English Act.

The correct approach under the English provision was said to be a two-stage test:[36]

> The first matter on which the court has to form an opinion is whether the dissolution of the marriage will result in grave financial or other hardship to the respondent. It is only if the court is of such opinion that it is then necessary to proceed to the next stage and to consider whether it would in all the circumstances be wrong to dissolve the marriage.

[33] The adjective "grave" qualified "other hardship" as well: *Parker* v *Parker* [1972] Fam 116, at 118; *Rukat* v *Rukat, supra*, note 31.

[34] Although Matrimonial Causes Act 1973, s 5(2), specifically mentions "other persons concerned" as one of the circumstances to be considered while Women's Charter, s 95(4), does not, it is submitted that there is no difference here since both provisions require that "all the circumstances" be considered.

[35] *William Cheng* v *Chai Mei Leng, supra*, note 18, para 23 (Court of Appeal); DCA No 5004 of 1998, 6 October 1998, paras 4, 23 (High Court); DCA No 5004 of 1998, 24 April 1998, para 35 (District Court).

[36] *Parker* v *Parker, supra,* note 33, at 118. See also *Dorrell* v *Dorrell* [1972] 1 WLR 1087; *Rukat* v *Rukat*, *supra*, note 31; *Jackson* v *Jackson* [1993] 2 FLR 848. But it is noted that there is no case in which grave financial or other hardship could be shown, but that it could not be shown that it is wrong to dissolve the marriage.

Hence, just as under the English provision where the two conditions are conjunctive, under the Women's Charter, the court too must find that it is not just and reasonable to grant the petition *and* that it is wrong to dissolve the marriage in order to dismiss the petition.

However, this interpretation is far from ideal given that the terms "just and reasonable" and "wrong" are already imprecise. It suggests that it may be "wrong" to dissolve a marriage and yet "just and reasonable" to grant the decree, or *vice versa*.

A second possible interpretation is that section 95(4) of the Women's Charter is in the nature of an elaboration or exegesis on the meaning of subsection (2), and the use of the word "wrong" is not meant to introduce another concept into the law. The consideration whether it is "just and reasonable" to make a decree, or "wrong to dissolve the marriage" are alternative formulae for allowing the court to deny the petitioner the decree sought.[37]

A third possibility is to interpret the concepts "just and reasonable" and "wrong" in a hierarchy, depending on the gravity of the circumstances. Hence, if, despite the proof or admission of irretrievable breakdown of marriage, the court finds that it would be wrong to dissolve the marriage, the court must dismiss the petition.

On the other hand, if the circumstances can be alleviated by, for example, the petitioner entering into an undertaking to carry out certain conditions, it would be "just and reasonable to make a decree ... and it may make a *decree nisi* subject to such terms and conditions as the court may think fit to attach". In other words, section 95(4) of the Women's Charter should be read as providing for two, not one, possible ways to oppose a divorce petition. The court may prevent the divorce altogether by dismissing the petition; or it may allow the divorce by granting the *decree nisi* subject to terms and conditions.

It is submitted that this is a better interpretation for three reasons. First, this approach fits better with the drafting of subsection (4) in its use of the two different terms and the stronger emphasis given to the last part of the subsection ("but if it should appear ... wrong to dissolve the marriage, the court shall dismiss the petition"). Secondly, although this approach requires a different meaning to be ascribed to each phrase, it is a better approach than the first interpretation suggested above. Under the first interpretation, the court must be satisfied of *both* conditions before the

[37] Sometimes these terms have even been treated as sufficient on its own: "unjust or unreasonable or wrong to grant the decree", the learned District Judge in *Chai Mei Leng* v *William Cheng, supra*, note 35, para 26.

petition is defeated. Under the present proposed approach, the petition will be dismissed on showing one condition only, that some serious consequence will follow if the petition succeeds such that it becomes "wrong to dissolve the marriage".

