THE SEVEN-YEAR HITCH

A COMPARATIVE STUDY OF SINGAPORE'S NEW DIVORCE GROUND

The Women's Charter (Amendment) Act of 1967 which came into operation on June 2nd of that year, in the words of the explanatory statement to the Bill:

> "makes a number of amendments to the Women's Charter, 1961, in the light of experience gained since 1961, and of recent developments in the law of matrimonial relations in the United Kingdom, Australia and New Zealand." [1]

The Amendment, following recent English Legislation in the realm of matrimonial property has provided for the equal division of money derived from the housekeeping allowance to the wife, or property acquired out of such money;[2] also that husband and wife may now sue each other in tort.[3]

In the area of divorce, collusion has become a discretionary, and not an absolute bar;[4] adultery once condoned shall no longer be capable of being revived;[5] resumption or continuation of conjugal cohabitation by the husband following a matrimonial offence by the wife no longer raises an irrebuttable presumption of condonation against him;[6] also, provisions have been made to allow spouses to continue or resume cohabitation in an attempt to effect a reconciliation without such necessarily amounting to either condonation of adultery or cruelty, or termination of desertion.[7] Furthermore, the court is given power to adjourn proceedings for divorce or judicial separation where there is a reasonable possibility of a reconciliation.[8]

1. Singapore Government Gazette. Bills Supplement No. 17. November 8th, 1966.
2. Clause 20, repealing and re-enacting Section 50. See also United Kingdom — Married Women's Property Act 1964. Section 1.
3. Clause 23, repealing and re-enacting Section 54. See also United Kingdom — Law Reform (Husband and Wife) Act, 1962.
4. Clause 29, amending Section 86. See United Kingdom: Matrimonial Causes Act, 1965. Section 5(4).
5. Clause 31, adding Section 87(4). See United Kingdom: Matrimonial Causes Act, 1965, Section 42(3).
6. Clause 31. adding Section 87(2). See United Kingdom: Matrimonial Causes Act, 1965, Section 42(1).
7. Clauses 31 and 28 adding Section 87(3), Section 84(6). See United Kingdom: Matrimonial Causes Act, 1965, Sections 42(2) and 2(2).
8. Clause 30, adding Section 86A. See Australia: Matrimonial Causes Act, 1959-65, Section 14.

With regard to children, the definition of "child of the marriage" has been extended in respect of the welfare, custody and maintenance of children during or after proceedings for nullity, divorce, judicial separation and restitution to include adopted children, and indeed any child who is "a member of the family of the husband and wife."[9] The Court is also required to ensure that adequate arrangements are made for the welfare of children of a marriage before pronouncing a decree absolute in nullity or divorce proceedings, or before pronouncing a decree of judicial separation.[10]

Finally, children of annulled marriages shall be legitimate if they would have been the legitimate children of the parties to the marriage if the marriage had been dissolved instead of being annulled.[11] Whether this section refers to void marriages as well as to voidable marriages is not easy to determine. The legislature seems to have contemplated that it should cover both situations[11a] but the wording of the section which is similar to that in the English Matrimonial Causes Act 1965, section 11 (except that the latter expressly confines itself to voidable marriages) strongly suggests that only children of voidable marriages are legitimate. One argument in favour of this interpretation is that the section only apparently applies where a child was at some time legitimate; a child, in fact.

> "who would have been the legitimate child of the parties to the marriage if the marriage had been dissolved."

A child of a void marriage is never a legitimate child, whilst a child of voidable marriage is legitimate whilst the marriage subsists In other words, the section is designed to *preserve* legitimacy, not to *create* legitimacy.[11b]

The foregoing are among the more substantial provisions in the Amendment, but undoubtedly the centrepiece of the statute and the most controversial measure is that which allows either a husband or a wife to present a petition for divorce to the court praying that their marriage be dissolved on the ground that the other party has lived separately from the petitioner for a period of not less than seven years immediately preceding the presentation of the petition and is unlikely to be reconciled with him or her, as the case may be.[12]

9. Clause 26 amending Section 80 and Clause 35 amending Section 113. See United Kingdom: Matrimonial Causes Act, 1965, Section 46(2).

10. Clause 34, adding Section 112A. See United Kingdom: Matrimonial Causes Act, 1965, Section 33.

11. Clause 33, repealing and re-enacting Section 94.

11a. Singapore Legislative Assembly Debates. Vol. 25 Part II at Col. 482.

11b. See now the Statute Law Revision Bill 1969 which introduces a new subsection to Section 94 to the effect that "The Child of a void marriage whether born before or after the commencement of this Ordinance shall be deemed to be the legitimate child of his parents."

12. Clause 28, amending Section 84. The ground is also available to gain a decree of judicial separation (Section 96).

The provision visualises, therefore, the granting of a divorce on the basis that the marriage has broken down, rather than on the proof of matrimonial fault attributable to either of the parties. Breakdown itself, is to be inferred, when evidence is presented that the couple have lived apart without likelihood of reconciliation for the requisite period.

This approach has been called *Breakdown without Inquest* in the recent English Law Commission's Report on the Reform of the Grounds of Divorce — *The Field of Choice*,[13] as opposed to *Breakdown with Inquest,* which was advocated as a sole ground for divorce by the Archbishop of Canterbury's Group on Divorce in *Putting Asunder.*

The distinction between the two approaches is apparent in the following quotation from *The Field of Choice*.[14]

> "As we see it. a divorce case based on breakdown should involve the determination of four questions:—
>
> (a) Has the marriage broken down?
>
> (b) If so, is there any reasonable prospect of a reconciliation?
>
> (c) If not, is there any reason of public policy including in particular, justice to the parties and the children why the marriage should not be dissolved?
>
> (d) If not, what are the appropriate consequential arrangements to be made, regarding the parties and the children?
>
> The Archbishop's Group wish the answers to all these questions to be proved positively to the satisfaction of the court by means of an inquest into the whole of the married life. Under the alternative proposal that we are now considering, the court, *on proof of a period of separation,* would be prepared to assume a positive answers to (a) and in the absence of evidence to the contrary negative answers to (b) and (c). The ending of cohabitation and a sustained failure to resume it are the most cogent objective and justiciable indications of breakdown and the objectives of a sound divorce law as summarised in paragraph 15,[15] might be better achieved by relying on these indications rather than on an attempted inquest, in all cases, into the whole marital history."

The ground, as enacted in Singapore (and as we shall see, as enacted in Australia and New Zealand) lies alongside the usual fault grounds. There is no complete replacement of the fault principle by the breakdown principle.

It has been argued however, that the two principles are incompatible. Lord Hodson, speaking on the Matrimonial Causes and Reconciliation Bill of 1963, where it was sought by Amendment to include a seven year separation ground into the English Divorce Law, said:

> "There are only two theories alive on this problem, namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory."[16]

13. Cmnd. 3123.
14. *Ibid.* para. 72.
15. See text supported by note 26.
16. House of Lords Debates, 21st June, 1963, Col. 1538.

His Lordship later conceded that an inroad had been made in the fault principle by the inclusion of the ground of incurable insanity in the respondent, but regarded this as exceptional and was anxious that no further inroad should be made, fearing the deleterious effect on the institution of marriage.[17]

The Lord Chancellor, at that time, the Right Honourable Lord Dilhorne, in support of Lord Hodson said:—

> "It may be, I do not know that it would be possible to devise another system where divorce would not be dependent on the establishment of a matrimonial offence but upon the fact of the breakdown of marriage. But that is not our system. That is not the system which this Amendment proposes. What this Amendment proposes is to graft upon our existing law a proposition based upon the fact of the breakdown of marriage. I must say that I think the result would be very illogical and difficult to defend for this reason: there might so easily be a case where a man seeks to obtain a divorce on the ground of adultery or cruelty, or something of that sort, and after a long fought out case, his petition fails. He knows that he has only to wait,, and at the end of seven years. under this clause, he will get a divorce." [18]

The Archbishop's Group, in advocating that there should be one comprehensive ground for divorce, namely breakdown, with an inquest by the court into the marriage, gave support to the Lord Chancellor's view that the breakdown principle whilst it may be *a* substitute for the fault principle, should not be an addition to it. The Group's objections are:—

(1) The mutual incompatibility of the two principles would be glaringly obvious. That in fact, in the present law, the existing grounds of divorce are mutually inconsistent.

> "If, as many defenders of the present law have insisted, the moral principle underlying the doctrine of the matrimonial offence is right and necessary to be maintained, then divorce on the ground of a spouse's insanity must surely be immoral, for insanity is not an offence, but an affliction. If, on the contrary, it is morally right to grant divorce in cases where the common life has been brought to an end by circumstances outside the control of either party, it is hard to see why the law should make decrees depend on the commission of an offence, except in the one case. The two concepts do not mix."[19]

(2) The superficiality inseparable from verbally formulated grounds would tend to render the principle of breakdown inoperable, and,

(3) Divorce would be made easier to get, without really improving the law.

In respect of the first objection it may be answered that the fact that in one extreme case (insanity) the law permits a divorce when there is no matrimonial offence is no ground for totally scrapping the matrimonial offence principle. The two principles can operate side by side and are in no way inconsistent. Professor Monrad Paulson has also said:—

17. *Ibid.* Col. 1534-35.
18. *Ibid.* Col. 1566.
19. *Putting Asunder,* paragraph 44.

> "But why should an exclusive choice be made? One principle can serve the case of the spouse who has suffered serious offence. The other can serve those spouses in respect of whom no glaring misconduct can be identified and those who seek the divorce against the will of a relatively innocent partner. The legal system frequently chooses different principles to dispose of distinguishable situations.[20]

The other objections however are not so easily brushed aside. In respect of the third objection, we have already seen an example of the kind of situation which may possibly arise in the above quoted speech of Lord Dilhorne.

We shall also see later that the principle of breakdown introduced into an existing system based on the matrimonial offence, tends to become bedevilled with artificial considerations of fault.[20a]

Again, a court of law is not an appropriate tribunal to try the issue of breakdown, being more accustomed to trials conducted on the adversary system. Although the court assumes an inquisitorial role in divorce proceedings,[21] its duty of inquiry into the facts is in most cases discharged in theory rather than in practice, especially in undefended cases where the whole proceedings may not last more than ten minutes. Obviously in this space of time, the Judge is unable to carry out a thorough inquisition into the marriage.

On the other hand, if breakdown were to become the sole ground and a full inquisitional procedure adopted, fundamental reforms of the divorce courts and their procedure would be essential. Cases would take much longer to hear and cost more, and the State would have to bear the financial burden of providing more Court houses, more judges, more Legal Aid, and altogether more officials, including social workers, to enable the system to work properly.

Apart from the increased cost to litigants and the burden on public funds, public opinion would not easily tolerate a system which made divorce more difficult or longer to get, unless it could be shown that a substantial number of marriages would be saved as a. result.[22] The result would probably be an increase in the numbers of illicit unions and consequently in the numbers of illegitimate children.

The Law Commission, recognising these difficulties, attempted to meet them by a suggested modification of the Archbishop Group's proposals.[23] As we have seen above, whilst agreeing upon the introduction of the breakdown principle, the Commission rejected the re-

20. In a review of *Putting Asunder, New Society,* 4th August, 1966.

20a. See, for example, *Govinden* v. *Govinden,* Straits Times, February 1st, 1969, where Choor Singh J. held that Mrs. Govinden, who petitioned on the grounds of seven years separation from her husband, needed to prove that the separation was caused by her husband's adultery.