Thirdly, it is submitted that this suggested approach is in line with the scheme envisaged under the albeit narrower English provision. If the irretrievable breakdown of marriage is based on five years' separation, the divorce petition may be refused altogether under section 5 of the (English) Matrimonial Causes Act 1973. However, where the petition is based on two years' or five years' separation,[38] the respondent may apply under section 10 of the (English) Matrimonial Causes Act 1973 to delay the pronouncement of the decree absolute until *inter alia* reasonable and fair financial provision for the respondent has been made, or the best that can be made in the circumstances:

> (3) The court hearing an application by the respondent [where the divorce petition alleged two years' or five years' separation] shall consider all the circumstances ... and, subject to subsection (4) below, the court shall not make the decree absolute unless it is satisfied –
>
> (a) that the petitioner should not be required to make any financial provision for the respondent, or
>
> (b) that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances.
>
> (4) The court may if it thinks fit make the decree absolute notwithstanding the requirements of subsection (3) if –
>
> (a) it appears that there are circumstances making it desirable that the decree should be made absolute without delay, and
>
> (b) the court has obtained a satisfactory undertaking from the petitioner that he will make such financial provision for the respondent as the court may approve.

Hence, the "innocent" respondent under the (English) Matrimonial Causes Act 1973 has two tries at opposing or delaying a divorce. The respondent may first seek to have the petition dismissed on the basis of grave financial

[38] Where the petition is based on two years' separation, the respondent must consent to the decree being granted, Matrimonial Causes Act 1973, s 1(2)(d).

or other hardship and that it would in all the circumstances be wrong to dissolve the marriage. Should this fail, the respondent may seek to delay the grant of the decree absolute on the basis that adequate financial provisions have not been made. The latter is particularly used in circumstances where the respondent would be materially prejudiced if the petitioner were to die between the decree absolute and the final financial order.[39]

These two measures were enacted in England as ways to oppose a divorce petition that relies on the fault-free fact of separation. As explained by the Law Commission in *Facing the Future: A Discussion Paper on the Ground for Divorce,*[40] these were seen as ways to meet a concern for the "innocent" spouse to allow her to oppose being divorced against her will. At the time when the proposals to change the English divorce law were made, there was lingering fear of the effect of abolishing fault-based divorce. There was reported:[41]

> ... a widely held view, voiced many times during the debates on the 1969 Bill, that to abandon the fault principle would prejudice the middle-aged dependent housewife. However blameless she had been, she might be divorced against her will, left destitute and outcast, while her husband married a younger woman and started a new family.

It is submitted that section 95(4) of the Women's Charter arguably takes the same approach by amalgamating sections 5 and 10 of the (English) Matrimonial Act 1973. Although the Women's Charter provision speaks of attaching terms and conditions to a *decree nisi* while the English provision relates to a decree absolute, it is noted that nowhere else in the Women's Charter allows for general terms and conditions to be attached to a decree

39 All circumstances are to be considered by the court in hearing this application, including "the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties, and the financial position of the respondent, having regard to the divorce, it is likely to be after the death of the petitioner should the petitioner die first", Matrimonial Causes Act 1973, s 10(3). It is said that applications under s 10 are "significantly more commonplace and successful" than under the Matrimonial Causes Act 1973, s 5, *supra*, note 4, at 124.

40 Law Com No 170 (1988).

41 *Ibid*, para 3.28. See also SM Cretney, JM Masson, *Principles of Family Law* (1990), at 129-130; Law Commission, *The Field of Choice*, *supra*, note 15, at paras 112-119. The third measure or "safeguard" that was introduced was the Matrimonial Proceedings and Property Act 1970 which greatly improved the courts' powers to award financial provision and property adjustment. These powers apply irrespective of who petitions and which fact is relied on. See *supra*, note 40, para 3.32. The powers of the courts have been improved again, this time over pension rights, by s 25B-D of the Matrimonial Causes Act 1973, as introduced by the Pensions Act 1995 and amended by the Family Law Act 1996.

absolute. Under section 99(2) of the Women's Charter, any person may show cause why the decree should not be made absolute, and the court may "deal with the case as it thinks fit", but this only relates to "material facts not having been brought before the court". Under section 123 of the Women's Charter, the court shall not make absolute a decree for divorce unless it is satisfied *inter alia* that satisfactory arrangements for the welfare of the child have been made. A situation such as that envisaged in section 10 of the (English) Matrimonial Causes Act 1973, that is, a claim that the petitioner failed to make reasonable and fair financial provision to the respondent, must have been intended to be dealt with under section 95(4) of the Women's Charter.

Although it is still open to a court to order that a *decree nisi* could only be made absolute upon the resolution of all ancillary matters, in addition to the usual three months' period,[42] this may not give as much incentive for the petitioner to meet the demands of the respondent as compared to the situation where the *decree nisi* can be made subject to terms and conditions.

The fact that the English provision only applies to the petitioner relying on separation while the local equivalent applies to all the five "facts" as evidence of irretrievable breakdown of marriage should not, it is submitted, make a difference to our analysis. The broader local equivalent only goes to show that the Singapore legislature intended our courts to play a larger role in ensuring that respondents are treated fairly whether they are to "blame" for the breakdown of the marriage or not. In doing so, the Singapore legislature had stolen a march on the English which had also belatedly recognised that in a no-fault system of divorce, the hardship bar should be extended to all who wished to invoke it.[43]

It is also in line with this generous approach that "in all the circumstances it would be wrong to dissolve the marriage" should be the sole consideration in determining a dismissal of the petition. Our court need not be concerned with a showing of "grave financial or other hardship" as the English court or that it must additionally be not "just and reasonable" to grant the petition.

[42] As ordered by the learned District Judge in *William Cheng* v *Chai Mei Leng*, *supra*, note 35, para 35.

[43] Law Commission, *Family Law: The Ground for Divorce* (Law Com No 192, 1990), para 5.73. Now see the Family Law Act 1996, s 10. There was however some opposition to the extent of this provision, see *supra*, note 4, at 124. Note also that the Family Law Act 1996, s 10, is wider than the Matrimonial Causes Act 1973, s 5, in two respects: (1) the Matrimonial Causes Act 1973, s 5, limits hardship to the respondent, while the Family Law Act 1996, s 10, extends it to a child of the family as well; (2) the Matrimonial Causes Act 1973, s 5, refers to "grave" hardship, while the Family Law Act 1996, s 10, applies a lower standard of "substantial" hardship.

4. *Dismissal of petition in exceptional cases only*

Under English law, it was decided that the "grave financial or other hardship" must flow from the legal status of the divorce rather than the emotional and personal status of the spouse or from the fact of separation and marriage breakdown.[44] In other words, the scope of enquiry is within a narrow band. It comes as no surprise that very few divorces have been refused on this basis since it is generally the separation and marriage breakdown that will be the common cause of financial or other hardship.[45] An example of this approach can be seen in *Parghi* v *Parghi*[46] where it was said:

> A decree of divorce would add little to the hardship already suffered by her which resulted from the separation 12 years ago ... which was similar to that suffered by all deserted wives left to bring up children without a husband's help.

Furthermore, the respondent must also show that the hardship suffered reached a certain objective level. In a case where grave financial hardship was relied on, Ormrod LJ opined that the wife was not entitled to be compensated pound for pound for what she will lose in consequence of the divorce.[47] The reason for adopting such a narrow focus had been explained as follows:[48]

> The law cannot create or restore a family unit nor can it compel a couple to live together. The most that it can do is to prevent the legal relationship of husband and wife from being terminated; and the power to make an order preventing divorce is therefore concerned exclusively with the consequences of divorce, not those of separation. What has

[44] *Talbot* v *Talbot* (1971) 115 SJ 870.