21. Women's Charter, 1961, Section 86.

22. Royal Commission on Marriage and Divorce. Report 1951-55, paragraph 50. (Cmnd. 9678).

23. *The Field of Choice,* paragraph 71 *et seq.*

quirement of inquest and proposed instead that breakdown should be inferred from a period of separation with no possibility of a reconciliation between the parties.

This would enable the existing courts to deal with the cases quite adequately as normally neither the fact of separation nor the unlikelihood of reconciliation will require much investigation. Dispute would only arise in a small number of cases,[24] one most likely being where the court may need to exercise its discretion to refuse divorce on grounds of hardship to the respondent or the children or on grounds of public interest in preserving the institution of marriage. The present court system could adequately deal with these.

The harshest criticism that can be made of the recommendations of the Law Commission is that we are merely presented with a choice of two alternatives, breakdown without inquisition, or adversary type proceedings to determine breakdown; neither of these being anything but a makeshift solution to the real problem of how to reform the law and not merely make divorce easier.[25]

It is arguable that the Law Commission's recommendations would to some extent enable the second of its two objectives in reforming the law to the attained, that is:—

> "When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation".

But would not do enough to achieve the first, that is:—

> "to buttress rather than to undermine the stability of marriage."[26]

Mr. D. Lasok has recently criticised the Law Commission for its apparent failure to do this, and notably for its tepid attitude towards reconciliation measures.

Mr. Lasok thinks that within the framework of an inquisitional system, (which, he claims, is the only effective system, where the doctrine of breakdown can be applied):

> "it is necessary to restore the legal status of marriage as an institution of society which has no serious rival and insist on certain standards of conduct. The first casualty of this approach would be the divorce by consent and divorce by repudiation. Secondly, it is necessary to have a properly instituted 'family court' the proceedings unlike the present practice being in essence conciliatory and the court having necessary powers to explore of its own initiative the prospects of reconciliation."[27]

Mr. Lasok admits however, that in countries like France for example, inquisitional systems with compulsory reconciliation proceedings have not proved as effective as might be expected, much depending on the attitude of the judges, the parties and their lawyers.

24. In the United Kingdom it is estimated that only 7% of cases are defended.
25. See D. Lasok (1968) 112, Solicitors Journal, p. 430.
26. *The Field of Choice,* para. 15.
27. (1968) 112 Solicitors Journal, p. 472.

As we have seen, it is doubtful whether such an approach making for more difficult, protracted and expensive divorce proceedings would commend itself either to public opinion or indeed to the public purse notwithstanding any success that may be achieved in saving marriages rather than destroying them.

A favourite argument for introducing breakdown of marriage as a ground for divorce is of course that already the law is tending in the direction of substituting breakdown for the matrimonial offence.

Breakdown is already openly recognised as the basis of divorce on the ground of incurable insanity.[28] The ground of Presumption of Death[29] will also release a petitioner from a marriage which exists in name only. Even the three year rule,[30] which prevents petitions from being presented during the first three years of marriage, unless there are exceptional circumstances, implicitly recognises that if the troubles are severe, or arise or continue after three years have elapsed, then there is every likelihood that the marriage has broken down.

In many cases, the very fact that the parties are before the court is enough to indicate breakdown without anything more; the question which remains to be determined is not so much whether or not to grant a divorce, but rather, to whom is it to be granted?

The most spectacular and the most widely quoted advance in the substitution of breakdown for the matrimonial offence was of course in the cases of *Gollins* v. *Gollins*,[31] and *Williams* v, *Williams*,[32] both judgments being delivered by the House of Lords on June 27th, 1963, ironically enough only six days after the House of Lords had rejected a clause in the Matrimonial Causes and Reconciliation Bill[33] which would have allowed a divorce on the ground of seven years separation without likelihood of reconciliation.

The decisions in these cases, which have been exhaustively discussed elsewhere,[34] by eliminating intention to hurt as an essential requirement before a finding on the issue of cruelty can be made, drained away culpability from the matrimonial offence of cruelty. As Professor Neville Brown has said:—

> "Once one allows that there can be cruelty without culpability, then one has divorce without fault. Lip service may still be paid to the doctrine of the matrimonial offence, but behind this legal fiction the courts are accepting the principle of the breakdown of the marriages as the basis for divorce. Thus, the extensive arguments based upon a balance of hardship

28. Women's Charter, 1961, Sections 84(1)d, 84(2)f.
29. *Ibid.* Section 90.
30. *Ibid.* Section 83.
31. [1964] A.C, 644.
32. [1964] A.C. 698.
33. Later the Matrimonial Causes Act of 1963, the provisions of which are now consolidated in the Matrimonial Causes Act 1965.
34. See especially L. Neville Brown in (1963) 26 Modern Law Review, p. 625.

> fit strangely into the context of the matrimonial offence, but are more appropriate, say, to the ground of incurable insanity, confessedly a ground posited upon the principle of breakdown. And Lord Pearce stated the ratio *legis* behind the ground of cruelty to be that of alleviating the hardship to both spouses in being tied for life to a marriage that has broken down." [35]

Professor Brown goes on to say that if the House of Lords has now made cruelty (and constructive desertion) a ground to be grouped with incurable insanity under the principle of breakdown then the decisions can only discredit still further the "offence" doctrine by emphasising its superficiality, for on deeper analysis, adultery, cruelty, and either form of desertion are all equally symptomatic of marriage breakdown.

Lord Silkin, speaking in the House of Lords Debate mentioned previously had indeed anticipated this view when he said:—

> "Broadly speaking on all these grounds for divorce it is the view of the community that the marriage has broken down. There can be no real marriage where one party is cruel to the other; or one party is insane, or where there is desertion." [36]

Notwithstanding *Collins* v. *Gollins*[37] and *Williams* v. *Williams*[38] the courts have not thrown open the doors to divorce for incompatibility. A spouse still cannot gain a divorce because he or she finds the marriage irritating or exasperating, who is in fact suffering from no more than "the wear and tear of conjugal life." [39] It is still necessary for the matrimonial offence of cruelty to be made out. Conduct, in order to be cruel must be such that no reasonable person would tolerate it, or consider that the petitioner should be called upon to endure it.

The Court of Appeal in *Le Brocq* v. *Le Brocq*[40] emphasised that cruelty in the law of divorce means cruelty in the ordinary and natural meaning of the word. It had no artificial or esotetic meaning. Salmon L.J. in particular said:—

> "I do not consider *Gollins,* as having altered the law save that it gives the quietus to the doctrine that conduct in order to be cruel must be 'aimed at' the party complaining." [41]

In another *post-Gollins* decision, *Safier* v. *Safier*[42] it was held that notwithstanding that the marriage had irretrievably broken down and that there was injury to the health of both parties, a matrimonial offence, in this case, cruelty remained to be proved. Cruelty begat misery, but misery did not prove cruelty. In the absence of "grave and weighty conduct" therefore, a spouse, no matter that he or she suffers injury to health by remaining in the matrimonial home is unable to be released from the marriage. If, in such a case, a wife leaves the matrimonial

35. *Ibid.* p. 645.
36. House of Lords Debates June 21st, 1963, Col. 1534-35.
37. *loc. cit.* note 31.
38. *loc. cit.* note 32.
39. *Buchler* v. *Buchler* [1947] P. 25, C.A. *per* Asquith L.J.
40. [1964] 3 All E.R. 464, C.A.
41. *Ibid.* p. 471-2.
42. (1964) 108, Solicitors Journal, p. 338.

home for good, in order to protect her health, she will, because of her desertion, lose her right to be maintained, and may after three years have a divorce pronounced against her. She is enmeshed in the "cruel dilemma" of whether to stay and suffer, or go, and suffer.[43] If her husband refuses to divorce her, she is tied to the marriage for good (in the absence of a subsequent matrimonial offence on his part, or such a ground as we are considering). Similarly, if she is found to have a reasonable cause for leaving the matrimonial home but her husband is not in constructive desertion, then neither party being at fault, neither can get a divorce, although the marriage will be empty and devoid of meaning.[44]

It may be seen so far that despite the *Gollins* and *Williams* decisions, the courts have acted with restraint in deciding cruelty cases. In two recent cases,[45] both involving refusal of sexual intercourse by the respondent and subsequent injury to the health of the petitioner, the courts seem almost to have recanted, and by importing the requirement that conduct in order to be cruel should be inexcusable,[46] have re-introduced the element of fault. This seems inconsistent with *Williams* v. *Williams*[47] where the conduct of the mentally sick respondent was excusable but nevertheless held to be cruel.

The answer may be of course that every case turns on its own facts and indeed the courts would be placed in an impossible situation if they had to determine what constituted normal sexual satisfaction within a marriage. Much depends therefore on the conduct of the respondent. It seems that if the courts can detect some element of wilfulness in the refusal of sexual intercourse over and above sheer disinclination, then cruelty may be established.[48]

The discretion cases are sometimes quoted as examples of the courts leaning towards the principle of breakdown. A divorce is not often refused to a petitioner who has committed a matrimonial offence,[49] unless it is discovered that he has failed to make a full disclosure of it.[50] A

43. See *Timmins* v. *Timmins* [1953] 2 All E.R. 187, C.A.

44. *G.* v. *G.* [1964] P. 133.

45. *P.* v. *P.* [1964] 3 All E.R. 919; *B(L)* v. *B(R)* [1965] 3 All E.R. 263, C.A.; *Walker* v. *Walker* (1967) 111 Sol. J. 436.

46. Lord Reid in *Gollins* v. *Gollins* [1964] A.C. 644 at p. 667, refers to *inexcusable* conduct on the part of the respondent as being cruel. It is submitted however that Lord Reid was referring only to the facts of *Gollins* itself. In the light of the later decision in *Williams* v. *Williams* [1964] A.C. 698, excusability of conduct or otherwise seems to be only one factor to be taken into consideration in determining the issue of cruelty as a whole.

47. *loc. cit.* note 32.

48. *P(D)* v. *P(J)* [1965] 2 All E.R. 456. See also *Sheldon* v. *Sheldon* [1966] P. 62. (C.A.) and *Slon* v. *Slon* [1969] 2 W.L.R. 375.

49. The factors which are borne in mind by the court in exercising its discretion are set out in the judgment of the President of the Probate, Admiralty and Divorce Division of the High Court in *Bull* v. *Bull* [1965] 3 W.L.R. 1048 at 1056.

50. *Ibid.* See also *Goldsmith* v. *Goldsmith* [1965] P. 188.

court will however refuse a divorce if it finds that there is some prospect of a reconciliation between the parties.[51] This is consistent with the principle of breakdown. On the other hand, it was laid down by the House of Lords in *Blunt* v. *Blunt*[52] and emphasised by the English Royal Commission in 1955 that in taking into account the consideration that it may be contrary to public policy to maintain a marriage which has completely broken down, it is necessary to give at least equal weight to the other consideration, namely, respect for the binding sanctity of marriage.[53]

Cases arise therefore, where notwithstanding that the marriage has broken down, the court will refuse a divorce where the petitioner by his conduct has shown blatant disregard for his matrimonial obligations.[54]

It is difficult to see how the preserving of an empty legal union and the subsequent encouragement of illicit unions, together with the production of illegitimate children will do anything to preserve the sanctity of marriage within the community. Such a restrictive policy is based on the assumption that to preserve marriage as an institution the individual marriage should be unimpaired. We shall see later that it is doubtful whether this assumption can be justified.

Here, as in the area of cruelty, it can be seen that the principle of breakdown receives only a limited application.

It is suggested that over the years the Courts have tended to lose sight of the principle behind the bars to the granting of a decree. The Ecclesiastical Courts could only pronounce decrees of divorce *a mensa et thoro,* that is, they could only relieve parties from the duty of cohabiting. The bars against the granting of the decree were directed towards holding the marriage together *in fact,* and not permitting the couples to lawfully separate whilst still remaining married. The view prevailed that mutually guilty parties made good companions for each other and should continue to live together.[55] Also, the Ecclesiastical Courts in administering divorce *a mensa et thoro* were reluctant to release the parties into society in the dangerous character of a wife without a husband and a husband without a wife The bars were originally aimed to prevent a suspension of cohabitation, but were carried over into Divorce Law in 1857 by the English Matrimonial Causes Act.

Dissolution of marriage however, involving termination of status rather than suspension of cohabitation may well raise other consider-

51. *Little* v. *Little* (1966) 110, Solicitors Journal, p. 546 (C.A.). Compare *Copps* v. *Copps, ibid,* at p. 545.

52. [1943] A.C. 517. See however *Masarati* v. *Masarati* [1969] 1 W.L.R. 393 where emphasis was placed more on the factor of breakdown.

53. Cmnd. 9678, paragraph 228.

54. See particularly the case of *Williams* v. *Williams* [1966] 2 W.L.R. 1248, C.A. where the results of a refusal to exercise discretion on the ground that the petitioner had shown a complete disregard for the sanctity of the marriage were that two new stable unions formed by the parties (one of which had already resulted in the birth of an illegitimate child) could not be regularised.

55. *Beeby* v. *Beeby,* 162 English Reports. p. 755-756 (1799).

ations. The likelihood that parties will resume or continue cohabitation if a decree of *divorce* is refused as opposed to a decree of *separation* is remote indeed. If the bar is ineffective to prevent a complete disruption of the married life of the parties and only succeeds in doing what the Ecclesiastical Courts sought to avoid, that is, to throw upon society a husband without a wife, and a wife without a husband, then, it is submitted, the bar serves no useful purpose.

Whether the bars are relevant at all therefore, to dissolution of marriage (as opposed to suspension of cohabitation), *a fortiori* when the marriage has undoubtedly broken down beyond repair, is questionable.

It is submitted that a divorce should only be refused where it is evident that there is still a possibility of the marriage continuing.[56] This is more consistent with the principle of breakdown and with the purpose of the bars in the Ecclesiastical Courts, which was to prevent the disintegration of an existing *de facto* marriage, rather than maintain in name only a marriage which was already broken beyond repair.

In the Amendment, the ambit of condonation as a bar has been reduced,[57] as has been the effect of the return of a deserting spouse to the matrimonial home.[58]

The courts therefore, in ignoring situations which, at Common Law might well indicate that adultery, or cruelty had been condoned seem to proceed on the assumption that the marriage has broken down. In fact, conduct, which would amount to a bar at Common Law (notwithstanding the fact that the parties later came adrift) is seen to point to a permanent disruption of the married state, *and therefore to a need for dissolution rather than to be a reason for denying dissolution.* The conduct in itself involving an attempt at, and failure of reconciliation, is indicative of breakdown.

Similarly, with desertion, and its termination by resumption of cohabitation; to allow the deserted spouse to proceed on the ground of desertion, notwithstanding the fact that the required statutory period is interrupted for one period not longer than three months, indicates that the courts are assuming that the marriage has broken down and granting a divorce on that basis. In neither situation is the matrimonial offence made out, at least as visualised in Seciton 86 of the Women's Charter.

But the legislature, in enacting such provisions was restrictive in as much as it only allowed parties to come together for three months, and then for one period only.[59] More than this and the petitioner is

56. *Little* v. *Little, loc. cit.* note 51.

57. Women's Charter 1961, Section 87(2) & (3).

58. *Ibid.* Section 84(6).

59. The Women's Charter, section 87(3) seems to indicate that more than one attempt at reconciliation may be made without prejudice to the petitioner's remedy. However, Section 84(6) clearly indicates that only one such period is allowable.

subject to the full rigour of the Common Law and must rebut the presumption of condonation, or begin to count the desertion period afresh.[60]

The legislatures of both the United Kingdom and Singapore have also failed to take into account that desertion as a completed offence is capable of condonation, that is, either after the petition is presented[61] or after decree nisi is granted.[62] Section 87(3) of the Women's Charter refers only to condonation of adultery or cruelty. It seems therefore that a petitioner on the ground of desertion who resumes cohabitation with a view to reconciliation for a period, after the petition or decree nisi, is not protected by the Section and may well be found to have condoned the desertion. This is what happened in the English case of *Ives* v. *Ives*,[63] although in that case Cairns J. did not have to decide whether or not the reconciliation provision *in pari materia* with Section 87(3)[64] applied to desertion, as the parties had in fact been cohabiting for more than three months. Condonation could therefore be inferred, notwithstanding the sub-section.

The point is, that in this case, there was substantial evidence of breakdown, yet the court, apparently bound by the law,[65] could afford no relief but instead left Mr. Ives tied to a useless and empty marriage. The decision seems all the more unjust when we consider that the extent of Mr. Ives' sin was to make a brave but unwise attempt to get his marriage going again after three years separation. This case, if any, surely explodes the myth that the courts lean substantially towards the breakdown principle. Whilst the courts are completely enmeshed in the wrappings and trapping of the fault system, no meaningful progress can be made in the direction of substituting breakdown of marriage as the ground for divorce.

60. Furthermore, parties who become reconciled either before the three month period commences, or at any time during the period, lose the protection of the section. They are said to have resumed cohabitation *as a consequence of reconciliation* and not with a view to it. See *Brown* v. *Brown* [1964] 2 All E.R. 828, approved by C.A. in *Herridge* v. *Herridge* [1966] 1 All E.E. 92 also *Mackleworth* v. *Mackleworth, The Times,* May 7th, 1964. See also *Quinn* v. *Quinn* 113. Sol. J.p. 687.

61. *Maslin* v. *Maslin* [1952] 1 All E.R. 477.

62. *Ives* v. *Ives* [1967] 3 All E.R. 79. See my casenote, Me Judice, Vol. 9, 1968.

63. *loc. cit.* note 62.

64. U.K. Matrimonial Causes Act, 1965. Section 42(2).

65. My previous argument that the Ecclesiastical Courts bars to a separation decree are inappropriate to dissolution of marriage, especially when the chances of reconciliation are nil, has extra force when divorce is prayed for on the ground of desertion, for desertion, apart from being an offence unknown to the Ecclesiastical Law, (being introduced as a separation ground in the 1857 Matrimonial Causes Act to offset the failure of the restitution decree) is particularly anomalous as a ground for separation, for the simple reason that in desertion cases the parties are already separated. Furthermore, desertion is a ground nearer in essence to breakdown than any other for it more strongly indicates a permanent disruption of the marriage relationship, than may adultery or acts of cruelty, and for that reason should not attract the bar of condonation.

So far, we have discussed the principle of breakdown in divorce proceedings. It is now proposed to deal more specifically with the separation ground itself.

The ground embodies both divorce by repudiation and of course divorce by consent. It will be seen later that it is these aspects of the ground, which may result in hardship to an innocent wife and children, or less specifically have an erosive effect upon the institution of marriage, which give rise to the most controversy and opposition to the ground, more so than the principle of breakdown itself.

Divorce by consent or repudiation by the husband was permitted in Roman Classical Law, and this fact is sometimes quoted by modern moralists and lawyers as indicative of Roman decadence during the Empire. There are, however no particular indications that marriage stability during this period was anything but normal. In defence of the Roman freedom of divorce it has been said:—

> "Conscious of the true limits of law as were the Roman lawyers, in contrast to Greek and Oriental lawyers, they realised that it is beyond the strength of law to preserve matrimony against the will of the spouses, since law can never compel them to live peacefully together. Law can maintain matrimony in the legal sense, but neither morality nor the community is in the least interested in the existence of a mere legal marriage. In the great majority of cases, forcible maintenance of marriage has only the effect of dooming spouses to concubinage or other illegitimate intercourse not to speak of the devices applied by the parties and their advocates in order to elude the legal rules."[66]

Nearer to Singapore we have examples of divorce by repudiation in both the law of Islam and in Chinese Customary Law. In the latter case, divorce by mutual consent of the parties was recognised by the Colonial Courts in 1861.[67]

As to divorce by repudiation, it was held in the case *In the Estate of Sim Siew Guan decd.*[68] that a secondary wife, or t'sip, could validly be divorced unilaterally by the husband if she disobeyed the orders of the principal wife, if she violated the rules of the family, if she committed immorality, or if she was guilty of disobedience to him.

However, there is no evidence of any custom either in China or in Singapore which would allow a woman unilaterally to divorce her husband.[69].

In other jurisdictions, legislation containing many variations on the separation theme, which allows divorce by repudiation or consent is to be found particularly in Europe, as also in the U.S.A., in Australia

66. Schulz — Classical Roman Law, p. 132-133.

67. *Noniah Cheah Yew v. Othmansaw Merican and anor.* 1 Ky. (1861) 160, W.O.C. (1911) 22. See also *Lee Wah Fui* v. *Law* [1964] 2 All E.R. 248.

68. [1932] M.L.J. 95. See also *In re Lee Gee Chong decd.* [1965] 1 M.L.J. 102.

69. *Cheng Ee Mun* v. *Look Chun Heng and anor.* [1962] M.L.J. 411.

and New Zealand. A movement to introduce such a ground is at present taking place in the United Kingdom in the shape of the Divorce Reform Bill.[70]

In the United States, the Kentucky Laws of 1850[71] provided for divorce where parties to a marriage:—

> "shall have separated and lived apart without any communication whatever for the space of five years before the commencement of any suit for divorce."

By the Winsconsin General Laws of 1866[72] a divorce could be obtained by either party:—

> "whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years next preceding application for divorce."

In Rhode Island in 1893[73] both decrees of divorce and judicial separation could be obtained by either party:—

> "where the parties have lived separate and apart .... for the space of at least ten years."

By 1956, some eighteen states had enacted variants of the separation ground[74] the period of separation varying from ten years down to two years. Texas, originally ten years, later reduced the period to seven years. North Carolina, originally ten years, later reduced to two years. In the majority of states, the period was originally five years and in some of these the period has also been reduced. The general tendency seems to be to reduce the necessary time period.