[45] Examples of successful cases are *Julian* v *Julian* (1972) 116 SJ 763; *Johnson* v *Johnson* (1981) 12 Fam Law 116, where it amounted to grave financial hardship as the loss of the widow's pension could not be mitigated by the husband. The sole reported successful case based on grave "other hardship" is *Lee* v *Lee* (1973) 117 SJ 616, but the decree was granted on appeal owing to a change of circumstances, (1974) 5 Fam Law 48. Other cases which argued severe stigma flowing from divorce, exclusion from religious or social life, no prospect of remarriage within the community *etc*, have all failed so far.

[46] (1973) 117 SJ 582.

[47] *Le Marchant* v *Le Marchant* [1977] 3 All ER 610, at 613.

[48] Roger Bird, Stephen Cretney, *Divorce The New Law* (1996), para 5.10, citation omitted. See also Law Commission, *The Ground for Divorce*, *supra*, note 43, para 5.72; *Rukat* v *Rukat*, *supra*, note 31.

> to be compared is the applicant's position as a divorced (as distinct from a separated) spouse, and the child's position as the child of divorced parents (as distinct from his position as the child of separated parents).

Finally, being released from the bonds of marriage had been spoken of as a "right" in England:[49]

> While [the purpose of section 5 of the Matrimonial Causes Act 1973] should not be whittled away, it is equally important that it should not be used as a method of whittling away the rights of other people to get a divorce after five years' separation.

The same severe approach is adopted in Singapore. In *William Cheng* v *Chai Mei Leng*, the Court of Appeal said:[50]

> We conceive that [section 95(2) and (4)] are there for the most extreme of cases where notwithstanding that the marriage has irretrievably broken down for one or more of the five facts enunciated in sub-s(3), it would be still 'wrong to dissolve the marriage' ....

The circumstances that may be raised to defeat a divorce petition must be circumstances for maintaining the marriage.[51] There will necessarily be very few situations where this can be shown. Leong Wai Kum has commented that:[52]

> ... the divorce court now has, at its disposal, a range of powers to help spouses sort out their post-divorce economic positions and these powers may well suffice to remove any economic disadvantages which might otherwise come about as a consequence of the divorce. It is unlikely that a court would refuse a decree only because of any alleged social or psychological disadvantages arising from divorce.

[49] *Reiterbund* v *Reiterbund* [1975] Fam 99, at 112.

[50] *Supra*, note 18, para 10. At the High Court, it was also said that "it is only in very extraordinary circumstances that the court would find that it would be wrong to grant a divorce decree in face of such a breakdown", *supra*, note 35, para 4.

[51] *Cheong Kim Seah* v *Lim Poh Choo, supra*, note 20, at 182.

[52] Leong Wai Kum, "Trends and Developments in Family Law" in *Review of Judicial and Legal Reforms in Singapore Between 1990 and 1995* (1996), at 632, 671.

In comparison, such an approach was not taken in respect of the French Divorce Reform Act of 1975[53] or by the High Court in *William Cheng* v *Chai Mei Leng*.[54] There are many similarities between the French law and the English law of divorce in that the respondent may raise a hardship defence in cases of unilateral non-fault divorce initiated by the petitioner. In France, where it is shown that the spouses have separated for six years or that the marriage has been disrupted for six years by the mental illness of a spouse, the petition may be dismissed if it is established that the divorce would entail "material or moral consequences of exceptional hardship" for the unwilling spouse or for the couple's children.

This hardship clause had been applied very differently in France. It had been used not only in situations of economic disparity but also where it may affect the respondent's physical or mental health. In addition, the harm complained of could very well be caused by the fact of separation rather than by the divorce. Hence, a husband's petition had been dismissed where the wife, "who suffers already from having been abandoned by her husband, would be subject to reproach within her customary milieu (a Catholic community) by reason of the granting of a divorce", where the wife was "beyond reproach", had "run the household and raised six children", or where "she had lost three children and had then been subjected to the indignity of seeing her husband turn to another woman".[55]

The broader approach stems from a different view of the role of the family law in general. In this view, the well-being of the spouses and the way they conduct themselves are very much its concern. It does not accept the belief that there is nothing the law can do to influence the parties' behaviour and therefore it should not intervene. Instead, the law is seen as a means by which proper behaviour may be encouraged.[56]