New York, a state which previously had granted divorces only on the ground of adultery, passed a law in the Spring of 1966 (coming into effect on 1st September 1967) which permits divorces on the ground of two years separation under a decree of separation or a formal deed of separation, provided that the petitioner has duly performed all the terms and conditions of the decree or deed.[75] The Act also contains provisions for compulsory attempts at conciliation by a commissioner appointed by the court and for the appointment of special guardians to protect the interests of the children.[76]

In New Zealand, three years separation under a decree order, or separation agreement was made a discretionary ground of divorce in 1920,[77] but the court's discretion was subsequently fettered by imposing an absolute bar if the petition was opposed *and* the court found that the

70. The Bill has now passed through both Houses of Parliament and is scheduled to come into force in January 1971. (Clause 11(3)).
71. C. 498, p. 55.
72. C. 37, p. 40.
73. Pub. Laws, C. 1187. p. 313.
74. McCurdy — Vanderbilt Law Review, Vol. 9, p. 685.
75. Laws of New York, Ch. 254 of 1966.
76. *Ibid.* Section 8.
77. Divorce and Matrimonial Causes Amendment Act 1920 (N.Z.) Section 4.

separation was due to the wrongful conduct of the petitioner.[78] In 1953, a further ground was introduced; seven years separation with no likelihood of reconciliation with a similar absolute bar.[79] But, by the Matrimonial Proceedings Act of 1963, an absolute discretion was restored where the ground was seven years separation with no prospect of a reconciliation.[80] The present position in New Zealand is that the court has a discretion to grant a divorce where separation has lasted for seven years[81] or for three years following a decree order or agreement and the petition is unopposed.[82] A divorce may not be refused solely on the ground that the petitioner has committed adultery since the separation.[83]

The New Zealand provisions, in part, form the basis of the Singapore Legislation,[84] but insofar as the petitioners adultery at any time during the marriage is a discretionary bar to relief in Singapore,[85] then the Women's Charter, as we shall see later follows Australian legislation.[86]

In Australia, a comparatively more simple version of the separation ground was introduced by the (Commonwealth) Matrimonial Causes Act 1959, which, coming into force on February 1st, 1961, for the first time provided a single national code.[87] Prior to the Act, separation had been a ground only in South Australia,[88] and Western Australia,[89] A divorce can now be obtained in all states by either party after five years separation if there is no reasonable likelihood of cohabitation being resumed.

In England, attempts to introduce a separation ground into the divorce law have been being made since 1949, when in connection with the Law Reform (Miscellaneous Provisions) Bill, an attempt was made to introduce in a package deal, divorce on the ground of separation of the parties. In 1950, Mrs. Eirene White, M.P., introduced a Bill containing a similar provision. This secured a second reading in the Commons, but was withdrawn on the Government's undertaking to set up a Royal Commission. The resulting Morton Commission was divided on the issue of breakdown.

78. Divorce and Matrimonial Causes Amendment Act 1921-2 (N.Z.) Section 2.
79. Divorce and Matrimonial Causes Amendment Act 1953 (N.Z.) Section 7.
80. Matrimonial Proceedings Act 1963 (N.Z.) Sections 29 and 30.
81. *Ibid.* Sections 21(1)o and 30.
82. *Ibid.* Sections 21(1)m and n, 29, 30.
83. *Ibid.* Section 30.
84. Singapore Government Gazette. Bills Supplement No. 17, 8th November, 1966, Explanatory Statement.
85. Women's Charter, 1961, Section 86(2), proviso.
86. In Australia, the Court has a discretion to refuse a decree, but in Singapore, following U.K. legislation the court has a discretion to grant a decree. With regard to the burden placed on a petitioner, however, this appears to make little difference in practice. See *Grosser* v. *Grosser* (1961) 2 F.L.R. 152 at p. 156; *Henderson* v. *Henderson* (1948) 76 C.L.R. 529.
87. See Mr. Justice Selby in (1966) 29 Modern L.R. p. 473.
88. Matrimonial Causes Amendment Act. 1938.
89. Supreme Court Amendment Act, 1945.

Nine members of the Commission were opposed to the introduction of the doctrine of breakdown of marriage in any form, because they considered that it would be gravely detrimental to the well being of the community.[90] Nine members on the other hand, considered that the time had come to introduce the doctrine of breakdown to a limited extent and recommended that, where a husband and wife have lived separate and apart for seven years, it should be possible for either spouse to obtain a divorce if the other spouse did not object.[91]

Four of these nine members were prepared to permit divorce after seven years separation provided that if the other sponse objected, the petitioner would have to satisfy the court that the separation was due in part to the unreasonable conduct of the other spouse.[92] Lord Walker was prepared to make three years separation with proof of irretrievable breakdown the sole ground of divorce.[93]

The Matrimonial Causes and Reconciliation Bill introduced by Mr. Leo Abse, M.P. in 1963 contained a clause providing for divorce on proof of seven years separation without reasonable likelihood of cohabitation being resumed. This clause was withdrawn at the Report Stage of the Bill, by Mr. Abse, who chose to sacrifice the ground at that stage rather than lose the whole Bill. The ground was later re-introduced, as we have seen, into the House of Lords by Lord Silkin as an Amendment and was heavily defeated.

The present Divorce Law Reform Bill[94] is yet another attempt to introduce the ground, this time as part of a general move to abolish the matrimonial offence as a ground for divorce and substitute breakdown as the sole ground. Breakdown will be inferred on proof of certain facts such as adultery, desertion or intolerable behaviour on the part of the respondent, also where it is established:

> "that the parties to a marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted."
>
> or
>
> "that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition."[95]

The clauses are similar to the New Zealand provisions allowing divorce either by consent[96] or by repudiation[97] except that as regards the

90. Cmnd. 9678, para. 69.
91. *Ibid.* para. 70.
92. *Ibid.* para. 71.
93. *Ibid.* para. 340-341.
94. First introduced into the House of Commons on November 29, 1967 by Mr. William Wilson, M.P., the bill is patterned on the recommendations of the Law Commission and the Archbishop of Canterbury's Group.
95. Divorce Reform Bill, Clause 2(1)d and e.
96. New Zealand: Matrimonial Proceedings Act 1963, Section 21(1)m.
97. *Ibid.* Section 21(1)o.

former, no separation agreement or court order is necessary, neither does the veto of the respondent fail if she cannot show that the separation was caused by the conduct of the petitioner.[98]

As to divorce by repudiation, apart from the time being five years instead of seven years, the clause omits the usually found requirement that the parties —

> "are unlikely to be reconciled."

But when the parties have lived separately for a continuous period of five years, or more, and one of them is petitioning for divorce on this ground the likelihood of reconciliation being virtually nil, then the requirement seems superfluous.

The introduction of a separation ground into any system of divorce law has always raised a great deal of controversy and hostility. The battle for reform in England for example has been long and bitter, and as we have seen, it is a battle not yet decided.

The arguments presented by critics of the introduction of such a ground are manifold[99] and there is only space here to consider the main ones which are as follows:—

First, divorce becomes easier without really improving the law. If a man or a woman fails to get a divorce on a fault ground, all he or she has to do is wait a while and then proceed on the ground of breakdown.

> "Introduction of the principle of breakdown in the form of a new verbally formulated 'ground' would not reform the law; it would simply make the existing law open-ended and provide a last report for petitioners who found that they could not succeed on any other ground." [100]

Second, the stability of marriage as an institution would be threatened.

> "A law based on breakdown .... could be represented as making marriage essentially perishable. Would it not therefore inevitably derogate from the life-long intention hitherto required at the making of the marriage? Those approaching marriage would no longer be expected to regard marriage as indissoluble unless one party behaved intolerably (or went mad) but would be invited to see it as a relationship liable to die a natural death without any grave fault having been committed on either side. Would this not turn every marriage into a trial marriage?" [101]

The third criticism which may be seen as a detail embodied in the second is that innocent wives would suffer from the inclusion of such a ground not only from the loss of rights and status as a wife, but also

98. *Ibid.* Section 29(2).

99. See particularly House of Lords Debates 21st June, 1963. Singapore Legislative Assembly Debates, 1966, Cols. 480-486. 1503-1519; also *The Field of Choice,* Cmnd. 3123, para. 58.

100. *Putting Asunder,* para. 69 at p. 59. See also the speech of Lord Dilhorne, the then Lord Chancellor. House of Lords Debates, 21st June, 1963, Col. 1566.

101. *Putting Asunder,* para. 60.

from a loss of confidence in the stability of a marriage which the husband may reject at any time, perhaps for the favours of a younger woman.[102] All this apart from the basic objection that a guilty party should not be able to take advantage of his own wrong.[103]

Finally, children, in particular, suffer from the breakup of the marriage.

The first criticism has already been noted and discussed above.[103a] It may be added that either the seven year or five year separation ground would not present an attractive alternative to a petitioner who had failed to obtain a divorce on a fault ground. However, the pressure to reduce the period is very real, as we have seen in the examples given of legislation in the United States.

The second criticism, notably that to introduce the breakdown principle in the form of separation ground would threaten the stability of marriage in general, must rest on an assumption that the availability or otherwise of divorce at any time affects public attitudes towards the nature of marriage as a permanent institution. There is no evidence available which would provide a basis for such an assumption. Marriage breakdown will occur whether or not divorce is available.[104] The availability of divorce and a subsequent rise in divorce rates may merely show that more marital breakdowns end in divorce, not that more divorce leads to more marital breakdowns.[104a]

If it could be shown that any particular ground for divorce caused breakdown of marriage, apart from providing release from a marriage that had already broken down then this criticism would be justified. At present however no known enquiry has been made which could satisfy us on this point.

Divorce may be seen merely as one of the possible outcomes of a marriage that has broken down. Other courses, the parties may take, are either to separate by agreement or obtain a decree of judicial separation. Divorce may follow where parties desire to re-marry rather than to live in "sin". Statistics in Britain show that approximately 75 per cent of divorced persons do in fact re-marry.[105] This in itself is taken to be an indication that public attitudes favour marriage as a desirable state and that the practice of divorce does little to affect the stability of the institution of marriage as a whole.

102. *Ibid.* para. 63-68.

103. *Ibid* para. 66.

103a. See note 18.

104. Marriage breakdown is not uncommon in Italy, for example, where the law does not yet permit divorce. The question might also be posed — Are Roman Catholics living apart by a decree of Judicial Separation induced to seek reconciliation because of their inability to re-marry?

104a. Conversely, as in Singapore, where divorce became more difficult after 1961, and divorce figures fell, *fewer* breakdowns apparently end in divorce than before. But neither the fact of more divorces or fewer divorces indicate that the number of marital breakdowns in society has changed.

105. Statistical Review — Part III Commentary for 1956.

The Archbishop's Group in answering this criticism also indicated —

> "that instability in marriage stems mostly from factors which were operative in childhood, before the persons concerned were consciously concerned with a divorce law at all, and which have either not been recognised or else not successfully dealt with in later life.[106]

The third criticism, that of injustice to wives, is composed of four facets. First, economic deprivation, second, the deprivation of status, third, the scandal of the petitioner taking advantage of his own wrong, and fourth, the feeling of insecurity that may be engendered in a wife by the knowledge that however well she behaves she may be divorced against her will.

It is frequently pointed out that the present law often allows divorce to operate to the comparative disadvantage of the wife, especially where economically she is the weaker party. Again, to permit an innocent party to be divorced and cause that party also to suffer an economic loss seems to magnify the injustice already present in the system.

It seems essential therefore that if such a ground as we are discussing is to be available to the husband, then adequate financial safeguards should be provided to ensure that a wife does not suffer that extra loss which flows from the dissolution of the marriage as distinct from the breakdown of the marriage. Rights to occupy the matrimonial home (now catered for in England under the Matrimonial Homes Act 1967) current support, insurance or pension rights as a wife, or as a widow, or the security of a husband's capital constitute the major economic interests that a wife has in a marriage and which need to be safeguarded.

At the time of writing, the Law Commission in England is working on proposals for extending the Courts' powers in respect of financial matters after divorce. The Report of the Commission is expected later this year, and it is unlikely that the present Divorce Law Reform Bill will be made law until the recommendations of the Commission are published, and new legislation introduced.[106a]

Attempts at safeguards which are normally written into legislation admitting the separation ground may themselves be subject to criticism; this mostly being that a husband who has formed a second union would be unable to afford to maintain both his first wife and family as well as a second. If a divorce were refused unless ample provision could be made for the first wife,[107] then the poorer sections of the community would be discriminated against.

As Lord Hodson has said of such a clause:

> "This is really a rich man's Charter It is a husband's clause and it is going to be available only to well-do-do husbands. These so-called safeguards are quite illusory. How is the woman who is the wife of a poor

106. *Putting Asunder,* para. 60, p. 43. Appendix D, para. 13.

106a. See note 70 supra.

107. *Ibid.* para. 64, p. 48.

> man to be compensated financially for the loss which she has to suffer by enabling the husband to go off with another woman and start a new marriage with her?" [108]

To which, Lord Kennett later replied:

> "Well, the man in the case is as rich or as poor as he was before. If he was able to support a legitimate wife and mistress he would also be able support a legal second wife and a first wife." [109]

It may be pointed out that in the majority of cases financial hardship will already have occurred due to the marriage breakdown, and refusal of dissolution is in no way going to alter this fact.[110]

Again, with regard to deprivation of status, the Archbishop's Group has pointed out that the real wound to a wife is inflicted not by the divorce but by the previous breakup of the marriage and separation of the parties.

> "In the kind of case we are considering, the real damage has been done before the petition is made: the spouses' common life has already come to an end. If, therefore a court having satisfied itself of the fact of breakdown decides that the legal name of marriage should be withdrawn, the real situation in terms of human lives is surely not greatly worsened, provided .... that due maintenance and so on are assured." [111]

The group also states that the fidelity of those who object to divorce on religious or ethical grounds would be unaffected by any action of the court in dissolving legal rights and duties. The court would not be concerned with severing any deeper bond. Also, a deserted spouse would not feel under pressure to set free another party by instituting proceedings herself.[112]

It only remains to add that loss of status has been held not to be "harsh and oppressive" to a wife so as to raise an absolute bar against the granting of a decree in Australia.[113]

The criticism that divorce of an innocent party will allow a guilty spouse to flout the legal maxim "No man can take advantage of his own wrong," is met by the proposal of safeguards which have the effect of denying a divorce to a petitioner who has shown by his own conduct, contempt for or disregard of his matrimonial obligations. The law, it is said, should not be made to appear to inflict undeserved hardship, to endorse outrageous matrimonial mis-conduct, to connive at evasion of clear obligations, or deny its protection to the institution of marriage.[114]

108. House of Lords Debates, 21st June, 1963. Col. 1541-1542.
109. *Ibid.* Col. 1574.
110. See *Penny v. Penny* (1966) 8 F.L.R. 128.
111. *Putting Asunder*. para. 65.
112. See the speech of Lord Kennett, House of Lords Debates, 21st June, 1963, Col. 1574. "If the marriage resides solely or principally in her intimate conscience and relationship with God, it will continue, and in her eyes the second wife, though acknowledged by the State will never be more than her husband's mistress." See also *Painter v. Painter,* 3 F.L.R. 370 (Australia).
113. *McDonald* v. *McDonald,* 6 F.L.R. 58 (Australia).
114. *Putting Asunder,* para. 98.

Safeguards may take a number of forms; divorce being denied, for example, where the petitioner is responsible for the breakdown, as in New Zealand,[115] or it would be "harsh and oppressive to the respondent or contrary to the public interest," as in Australia.[116]

The Archbishop's Group recommended that a decree should be refused, even though breakdown had been proved —

> "If to grant it would be contrary to the public interest in justice and in protecting the institution of marriage."

It has already been pointed out, however, that it is difficult to see how the preservation of a broken marriage will do anything to uphold the institution of marriage in general. As Lord Walker has said:—

> "Each empty tie. as empty ties accumulate adds increasing harm to the community and injury to the ideal of marriage."[117]

Again, if it can truly be said that ease of divorce or otherwise has no proven effect on the incidence of marriage breakdown generally then the imposition of such a bar is merely retributory against the party in question, and its deterrent, or reformative value in society as a whole is virtually nil.

The remaining facet to be explored is that of the feeling of insecurity that may be engendered in a wife by the knowledge that however well she behaves, she may be divorced against her will.

This, of course, is interrelated with the second of the above criticisms, namely that the introduction of the separation ground will further endanger the stability of the institution of marriage. This has been shown not necessarily to be so. Marital breakdown can be attributed to a variety of social factors. An increase in longevity for example means longer marriage, and a higher degree of risk. The same may be said of marriages where the parties as very young. The emancipation of women, almost complete in the West, and slower, but none the less sure in Asian countries, means that women released from the household become exposed to wider social contacts, independence — and temptation. Men too, find themselves working alongside women in many fields of employment which were previously closed to the female sex. The result is that marriage is more exposed to the risk of breakdown than ever before.[118]

115. New Zealand: Matrimonial Proceedings Act 1963, Section 29(2).,

116. Australia: Matrimonial Causes Act, 1959. Section 37(1).

117. Cmnd. 9678 at p. 341.

118. In Singapore "extended" families, in the sense of three or more generations living in the same household are today much less common. Young wives, who are free of the pressure of parents and parents-in-law, and who perhaps receive less guidance by elders in matrimonial matters, tend to be more vulnerable to outside pressures. As a result, the marriage becomes exposed to an increased risk of breakdown, (a *fortiori* to breakdown ending in divorce). See M. Freedman — *Chinese Family and Marriage in Singapore.*

Despite this, recent investigations in England show that in general, marriage as an institution is stable and healthy.[119]

Critics usually take the line that if an innocent wife can be divorced at will by the husband, this will encourage him to go off with younger women, especially when the wife's looks and charms have failed: a form of polygamy being introduced, as it were with consecutive wives, not concurrent ones.[120]

This may well be so, presuming of course that the husband will always find a woman willing to wait seven years to become "respectable" and who in the meantime has no legal claim upon him, apart from the consideration that her chances of making a proper marriage decrease as the years go by. To suggest that such happenings would be widespread is not so much a criticism of the law, as a questioning of the good sense and emotional stability of the majority of women. Strangely enough, however, criticisms of this nature usually come from women.[121]

Of course, husbands do form secondary stable unions which have every semblance of a happy marriage except that there is no legal tie. If this were not so, the benefit of the separation ground would be minimal inasmuch as its main purpose is to regularise such unions and legitimise the children of them.

Such unions are formed, and will be formed however, not because of the encouragement provided by the divorce laws but because the first marriage, proving unsatisfactory to the husband, has broken down. In most cases he would be divorced by his wife, or perhaps return to her if the new union proved to be unsatisfactory. The new ground merely enables him to release *himself* from the marriage should neither of these events occur.

The Archbishop's Group has also pointed out that:—

> "The power to keep one's legal status is not synonymous with security of the home and family from disruption .... whenever husband (or a wife for that matter) has so far broken away from the original marriage as to set up a new menage with the intention that it should be permanent, the lot of the deserted partner cannot be appreciably improved in terms of human life by mere maintenance of the legal *status quo.* The real damage has already been done."[122]

Finally, it has been seen that in rendering the objections noted above, critics tend to speak of the "innocent" and the "guilty" parties; that it is wrong for the "guilty" party to divorce the "innocent" party against her will, for example.

But such "guilt" or "innocence" seems to be determined on the basis of whether or not the parties have committed matrimonial offences

119. See *"The Family and Marriage in Britain"* — R. Fletcher.

120. Baroness Summerskill. House of Lords Debates, 1963, Col. 400, 1557-1559.

121. Baroness Summerskill, *ibid.*, Madam Chan Choy Siong. M.P. Singapore Legislative Assembly Debates on the Amendment to the Women's Charter, 1966.

122. *Putting Asunder,* para. 67, p. 55.

under the present system. Often, the so-called innocent party may be clearly to blame for the disruption of the marriage in the sense that the other spouse could no longer bear to stay in the matrimonial home but if that party's conduct is not sufficiently "grave and weighty" to drive the other spouse out then he or she is not guilty of any matrimonial offence and the leaving party is the "guilty" one, being in desertion.[123]

The areas of guilt, or innocent so defined may be seen to be completely artificial and irrelevant when considering the issue of breakdown. Spouses have no reason either to feel secure in the matrimonial home, or be justified in regarding themselves as innocent merely because they do not stray outside what has been called:—

> "the periphery of the area set by the verbal formulae of matrimonial guilt."[124]

It is precisely for this reason that the Archbishop's Group rejected the idea of having a breakdown ground alongside the fault grounds. The superficialities inseparable from the fault system would inevitably intercede to bedevil any proper findings on the simple basis of breakdown.[125]

The last criticism noted is that children suffer from the breakup of their homes. Much of what has already been said in respect of a wife's financial position also applies to children. It seems that equitable financial arrangements should also be made for the children before a divorce can be granted on this ground. Provision is already made in the Women's Charter for the court to be satisfied before granting a decree absolute, that arrangements have been made for the care and upbringing of the children of the marriage and that those arrangements are satisfactory or are the best which can be devised in the circumstances.[126]

With regard to the psychological effects which a divorce has upon children there seems to be no generalisation which can be applied to all cases. Sometimes the children will suffer more if their quarrelling parents stay together than they would if they were parted, sometimes they will not. Sometimes they will suffer further if there is a remarriage; sometimes they will gain.

Neither the Archbishop's Group, nor the Law Commission approved of any system of divorce which permitted divorce only to the childless. Such discrimination, apart from its basic injustice, would not particularly serve the interests of the children themselves.[127]

123. *Buchler* v, *Buchler* [1947] 1 All E.R. 319 (C.A.).

124. Sydney Law Review (1961) III, 3, 417.

125. *Putting Asunder,* para. 69 (b), p. 58.

126. Women's Charter, 1961, Section 112A.

127. *Putting Asunder,* para. 57. Also Appendix D, p. 148. *The Field of Choice,* para. 50-51.

Further support for the view that refusal of divorce does nothing for the children of the marriage was given by Lord Kennett who said:—[128]

> "The factor which pre-disposes to delinquency or any other sort of personal or social disorder, is the sheer absence of one parent or the other, not the presence or absence of a state of marriage between them."

As a refusal of a decree is unlikely to bring the parties together again after seven years, nothing is achieved, either for the legitimate children, or the illegitimate children of any secondary stable illicit union. To grant a decree will hardly worsen the state of the legitimate children but at least it will enhance that of the illegitimate children who will become legitimate through the subsequent marriage of their parents,[129] or be born legitimate if unborn at the time of the divorce.

Social Purpose of the Ground

The main argument in favour of the separation ground is that it will aid the legitimising of the children of stable illicit unions which cannot be regularised because of prior existing marriages. It has been estimated that in England, for example, if the law were changed to include such a ground, then about 180,000 illegitimate children could be legitimated and that each year some 19,000 children who would otherwise be illegitimate might be born in wedlock, or subsequently legitimated.[130]

Inclusion of the ground allows the guilty party to obtain a divorce, where the "innocent" party declines to petition, either through religious objections, spite, perhaps because of apathy, or fear of the law, or more cogently, because of fear of losing status and the financial benefits of the marriage.