Hardship clauses, suggests Mary Ann Glendon:[57]

> ... rule out the notion that divorce can be viewed in some sense as an individual's "right". This is strongly reinforced by the long separation periods required ... before one spouse can unilaterally terminate a marriage to a legally "innocent" partner .... Long waiting periods are

53 Mary Ann Glendon, *Abortion and Divorce in Western Law* (1987), at 71-73. See also David Pollard, *Sourcebook on French Law* (1996), at 274-275.

54 *Supra*, note 35.

55 Mary Ann Glendon, *supra*, note 53, footnotes omitted. There also appears to be a difference between the approach of the French provincial courts and the Paris courts. The latter is said to apply the more limited approach like the English courts.

56 A view shared by Leong Wai Kum, *Cases and Materials of Family Law in Singapore* (1999), at v.

57 Mary Ann Glendon, *supra*, note 53, at 81.

> typically combined with other legal provisions which ... can aid a reluctant spouse in extracting better economic terms in exchange for agreement to a quicker divorce on fault grounds. A legal system which requires a spouse to wait for several years to divorce a nonconsenting husband or wife is obviously telling a different story about marriage from that told in a country where a divorce is available on one party's demand in a year or less.

In Singapore, we have decided to follow the English lead and not give full play to section 95(4) of the Women's Charter. In doing so, we have adopted the underlying values inherent in this approach. It is suggested that we may identify three values. First, that the law can do little to stop a married person from divorcing. Second, that a spouse has a "right" to divorce. And third, that the law should generally not intervene in an area as private as that of choosing to end one's marriage. The first two values had already been noted above. The third is described below.

III. Respect for Party Autonomy in Divorce

The respect accorded to the decision of the parties to divorce can be seen in the very different approaches adopted by the High Court and the Court of Appeal in *William Cheng* v *Chai Mei Leng*.[58] The husband had petitioned for the dissolution of his marriage to the respondent on the fact that they had lived apart for a continuous period of at least four years immediately preceding the presentation of the petition.[59] The fact of separation was not denied by the respondent, but she contended that the petitioner's conduct, both before and after the date of separation had been such that the decree for the dissolution of the marriage should not be made.[60]

In order to explore the case further, more details as to the conduct of the parties are needed. The petitioner and the respondent married in 1955. At the time the petition was presented in 1997, they had been married for over 40 years. There are three children of the marriage, all of whom are grown up and self-supporting. The petitioner was almost 70 years and the respondent was in her mid-60s at the time of the petition.

Since the 1970s, the petitioner had an affair with another woman and they had a daughter in 1977. A property in Siglap was purchased by the petitioner to house his mistress and his daughter. Although the respondent was aware of the affair, she nevertheless chose not to divorce the petitioner.

[58] *Supra*, note 35.
[59] Women's Charter (Cap 353, 1997 Rev Ed), s 95(3)(e).
[60] *Supra*, note 18, para 1.

An incident happened in 1990 which led to the separation of the parties. In June 1994, the respondent together with her son and daughter-in-law purchased an apartment. The respondent paid 10% of the down payment while her son and daughter-in-law paid the other 10%. The balance of the purchase price was financed by a loan. A dispute arose over the disposal of the property. The son alleged that the respondent was holding her share on trust for him as she had intended to make a gift to him. According to the respondent, the purchase was made for investment purposes and she never intended it to be a gift to her son.

The respondent wanted to sell the property in 1996. She wanted a half share in the net proceeds of sale which amounted to some $800,000 after deducting the loan. The son offered her $200,000 in full settlement of her entitlement. She refused and went on to engage lawyers to protect her interest in the property.

The petitioner was extremely displeased with the conduct of the respondent. He believed that such family disputes should be resolved internally without the involvement of lawyers. Through his sister, the petitioner asked the respondent to accept the offer made by their son and to settle the matter.