Furthermore, the ground will be useful in those cases where there may be no grounds for divorce on either side; if each consents to the other living apart for example; or if one spouse has good cause to leave the other, either to protect her children,[131] or for the sake of her own health. In such cases, there may not always be constructive desertion by the remaining spouse, especially where the ill-health of the wife is due to her own hyper-sensitivity or abnormality.[132]

The husband or wife, who, suffering from the wear and tear of conjugal life, has left the matrimonial home, will be able, on his or her own initiative to obtain eventual release from the marriage. Because of this, the present gaps in the fault system will be filled in, inasmuch

128. House of Lords Debates 1963, Col. 1574.

129. Singapore Legitimacy (Amendment) Act, 1966.

130. *The Field of Choice,* para. 33-37.

131. *G. v. G.* [1964] 1 All E.R. 129.

132. See *Lilley* v. *Lilley* [1959] 3 All E.R. 283 (C.A.), and providing that the couple are found to have "lived separately" in the sense that there is no mutual intention to resume cohabitation. See *M.* v. *M.* [1967] N.Z.L.R. 931.

as the areas of matrimonial "guilt" and "innocence" will be less clearly defined, and the marital problem seen more realistically to be one of a *mutual* failure to establish a satisfactory and enduring relationship.

As the Archbishop's Group has put it:—

> "We are persuaded that a divorce law founded on the doctrine of breakdown would not only accord better with social realities than the present law does, but would have the merit of showing up divorce for what in essence it is, not a reward for marital virtue on the one side and a penalty for marital delinquency on the other, not a victory for one spouse and a reverse for the other, but a defeat for both, a failure of the marital "two-in-one-ship" in which both its members however unequal their responsibility, are inevitably involved together." [133]

In Singapore itself, any further social advantages other than what have already been stated were not made evident in the proceedings leading up to the passing of the Amendment.[134]

Madam Chan Choy Siong, M.P., opposing clause 28 in the Amendment, rightly pointed out that the effect of the clause would be to restore divorce by unilateral repudiation, and divorce by mutual consent, both of which were permitted in Singapore before 1961.[135]

A further effect, she said, would be to encourage a new form of polygamy to replace the old (or successive monogamy according to Baroness Summerskill)[136] which would be detrimental to women generally.

However, the new repudiation ground is available to both men and women,[136a] (Emotional arguments opposed to the ground tend to overlook this fact), which was certainly not true in the pre-Women's Charter days.[137]

Neither can the husband repudiate the wife for minor acts of misconduct, such as disobedience to him or to his principal wife. The requirements of the law are now much more stringent, and repudiation depends on proof of breakdown evidenced by separation for seven years; the husband who will use this ground will in the majority of cases be himself guilty of desertion, and maybe other matrimonial offences; he is therefore always likely to be divorced at his wife's initiative.

Divorce by mutual consent is restored, but again with more stringent legal requirements than before. Now, both principal and secondary wives can divorce by consent. Previously, there was some doubt

133. *Putting Asunder,* para. 26.

134. Singapore Legislative Assembly Debates, 1966.

135. *Ibid.* Col. 1504-5.

136. House of Lords Debates, June 21st, 1963, Col. 1559.

136a. In Singapore in 1968, out of 25 petitions on this ground, 15 were presented by women.

137. *Cheng Ee Mun* v. *Look Chun Heng* [1962] M.L.J. 411 where it was held that there was no evidence of any custom either in China or in Singapore which would allow a woman unilaterally to divorce her husband.

whether secondary wives could be divorced in this way[138] (or indeed whether principal wives could be repudiated).

To say that the Women's Charter itself improved the position of women and that the Amendment of 1967 has tended to whittle away that improvement is hardly accurate.

The Women's Charter as it stood in 1961 may in fact have worsened the position of some women in Singapore. Although the Charter by abolishing extra-judicial divorce.[139] sought to prevent husbands from easily casting off wives, it also prevented wives from getting rid of unwanted husbands, at least by mutual consent.

Also, the honourable estate of being a secondary wife to a rich man is no longer possible for a well educated young Chinese woman,[140] She can only become his mistress. On a lower level young women who after 1961 purported through ignorance to become the secondary wives of already married men, unwittingly become mistresses and their children born illegitimate. As such, they lost a legal status which the Courts would have accorded to them prior to 1961,[141] the consequence being that they are ineligible to claim any maintenance as wives, or any share in an intestate "husband's" estate after his decease.[142]

The separation ground at least allows the possibility that their "husbands" can eventually divorce the first wife and thereafter regularise the illicit union and legitimise the children of it.[143]

On balance, it seems that women still come off better than men. For example, some wives, through the Women's Charter, are able to gain their freedom from an unwanted husband in ways which may not be available to men. By virtue of Section 92(1)(c), which provides that a decree of nullity may be made on the ground that "the former husband or wife or either party was living at the time of the marriage and the marriage with such husband or wife was then in force," any wife, except the first wife can obtain a decree of nullity if she were validly married before September 15th, 1961. It is of no matter that she knew of the existing situation when she married.[144] Such a wife therefore can neatly release herself from the marriage without needing to prove either a matrimonial offence or seven years separation indicative of breakdown.[145]

138. See M. Freedman: Colonial Law and Chinese Society.

139. Women's Charter. Section 7, and Section 166(3).

140. Ann E. Wee "Chinese Women of Singapore: Their present Status in the Family and Marriage."

141. *In re Lao Leong An* (S.S.L.R. Vol. I, 1893, p. 1).

142. Apart from any loss of social status.

143. Singapore Legitimacy (Amendment) Act, 1966.

144. Women's Charter, Section 92, proviso.

145. However, as the marriage is clearly voidable and not void, the doctrine of approbation may apply. G. v. *M.* (1885) 10 A.C. 171.

Again, all but the last wife married before September 15th, 1961 may gain a divorce by virtue of Section 84(2) which gives a wife a remedy where since her marriage her husband has gone through a form of marriage with another woman. A principal wife however could well be barred if she delayed presenting or prosecuting the petition long after the subsequent marriage or was herself adulterous or cruel to the respondent.[146] Whether she could be found to have *connived* at the subsequent marriage, or *condoned* it is an open question depending on whether or not Section 86, to the effect that the court *shall* pronounce a decree of divorce where there is neither connivance at or condonation of adultery, or condonation of cruelty, is mandatory, and therefore restricts the ambit of such bars to cruelty and adultery.[147]

Finally, it is proposed to examine the separation ground as it has been applied and interpreted in other jurisdictions as well as in Singapore paying particular attention to the kind of statutory bars to relief which have been set up mainly in response to political pressure and public opinion.

The first legal question raised is — What constitutes separation?

The Singapore requirement is that the respondent:

> "has lived separately from the petitioner." [148]

The Australian and the New Zealand requirements respectively are:

> "the parties to the marriage have separated and thereafter have lived separately and apart;" [149]
>
> and
>
> "the petitioner and respondent are living apart." [150]

The Australian Courts have experienced some difficulty over the words "separately and apart." In the case of *Main* v. *Main* [151] the High Court of Australia hearing an Appeal from the Supreme Court of Western Australia on a Western Australia provision analogous to Section 28(m) of the Commonwealth Act of 1959, held that there must be physical separation and also a destruction of the *consortium vitae* or matrimonial relationship. Although it was unnecessary for the decision, the court stated that when parties were living together under the same roof, the requirement of physical separation was not fulfilled.

146. Women's Charter, Section 86, proviso.

147. See *Ives* v. *Ives* [1967] 3 All E.R. p. 79 at p. 88 where Section 5(3) of the Matrimonial Causes Act was considered not to be mandatory, and that a completed period of desertion was capable of being condoned.

148. Women's Charter, Sections 84(1)e and 84(2)g.

149. Australia: Matrimonial Causes Act, 1959-65, Section 28(m).

150. New Zealand: Matrimonial Proceedings Act 1963, Section 21(1)o.

151. (1949) 78 C.L.R. 636.

This statement has been treated as *obiter* in subsequent decisions.[152] In *Crabtree* v. *Crabtree*[153] particularly, the Full Court of New South Wales rejected any idea that parties living under the same roof could not be "physically separated" for the purposes of the section. The Court held that the reference in *Main v. Main*[154] was intended —

> "rather as a graphic mode of referring generally to spouses who are not physically separated, than as importing specifically that spouses who dwell under the same roof can never be in fact physically separated."

It also appears from these decisions[155] that parties are considered to be separate and apart for the purposes of the section when they are living in circumstances which, according to English and Australian decisions would constitute desertion by one of them, that is, when there is a physical separation in the sense that a common life together has altogether ceased,[156] and there is intention by one spouse of remaining permanently away from the other.[157]

Obviously, parties are not living "separately and apart" when the parting is involuntary, for example, owing to military service, hospital treatment or imprisonment. However, the *animus deserendi* of one party may supervene, turning such a situation into a separation for the purposes of the section.

Clearly, neither consent to the other party's leaving, nor good cause to leave will prevent separation from arising, so long as there is no mutual intention to resume cohabitation. The situation in New Zealand is similar and the meaning of "living apart" was clearly stated by the Court of Appeal in *Sullivan* v. *Sullivan*.[158]

> "What the legislature intended to convey by the expression 'living apart' was a state of affairs merely as such. The existence of a state of affairs which is the antithesis of living together; in other words, a state of affairs in which the parties are living separate and apart from each other, a state in which there is an absence of mutual *consortium* which is the essential characteristic of the proper relationship of husband and wife."[159]

The period of separation is seven years in Singapore as in New Zealand, but is five years in Australia. We have seen that there is a tendency, particularly in the United States for the period to be reduced. This fact has provided a major objection to the introduction of the ground in England.[160]

152. *Murphy* v. *Murphy*, 2 F.L.R. 363; *Sharp v. Sharp*. 2 F.L.R. 434, following *Hopes* v. *Hopes* [1949] P. 227 (C.A.).

153. (1963) 5 F.L.R. 307.

154. *loc. cit.* note 151.

155. (1963) 5 F.L.R. p. 309-310.

156. Or has never begun. See *Mradakovic* v. *Mradakovic* (1964) 7 F.L.R. 427.

157. *Beeken* v. *Beeken* [1948] P. 802 (C.A.).

158. [1958] N.Z.L.R. 912.

159. *Ibid*. *per* Finlay J., 918, 919.

160. Cmnd. 9678, para. 69 (XXI).

The recent Law Commission has recommended that the periods of separation should be five years where one party objects to a divorce, and two years where neither party objects, a recommendation which the present Divorce Reform Bill has taken up.

Both in Australia and Singapore the separation period must immediately precede the presentation of the petition.[161] This is not expressly provided in New Zealand [162] where the ground is:—

> "that the petitioner and respondent are living apart and are unlikely to be reconciled and have been living apart for not less than seven years."

But it seems that the correct interpretation is that the period of separation which exists at the time of presentation of the petition ("are living apart") and the period of seven years should be the same. Otherwise it would be possible for a previous completed period of separation to be pleaded notwithstanding that the couple had resumed cohabitation for a time and had once more separated immediately before the presentation of the petition. Such a situation however seems highly improbable.

Both in Australia and New Zealand provision is made for the parties to resume cohabitation for a period without such period necessarily being taken into account in determining the length of the period of separation.

In Australia,[163] where:

> (a) "Since the separation, the parties, on one occasion resumed cohabitation (whether with or without acts of sexual intercourse between them) but, within a period of three months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the petition; and
>
> (b) the court is satisfied that:—
>
> (i) the resumption of cohabitition was with a view, on the part of either party, to effecting a reconciliation; and
>
> (ii) a reconciliation was not effected during the period of cohabitation;
>
> the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart."

In New Zealand, any one period of two months during which the parties have resumed cohabitation, whether or not there have been acts of sexual intercourse shall not be taken into account in determining the length of any period of separation —

> "if the court is satisfied that reconciliation was the sole or principal motive for the resumption of cohabitation." [164]

161. Australia: Matrimonial Causes Act, 1959-61, Section 28(m). Singapore: Women's Charter, 1961, Section 84(1)e and (2)g.
162. New Zealand: Matrimonial Proceedings Act, 1963, Section 21(1)o.
163. Australia: Matrimonial Causes Act, 1959-65, Section 41A(3).
164. New Zealand: Matrimonial Proceedings Act, 1963, Section 26.

Similar provisions are set out in the English Divorce Law Reform Bill.[165]

The Women's Charter provides only for periods of cohabitation not exceeding three months with a view to reconciliation either for the purpose of determining the length of the desertion period[166] or in considering whether or not there is condonation of adultery or cruelty.[167] It does not extend the provisions to those persons petitioning on the separation ground who at some time during the seven years separation period have undertaken a period of cohabitation in an attempt to achieve a reconciliation. Consequently, a petitioner on this ground is at all times discouraged from attempting a reconciliation.

The court, in ascertaining breakdown, has to ensure that there is no likelihood of reconciliation, but the Charter, by discouraging attempts at reconciliation tends to obscure a true assessment of the marital failure, for how can it be truly said that the marriage has broken down and reconciliation unlikely, when the Charter, by positively discouraging reconciliation has *ensured* that it is unlikely? The marital situation is partly one of the law's own creation, and therefore, the issue of breakdown cannot clearly be tried.

On the other hand, periods of cohabitation being attempts at reconciliation which fail, strongly indicate that the marriage has indeed broken down and that reconciliation is unlikely.

It seems that the Charter, as framed, does nothing to save a shaky marriage which might well be salvageable, neither does it aid the court to determine properly that the marriage has indeed broken down. A final absurdity is the fact that if the deserted party chooses to petition instead of the deserting party, he or she would not be prejudiced by a trial period of cohabitation less than three months, whilst the respondent, if proceeding on the seven year ground, would.

The purpose of such provisions as Section 84(6) and Section 87(3) is twofold.

(1) By allowing the parties to attempt a reconciliation without jeopardising the petitioner's remedy, an attempt is being made to mend broken marriages before they come to court.

(2) Where such attempts fail, the resulting failure is evidence by which the court can come to a finding that the marriage has truly broken down. The fact of breakdown has been tested; and *none the less so if no attempt is made at reconciliation where it could be made without prejudice to the petition.*

In view of the purpose of the new separation ground, which is to grant divorce for breakdown of marriage, it would appear that the lack of a provision which would allow a party to attempt a reconciliation without losing his remedy is an unfortunate omission from the Amendment.

165. Clause 3(5).
166. Women's Charter, 1961, Section 84(6).
167. *Ibid.* Section 87(3).

In respect of the requirement that the petitioner and respondent are unlikely to be reconciled it has already been seen that the words are considered to be superfluous. The fact that the parties have been apart for seven years and that one of them is petitioning for divorce is indication enough that reconciliation is unlikely. It has been held in New Zealand that "reconciled" is used in the section there as the antithesis of "living apart."

> "and all that is required is that it must be unlikely that the parties should ever be reconciled in the sense of mutually consenting to live together again." [168]

A recent attempt has been made in Singapore High Court to argue that the words "unlikely to be reconciled," import a bar to the granting of relief on this ground, where the petitioner has made no attempt at reconciliation during tht seven year period. For how could it be said that reconciliation is unlikely when reconciliation was resisted?

Winslow J. rejected such an interpretation saying —

> "It seems to me .... that any such neglect, failure, or refusal on the part of a petitioner (to effect a reconciliation) is not a ground which gives the court any discretion to say that it shall not be bound to grant a decree of divorce. One would have thought that if it had been the intention of the legislature to give the court a discretion in the matter, steps would have been taken to provide this in the proviso. . . ." [169]

It is submitted that the decision is clearly beyond reproach, for apart from a clear finding on the basis of breakdown [170] and whether the petitioner makes an attempt at reconciliation or not, reconciliation in the sense that the parties will mutually consent to live together can never be likely whilst one chooses to remain severed from the matrimonial relationship. Likelihood of reconciliation depends on mutuality of purpose; where this is not evident, for whatever reason, the ground is still established.

It only remains to deal with the bars to relief that have been set up in respect of the separation ground.

In Singapore, no special safeguarding provisions have been enacted; neither have the present bars been amended,[171] although such seem peculiarly inappropriate to the new ground, as we shall see.

In New Zealand, there are in fact three grounds for separation. The first is that the petitioner and respondent are parties to an agreement for separation, and that the agreement has been in full force for

168. *McRostie* v. *McRostie* [1955] N.Z.L.R. 631 *per* F.B. Adams, p. 635.

169. *Moses* v. *Moses* [1968] 1 M.L.J. 96 at p. 97.

170. *Ibid.* p. 97 where Winslow J. continues: "In my opinion, no question of fault on the part of the petitioner enters into the picture at all. . . . The amendment appears to have been made on the basis that, where the marriage bond has become no more than a detested shackle after the parties have been separated for not less than seven years, it is in the public interest that the tie should be severed."

171. Women's Charter, 1961, Section 86.

three years.[172] The second provides that a petition for divorce may be presented on the ground that a petitioner and respondent are parties to a decree of separation, or a separation order, and that the same has been in full force for not less than three years.[173] The third is that the petitioner and respondent have been living apart for seven years with no likelihood of reconciliation.[174]

In respect of the first two grounds, the court shall dismiss the petition if the respondent opposes the granting of the decree and it is proved that the separation was due to the wrongful act or conduct of the petitioner.[175] The bar is therefore an absolute one. In addition, the court has a general discretion whether or not to grant a decree of divorce on any of the three grounds, but in the exercise of its discretion, the court shall not refuse to grant a decree by reason only of the adultery of either party after their separation.[176]

The New Zealand Supreme Court, in the case of *Newell* v. *Newell*[177] chose to exercise its general discretion to refuse a decree on the same principles as the Court of Appeal had done in *Mason* v. *Mason*.[178] In that case, the Court of Appeal, recognising that —

> "It is not conducive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage the duties of which have long ceased to be observed by either party and the purposes of which have irremediably failed."[179]

held that there was nothing to justify the adoption of any general rule to the effect that a decree of divorce should be refused to a guilty petitioner.

> "A refusal on this ground must be justified by special considerations applicable to the individual instance, and must be consistent with due recognition of the fact that the Legislature has expressly enabled either party, innocent, or guilty, to petition for a divorce on the ground of .... separation.[180]

The Supreme Court, also, in an attempt to provide itself with further guide lines by which it may exercise its general discretion chose to apply the well known principles laid down by Viscount Simon in the case of *Blunt* v. *Blunt*.[181]

In Australia, there is only one separation ground; that where the parties have separated and thereafter have lived separately and apart

172. New Zealand: Matrimonial Proceedings Act, 1963, Section 21(1)m.
173. *Ibid.* Section 21(1)n.
174. *Ibid.* Section 21(1)o.
175. *Ibid.* Section 29(2).
176. *Ibid.* Section 30.
177. [1965] N.Z.L.R. 737. See also *Fraser* v. *Fraser* [1967] N.Z.L.R. 856.
178. [1921] N.Z.L.R. 955. (Decided at the time when the court had a general discretion to refuse a decree when the ground was either that the couple were parties to a decree of separation or were parties to a separation agreement).
179. *Ibid.* p. 961.
180. *Ibid. p.* 962.
181. [1943] A.C. 517 at p. 525.

for a continuous period of not less than five years immediately preceding the date of the petition, without reasonable likelihood of cohabitation being resumed.[182]

The Australian Act has also incorporated the following safeguards :—[183]

(a) that the court shall refuse a decree if it finds — "that by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest to grant a decree on that *(i.e.* the ground of separation) on the petition of the petitioner."

(First Absolute Bar)

(b) that, if the court thinks it just that the petitioner should, "make provision for the maintenance of the respondent or should make any other provision for the benefit of the respondent whether by way of settlement of property, or otherwise" it shall not make a decree until the petitioner has made arrangements in that regard which it thinks satisfactory.

(Second Absolute Bar)

(c) that there shall be a *discretionary bar* to a decree — "if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent, or, having been revived."

(d) that when there is a cross-petition before the court, the court shall not grant a decree on — "the ground of separation, if, on either of the petitions, it can properly grant a decree on some other ground."

The Act also gives the court wide powers to order, in any proceedings under the Act, proper financial provision for either party, and for children of the marriage out of funds available to either party, antenuptial and post-nuptial settlements included.[184]

The absolute bar noted in (a) above,[185] has been judicially criticised for its vagueness in using the words "harsh and oppressive." One judge has been led to state:—

> "I suppose this is the most extraordinary subsection that has ever been passed by any legislature in the world. Its meaning is vague and uncertain in the extreme .... It is important, I think, that matters of absolute prohibition against the granting of a decree should be clear beyond doubt.[186]

182. Australia: Matrimonial Causes Act, 1959-65, Section 28(m).

183. *Ibid.* Section 37.

184. *Ibid.* Section 86.

185. The bar operates even where the respondent does not oppose the decree. *Judd* v. *Judd,* 3 F.L.R. 207.

186. *per* Neild, J. in *Taylor* v. *Taylor* (No. 2) (1962) 2 F.L.R. p. 371 at p. 372.

It is true that the bar seems to have been largely ineffective in operation. It has been held, for example, that it is not "harsh and oppressive" upon a wife to be divorced against her will and lose her status.

> "The phrase connotes come *substantial detriment* to the party before the court. It is not satisfied by argument based on generalities or on social philosophy, or that the petitioner is at fault, or by suggested injustice, for example, loss of status or such as would be said to result from unsuccessful opposition by the respondent.[187]

Granting a decree contrary to a wife's religious principles has been held not to be harsh and oppressive, although the religious beliefs of the respondent may be a factor to be considered along with all the other relevant circumstances of the case.[188]

The Courts in fact have not been quick to establish general principles concerning the application of "harsh and oppressive'; even less, it seems, concerning the question what is contrary to the public interest.[189]

A recent decision is illustrative of the kind of situation which a court envisages will bring down the absolute bar in question. This is in the case of *Penny* v. *Penny* (No. 2).[190]

Here, the petitioner, Mr. Penny had married twice already, and now wished to divorce his second wife (from whom he was already judicially separated) in order to marry a third. The facts disclosed that he was already under a legal obligation to pay maintenance to both his first and second wives and children by virtue of court orders, and that he was also liable to pay mortgage instalments on the house where his second wife resided. At the time of the suit, he was already living with his proposed third wife. Mr. Penny was already in arrears of maintenance to the tune of £2,200 to his first wife and £1,400 to his second wife, besides owing a substantial debt in costs to his first wife. The Court held that to grant a decree would be harsh and oppressive to the respondent, as the subsequent third marriage would result in the husband being unable to afford to maintain her together with the first wife. The Court also indicated that to grant a decree would be contrary to the public interest to allow a man who had legal obligations to two women which he could not discharge, to marry a third. Be that as it may, it is to be seen that in the circumstances of the case, the respondent would not suffer any more because of the decree being granted than she would if it were not granted.[191]

187. *McDonald* v. *McDonald* (1965) 6 F.L.R. 58. See also *per* Walsh J.A. in *MaCrae* v. *MaCrae* (1968) 9 F.L.R. 441.