The respondent alleged that the petitioner threatened to institute divorce proceedings, stop her maintenance and claim her properties if she did not accept the offer. Upon the respondent's refusal to comply with his orders, the petitioner stopped paying maintenance from November 1996 and did not resume payment until May 1997 when he was ordered to do so by the Family Court. In January 1997, he petitioned for divorce.

The petitioner also disposed of his memberships in three country clubs without any prior notice to the respondent. He assigned his life insurance policy to his mistress without informing the respondent who was the original beneficiary. Further, he transferred the apartment in Siglap to his mistress.

Although the respondent was a housewife throughout the marriage, she had substantial assets. At the time of the petition, the respondent owned three landed properties. The first was the matrimonial home which was purchased by the petitioner but registered in the respondent's name. It was not disputed that she held more properties in her name than the petitioner and that she was still financially dependent on the petitioner. Hence, the petitioner's threats were certainly not without force.

The learned High Court judge characterised the conduct of the petitioner in issuing the threats made as being a "bully" and wrongfully confining the respondent's freedom to deal with her property as she chose:

> The wife had the right to deal with the property as she saw fit and, although the husband might have views on this especially when there was a dispute between her and their son, he had no right to try and force her to take any particular course. The husband, however, con-

> sidered that even though he was living entirely separately from her, he still had rights as a husband to tell her what to do and to threaten recriminations if he was not obeyed.[61] ...
>
> All in all, the circumstances disclosed a man who wanted to get his own way and was not above using the process of the law as a bludgeon to achieve it. ... the husband ... had brought the divorce petition to punish her for not acceding to his demands, being demands which had nothing to do with their own relationship as spouses but related solely to the son. ...The husband had not initiated the divorce proceedings because the marriage had broken down irretrievably but for ulterior motives.[62]

Although there is suggestion in England that "conduct" in section 5(2) of the (English) Matrimonial Causes Act 1973 includes a consideration of misconduct such that the court must regard very gross conduct, including the commission of matrimonial offences, by the parties to the marriage in deciding whether or not it is wrong to dissolve the marriage,[63] the better view, it is submitted, is that accepted by the Court of Appeal.[64] The court should not be made to enter into an inquiry as to who is to "blame" for the breakdown of marriage. Doing so would seriously undermine the concept of irretrievable breakdown of marriage as the sole ground of divorce.[65]

However, the Court of Appeal went further. It held that it was not in line with "the policy and philosophy of the Charter"[66] to consider the motive of the petitioner in commencing the divorce petition. To investigate such matters would make contested divorces "even more acrimonious than they already are" and that the court "should not be put in the impossible position of having to make decisions as to whether the motive was proper or improper".[67]

It can be seen that the Court of Appeal's disagreement with the decision of the High Court concerned the weight to be given to party autonomy in the divorce process. The picture that emerges is that the decision to divorce

[61] *Supra*, note 35, para 20.

[62] *Ibid*, para 22.

[63] *Brickell* v *Brickell* [1974] Fam 31, at 38.

[64] *William Cheng* v *Chai Mei Leng, supra*, note 18, para 47.

[65] See also *Reiterbund* v *Reiterbund*, *supra*, note 31, at 797-798; *Dorrell* v *Dorrell*, *supra*, note 36, at 1091-1092; and the comment by Leong Wai Kum, "A *Turning Point* in Singapore Family Law", *supra*, note 23, at 331, approved by the Court of Appeal in *William Cheng* v *Chai Mei Leng*, *supra*, note 18, para 45.

[66] *William Cheng* v *Chai Mei Leng, supra*, note 18, para 49.

[67] *Ibid*.

is the private decision of the parties, and the law's role is to assist the parties to give legal effect to the decision, without having to examine the reasons or the conduct of the parties.

This approach is very much in line with the case law[68] as well as statutory developments.[69] In terms of divorce, family law in Singapore had become less interventionist and deterrence oriented.[70] This may be regarded as part of the process, initially begun in 1980 by the Singapore legislature, when it discarded the old concept that a marriage can only be legally terminated for grave reasons, for one which may be legally terminated on proof of irretrievable breakdown of marriage.[71] As it currently stands, it is only in truly extreme cases that the court will stand in the way of a petitioner who wishes to terminate his marriage.[72]

IV. A Suggested Approach

A high threshold is set in England before the hardship bar may be satisfied. First, the hardship has to be shown to be an objective hardship of some kind, such as selling a house specially adapted to meet the needs of a disabled child. Hardship, even if it is genuinely and keenly felt, does not suffice unless "sensible people, knowing all the facts, would think it was a hardship".[73]

Secondly, it must be "wrong" to dissolve the marriage.[74] It had been noted that words like "wrong", and "right" are unusual in a statute, and that in construing "wrong", regard must be given to all the circumstances of the persons involved and to "the balance which had to be maintained

68 The validity of agreements between spouses regulating their marital relations as well as division of matrimonial assets on divorce are generally upheld: *Kwong Sin Hwa* v *Lau Lee Yen* [1993] 1 SLR 457; *Wong Kam Fong Anne* v *Ang Ann Liang* [1993] 2 SLR 192; *Wee Ah Lian* v *Teo Siak Weng* [1992] 1 SLR 688.

69 Women's Charter (Cap 353, 1997 Rev Ed), s 50, added in 1996, encourages parties to come to a mutually acceptable solution instead of resorting to litigation in matrimonial proceedings.

70 This statement is true of all areas of family law apart from instances of gross misbehaviour. In family violence, for example, the law has become more intrusive and protective, see Women's Charter (Cap 353, 1997 Rev Ed), Part VII.

71 This conception of the role of the law in cases of divorce had also been noted in relation to English law, Carol Smart, "Regulating Families or Legitimating Patriarchy? Family Law in Britain" (1982) 10 International Journal of the Sociology of Law 129.

72 *William Cheng* v *Chai Mei Leng, supra*, note 18, para 10.

73 *Rukat* v *Rukat*, *supra*, note 31, at 73. However, in forming an objective assessment of the respondent's situation, an appraisal is made as to the respondent's own expectations about her own suffering, *Balraj* v *Balraj* (1981) 11 Fam Law 110.

74 "Wrong" had been interpreted as "unjust", *Reiterbund* v *Reiterbund*, *supra*, note 31, or "not right", *Brickell* v *Brickell*, *supra*, note 63.

between upholding the sanctity of the marriage and the desirability of ending empty ties".[75]

A wide range of circumstances may be considered which may make it wrong to dissolve the marriage. This will include children who have passed the age of majority, where relevant.[76]

The approach to be applied with regard to the bar in Singapore appears to be the same. In *Tan Lee Tiang* v *Chia Thuan Hwa*, it was said:[77]

> The court is also required to stand back and ask the question whether 'in all the circumstances it would be wrong to dissolve the marriage' .... The facts must be looked at objectively and if it appears to the court that it would be wrong, the petition must be dismissed.
>
> [Section 95] requires the court to apply both an objective and a subjective standard. The subjective standard requires the court to consider the content of the marital relationship of each couple. The objective standard requires the court to consider whether it is just and reasonable in all the circumstances and whether it would be wrong to dissolve the marriage.

However, such a high threshold in all situations may not be appropriate under the Women's Charter if it is accepted that section 95(4) includes the power of the court to order a *decree nisi* subject to certain conditions.[78] Making this distinction may be a matter of crucial importance in some cases. Returning to the case of *William Cheng* v *Chai Mei Leng* again, one of the allegations raised by the respondent was that dissolution of the marriage would have an adverse financial impact on her. This does not seem to have been strongly argued,[79] but the Court of Appeal commented:[80]

> In any event, the mere fact that financial hardship would ensue from the divorce was *per se* insufficient to resist the grant of the decree. ...As the learned district judge rightly pointed out, such financial matters can be more appropriately dealt with at the hearing of the ancillary reliefs.