188. *Painter* v. *Painter* (1963) 3 F.L.R. 370. See also *Judd* v. *Judd* (1961) 3 F.L.R. 207; *Kearns v. Kearns* (1963) 4 F.L.R. 394; *Lamrock* v. *Lamrock* (1963) 4 F.L.R. 81; *MaCrae* v. *MaCrae* (1968) 9 F.L.R. 441.

189. See *Viant* v. *Viant* (1955) 94 C.L.R. 347 at p. 352.

190. (1966) 8 F.L.R. 128.

191. See *per* Walsh J.A. in *MaCrae* v. *MaCrae*, 9 F.L.R. 441.

Mr. Penny was already living with his proposed third wife, and supporting her, which fact was already leaving him too poor to discharge his other legal commitments. The answer may be that Mr. Penny had no legal commitment to the third woman until he married her and to allow him to marry her would bind him legally to supporting three women, a thing he was in no financial position to do. It is interesting to speculate however on what the court would have done if Mr. Penny had been rich enough to support adequately all three women. It would seem that, apart from the question of public interest, the bar would not fall.

If this is so, then the law would seem to be discriminating the rich from the not so rich, and what is "harsh and oppressive" or not is to be measured in terms of hard cash.[192]

The discretionary bar contained in Section 37(3) empowering the court to refuse a decree where the petitioner has at any time during the marriage committed adultery seems anomalous in proceedings based on breakdown. The courts, in exercising their discretion under this section, have followed the principles laid down by the House of Lords in *Blunt* v. *Blunt*[193] and by the High Court of Australia in *Henderson v. Henderson*[194] recognising that —

> "there must be factors other than the fact of adultery present to justify the court refusing a decree. It is not sufficient that one party is guilty and another innocent."[195]

In other words, the legislature does not require any stricter rule to be followed where the ground is breakdown then it does where the ground is fault.

In many cases, therefore, where the court would refuse a decree under section 37(3) it would in any case be bound to do so under section 37(1). It has been held that the sub-sections are not mutually exclusive, and that, to some extent Section 37(3) may be regarded as a particular application of wider principles stated in section 37(1).[196] The failure of a petitioner to disclose his own adultery may be ground for refusal of a decree in the exercise of discretion conferred by section 37(3).[197]

The bars under discussion may be criticised either for their illogicality inasmuch as they introduce into considerations of breakdown the concept of matrimonial fault, or for their vagueness and their failure to provide the courts with sufficient guidance as to what principles should be followed in deciding whether or not to refuse a decree, this especially so where the bar is absolute.

192. See *Ferguson* v. *Ferguson,* 6 F.L.R. 31.

193. *loc. cit.* note 181.

194. (1948) 76 C.L.R. 529.

195. *Grosser* v. *Grosser* (1961) 2 F.L.R. 152.

196. *Ibid.* p. 156.

197. *Judd* v. *Judd,* 3 F.L.R. 207.

The result is, that at least in the latter case, the bars are to a large extent ineffectual.

As Mr. Justice Selby has said, in a recent review of the Australian Matrimonial Law—[198]

> "... by the decision in *McDonald* v. *McDonald*,[199] it is difficult to envisage circumstances other than in the rarest and most exceptional cases in which the pronouncement of a decree under section 28(m) would be barred."

Mr. Justice Selby also indicated that the provisions imposing safeguards were nothing more than a sugar coating to make the "pill" of the new divorce laws more palatable to those who opposed them in principle.[200]

The Archbishop's Group[201] thought that the Australia legislation gave more guidance to the Court than that of New Zealand, but would itself, in providing safeguards, direct the court's attention, not, as in Australia to alternative considerations *(either* the protection of the respondent, *or* the public interest) but to the public interest as including concern that a respondent should not be treated unfairly.[202]

The Law Commission, whilst recognising the difficulty of devising a precise formula to guide the court and legal advisers, rejected the discretion conferred by the New Zealand Legislation and the Australian "harsh and oppressive, or contrary to the public interest" test as giving no guidance, and considered that the Archbishop's Group's proposal was no improvement upon them.

The Law Commission considered that there were in fact only two practical alternatives. The first being not to have any bar other than one restricted to cases where equitable financial provision is not made for the spouse.[203] The second, is to couple that bar with a wider discretion, which has a twofold object—

1. To protect the respondent from adverse consequences flowing from the divorce, notwithstanding equitable financial arrangements made.

2. To protect the public interest.

Such a bar would need to be defined as precisely as possible.

> "so as to promote consistency in its exercise and to enable legal advisers to give firm advice to clients." [204]

It is submitted that the first of the two practical alternatives is the better, that is, to have no bar except one to ensure that the respon-

198. Modern Law Review Vol. 29, p. 473 at p. 484.
199. *loc. cit.* note 187.
200. Modern Law Review Vol. 29 at p. 482.
201. *Putting Asunder,* p. 107. Appendix B, para. 17.
202. *Ibid.* para. 66, p. 53.
203. See for example, Australia: Matrimonial Causes Act, Section 37(2).
204. *The Field of Choice,* para. 120.

dent and children suffer no further financial hardship flowing from the divorce than is suffered already from the breakdown of the marriage.

We have already seen that any other bar, apart from the fact that it is difficult to frame well enough to guide the court with precision is largely ineffectual, because hardship suffered by a respondent, other than hardship suffered due to loss of status, for example, pension rights, or widows' rights to property, is due more to the breakdown of the marriage itself than to the ensuing divorce.

Again, a bar to ensure proper financial provision for the respondent should be a bar against the granting of a decree absolute until the court is satisfied that the financial arrangements made by the petitioner are reasonable and fair, or the best that can be made in the circumstances. The bar would be similar in effect to the present provision in the Women's Charter which prevents a decree absolute from being pronounced until proper arrangements have been made in respect of children of the marriage.[205]

The danger of such a bar is that it may leave a petitioner in the undesirable state of being half-divorced for some time, yet the alternative, which is to raise an absolute or a discretionary bar against the granting of a decree seems unjust and discriminatory inasmuch as the richer man will always be at an advantage.

Secondly, it has been observed that there is no evidence to support any assertion that the institution of marriage is strengthened by refusing to grant decrees to petitioners who themselves have behaved badly within the marriage. Preserving empty legal ties does nothing but harm the institution of marriage. It has been said that to allow a divorce to such a petitioner is to bring the law into disrepute. But surely nothing is more likely to bring the law into dispute than a situation where the law fails to take note of social realities, and insists on maintaining empty marital shells whilst denying legal validity to stable unions.

Thirdly, apart from any question of the public interest, it might be asked what purpose is served in respect of any particular marriage by refusing a decree of divorce when it is clear that the marriage has broken down? If the petitioner has been guilty of misconduct, or has deceived the court as to his own conduct, the only effect of the refusal is to punish him for that as well as perhaps to punish his mistress and her children. The aim seems to be retributory and negative. Nothing at all is achieved either by serving as a deterrent to others, or in "reforming" the petitioner by encouraging him to patch up his marriage. The retributory element in judical decisions has largely disappeared from the Criminal Courts; why should it linger on in the Divorce Courts?

The Singapore provisions, it may be seen, allow a divorce on the ground stated[206] but unfortunately, no specific bars have been enacted

205. Women's Charter, 1961. Section 112A.

206. *Ibid.* Section 84(1)e and (2)g.

which give any special protection to a spouse so divorced, whether it be financial hardship she suffers, or otherwise.[207]

Illogically, the discretionary bars of collusion, delay, and the petitioner's own adultery or cruelty will apply to a petition on the separation ground.[208]

As the section allows spouses to divorce by consent, as well as by unilateral repudiation, collusion seems to be inappropriate. If parties collude to "fix" the period of separation at seven years when it is in truth less than that, the court, on discovering this shall dismiss the petition purely because the petitioner has not established the ground as required, not because the parties have colluded.[209] There is no question of discretion in such a case; the court is barred absolutely from granting a decree.

Collusion may be relevant however where the petitioner's adultery or cruelty could be raised as a bar by the respondent, but, by agreement between the parties, is not. This fact, is, in itself however an indication that collusion is co-existent with fault, and where the presence of fault is required, either for the purposes of gaining, or denying relief, then the likelihood of collusion must, of necessity, be considered. The fact remains that both fault *and* collusion are really irrelevant where the ground is breakdown.

Delay is rarely regarded as a ground for refusing relief,[210] and delay in presenting a petition on the ground of seven years separation, in itself indicative of the degree of breakdown, as the years go by, and the period of separation gets longer, seems hardly an appropriate bar to relief.

The remaining bars, depending on matrimonial fault are quite plainly illogical. Matrimonial misconduct, being indicative of breakdown, seems to point to a reason for granting a divorce, not for withholding one.

The lack of a provision which gives a court either a general discretion to refuse a decree, or to refuse a decree where to grant it would seem by virtue of the petitioner's conduct contrary to the public interest, may not, in the light of the Australian and New Zealand experiences, be too great a defect in the Amendment; however, to retain the existing bars, so as to make them applicable to the new breakdown ground points

207. The usual alimony provisions will apply. Women's Charter, Sections 107, 108.

208. *Ibid.* Section 86 proviso. It is interesting to speculate what would be the result where a petitioner on the separation ground attempted a reconciliation with the other spouse after the petition or after decree nisi, but failed to achieve it.

209. *Ibid.* Section 86(2).

210. Especially in cases of desertion. *Becker* v. *Becker* [1966] 1 W.L.R. 423 (C.A.).

to some clumsiness in dovetailing the new divorce ground into the Charter.[211]

It only remains to say that such legislation as we have examined which introduces the principle of breakdown into systems based on fault, can really only provide relief in those marital situations where none was available before. We have seen that the institution of marriage itself seems hardly to be affected by the ease or otherwise of divorce; also that the courts can do little to alleviate hardship to a respondent, except to ensure that she and the children are adequately provided for; nor can the court do much to mend broken marriages.

The Divorce Court is no place for conciliation, for by the time the petitioner comes to court the rift between the parties is too wide.

Again, divorce proceedings are by nature adversary, and therefore ill-suited for conciliation. Perhaps it is not too cynical to observe that the Divorce Court is the scrapyard rather than the repair shop for broken marriages. The instances where a Court can achieve a reconciliation by using its powers to adjourn for the parties to attempt reconciliation, or where a couple come back together after a petition has been rejected are rare indeed.[212]

It is submitted that the institution of marriage itself is better protected by education of young people towards marriage, rather than by a policy of withholding divorce purely in the public interest. Present so-called education towards marriage is too consciously directed to the physical side of sex when it should also be directed towards creating a better understanding of the psychological make-up of men and of women, and the roles in marriage, and in society which each are able to fulfil.

Perhaps in these days when the roles of men and of women in society are less clearly defined than they used to be, it is necessary to place more emphasis on the psychological differences, needs and capabilities of the sexes, in order to detract from the growing sense of competition between them which in itself is utterly destructive of permanent harmonious relationships.

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211. Compare the New Zealand and Australian enactments previously quoted.

212. In Australia, where a power to adjourn has existed since 1961, only fifteen cases were recorded up to 1965, where adjournment took place, and reconciliation was effected in only two of those cases. The Singapore High Court recently adjourned under powers granted by Section 86A of the Women's Charter, to allow a couple time to consider reconciliation. *Podt* v. *Podt,* Straits Times, February 1st, 1969. The attempt failed.

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