[75] *Talbot* v *Talbot, supra,* note 44.
[76] *Allan* v *Allan* (1973) 4 Fam Law 83.
[77] [1994] 1 SLR 186, at 194.
[78] See text accompanying notes 35-43.
[79] *Supra*, note 18, para 43.
[80] *Ibid.*

This may be well supported if the choice is between dismissal or the granting of the *decree nisi*. However, it is suggested that a third alternative may be available, that is, to grant the *decree nisi* sought by the petitioner but make it subject to terms which will resolve any danger of financial hardship caused by the divorce.[81]

It could also be noted in passing that the facts of this case present the prospect of the "innocent" spouse being divorced against her will, which figured so prominently at the time of the proposal to reform the divorce law in England. Although the respondent could have petitioned for divorce herself on the fact of the petitioner's adultery, she did not do so as she wanted to keep the marriage intact.

It is suggested that the court can and should use the divorce process itself to influence the parties' behaviour in this limited respect, that is, where the "innocent" spouse may not feel that her or her children's interests are adequately protected. Performing this task serves two great psychological goals: first, it soothes any anxiety and distress felt by the respondent over the financial or other arrangements after divorce; and secondly, it brings home to the petitioner the implications of the divorce. The latter is especially important where the petitioner fails to reveal the true extent and value of his assets or fails to keep up with mortgage or insurance policy payments.[82] In such situations, there may be a real danger that the respondent and children will not receive their fair entitlement on divorce. Where the potential prejudice caused to the respondent and children is so great and the potential prejudice to the petitioner slight (by postponing the decree nisi till he complies with the orders imposed), there is no doubt which party should bear with the consequences.

Furthermore, it is submitted that serious questions of justice and fairness are raised when the petitioner's conduct shows that he intends the respondent and the children to suffer after the divorce. Even if it is accepted that the petitioner's motivation in seeking a divorce is not to be considered in deciding whether to dismiss the petition, there ought to be some assurance that the respondent's and children's interests will be adequately cared for. In the case of allegations of financial hardship caused by the divorce, the court could require adequate financial arrangements to be implemented before the *decree nisi* is granted, thereby eliminating any problems of enforcement.

Hence, it is submitted that even if a high threshold is required before a court can say that it is "wrong to dissolve the marriage", a lower threshold

[81] The respondent had raised this somewhat by arguing in the alternative that "unless and until the court was satisfied that adequate, proper and enforceable arrangements could be made for her financial welfare", it would be wrong to dissolve the marriage, *ibid*, para 23.

[82] *Eg, Wickler* v *Wickler* [1998] 2 FLR 326.

may be appropriate when the court considers whether it is "just and reasonable ... to make a *decree nisi* subject to such terms and conditions". It may be argued that such concerns over the financial situation of the respondent spouse and children can be adequately dealt with at the hearing on ancillary matters, and to introduce them at this stage may overly complicate the divorce process. It is suggested however that flexibility ought to be given to the court to consider if it may be better to impose terms and conditions on the *decree nisi,* rather than to leave it entirely to the ancillary hearing. It is not possible to anticipate what these cases may be except to point out that *William Cheng* v *Chai Mei Leng* could be one such case.

V. Conclusion

A better interpretation of section 95(2) and (4) of the Women's Charter, it is submitted, is that it actually embodies three different powers of the court in any divorce petition. These are:

(i) allowing the presumption of irretrievable breakdown of marriage to be rebutted;

(ii) dismissing the petition where it is "wrong to dissolve the marriage"; and

(iii) granting the *decree nisi* subject to terms and conditions where it is just and reasonable to do so.

In coming to its decision, all the circumstances of the case are to be considered.

Although a policy choice had been made such that there will be few cases in which a respondent can successfully make out a case for either (i) or (ii), it is submitted that the policy choice does not prevent a wider, more generous approach to be taken for (iii). Doing so will enable the court to better achieve a balance in the competing demands of the parties and fairness in ending marriages.

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