

# **LAW REFORM COMMISSION**

**Discussion Paper No. 1**

**Towards the setting up of a Family Court in Mauritius**

**(Project No. 1)**

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**Port Louis - Mauritius**

The Law Reform Commission is an independent body established by the Law Reform Commission Act 1992 to undertake the systematic review and reform of the law of Mauritius.

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## **PRELIMINARIES**

The Law Reform Commission has been requested by the Attorney-General to undertake a review of the present court structure in relation to family matters with the following term of reference:

1. To consider whether a dedicated Family Court, as a specialist court, should be set up, and in the affirmative,
2. To consider what should be its jurisdiction, its structure and how proceedings before it should be conducted,
3. To consider the introduction of mediation in family proceedings, and
4. To consider amendments that need be brought to the substantive law so as to bring it in tune with the proposed structure.

The Commission debated on the procedures to be adopted in the elaboration of the report and agreed upon the following:

- The Commission will first undertake a preliminary investigation. In the context of that investigation, apart from its own research, the Commission will meet with a few stakeholders directly concerned with the theme in question in order essentially to elicit from them their experience of the matter.
- On the basis of this preliminary work, the Commission will publish a discussion paper on which the public will be invited to comment. Where appropriate, the Commission will convene any person who has submitted written submission to a hearing.

- The Commission will then consider all submissions, written and oral and produce its final report.

In accordance with the agreed procedure, the Commission is pleased to present the discussion paper on the Family Court. In the elaboration of the discussion paper, the Commission met the Chief Justice, representatives of the Ministry of Women's Rights, Child Development & Family Welfare, a representative of the Probation and After-Care Service, and two magistrates whom the Commission approached through the Association of magistrates.

The discussion paper is in four parts.

In Part I, the Commission considers those matters that would fall within the jurisdiction of a Family Court and the place of Family Court within the present court structure.

In Part II, the Family Court at the level of the District Courts is considered.

In Part III, the Family Court, as a division of the Supreme Court, is considered.

In Part IV, the Commission makes some preliminary observations on the issue of divorce. A substantial part of the work of a Family Court indeed revolves around divorce and its consequences. The Commission is of the view that a consideration of the Family Court would not be complete without a consideration of the law on divorce.

The Commission is fully alive to the fact that family jurisdiction is an area of considerable controversy about which opinions vary widely. It is also alive to the fact that experience in other countries may not necessarily be directly transposable to Mauritius. In many countries, pilot schemes have been run before any particular system has been adopted (such is the case for Hong Kong, for example). Whatever may be the difficulties in relation to the setting up of a Family Court, the Commission believes that there is more

or less a consensus of opinion in the country that the system needs to be reformed. For that to happen, it is clear that we need to start somewhere.

The Commission would like to stress that the present Discussion Paper does not represent its final views. It is meant to be circulated for comment only.

## PART I – JURISDICTIONAL MATTERS

It would be appropriate to start by circumscribing those matters that, in the view of the Commission, would fall within the jurisdiction of a Family Court. The Commission has gone through the laws of Mauritius and is of the view that the following the matters should be dealt with by a Family Court.

### Matters Falling Within the Jurisdiction of a Family Court

- Amendment to entry on civil status certificate: S.50 of the Civil Status Act. Application is made with the Magistrate of the District in which entry has been registered. The Ministère Public may, however, refer the application to the Supreme Court.
- Late Declaration of Birth: S.12 of the Civil Status Act. Only upon order of the District Magistrate or the Registrar of Civil Status.
- Declaration d'absence: Art.112 and following of the Civil Code, Judge in Chamber.
- Mental Health: Patient in a mental hospital, S.14 of the Lunacy Act, on order of the Magistrate for the district from which the patient is removed.
- Majeurs en Tutelle/ Curatelle: Art.494 and following of the Civil Code, Judge in Chamber.
- Marriage & Effects
  - Dispense d'âge au mineur: Art.145 of the Civil Code, Judge in Chamber.
  - Levée de prohibition pour le mariage entre ascendants et descendants en ligne directe: Art.154 of the Civil Code, Judge in Chamber.
  - Nullité du mariage: Art.180 and following of the Civil Code; Supreme Court.
  - Alimony: S.107 of the Courts Act, District Court has jurisdiction in actions for payment of alimony
  - One spouse acting alone where consent of other spouse is required: Art.218/Art.220 of the Civil Code, authorisation by the Judge in Chamber.

- Marriage settlement
  - Change in marriage settlement: Art.1398 of the Civil Code, homologation du Juge en Chambre.
  - Acting for the other spouse: Art.1426/Art.1429 of the Civil Code, authorisation by the Judge in Chamber.
  - Action en nullité for acts done in excess of power by one spouse: Art.1427 of the Civil Code, Supreme Court
  - Dissolution of marriage settlement: Art.1444 and following of the Civil Code, Judge in Chamber.
- Divorce
  - Divorce and Judicial Separation: Divorce and Judicial Separation Act, Supreme Court with preliminaries before the Judge in Chamber.
    - The Court may also deal with periodical payment to the other party & for the benefit of any child: S.13
    - The Court may order transfer of property to other party: S.16
    - Order of the Court for custody of child: S18 & Art.261 of the Civil Code.
    - The Court may make provisional orders on a petition (for maintenance & for custody): S.19
    - The Court may make order for payment of litigation money: S.19
    - A la suite d'une demande en divorce, «nonobstant les mesures d'urgence prises par le magistrat de district, le juge en chambre peut prendre toutes les mesures provisionnelles qu'il estime nécessaire»: Art.240 of the Civil Code,
    - «S'il y a des mineurs, le juge en chambre se prononce sur leur garde»: S.242 of the Civil Code.
  - The District Court Magistrate may take «toutes les mesures d'urgence qu'il estime nécessaire à la suite d'une demande en divorce»: Art.239 of the Civil Code.
- Child

- Adoption: Art 343 and following of the civil code, Judge in Chamber. If the adoption is by a non-citizen, the prior authorisation of the National Adoption Council is also required, Art.346 of the Civil Code & National Adoption Council Act.
- La garde des enfants: Art.262, Supreme Court, Art.372, Judge in Chamber/Supreme Court
- La Filiation: Art.319 and following of the Civil Code, Supreme Court
- Autorité Parentale: Art.372-1 and following of the Civil Code, Judge in Chamber/Supreme Court
- Administration of the property of the child/Tutelle: Art. 388 and following of the Civil Code, Judge in Chamber. See also S.77 and following of the Sale of Immovable Property, Judge in Chamber
- Alimony: S.107 of the Courts Act, District Court has jurisdiction in actions for payment of alimony
- Protection order: Child Protection Act, District Court.
- Spouse
  - Protection order: Protection from Domestic Violence Act 1997, District Court

The Commission has also considered the possibility of including Change of name and Inheritance within the jurisdiction of the Family Court. Change of name is at present dealt with by the Attorney-General under S.55 to S.59 of the Civil Status Act. Taking into account the fact that most Mauritian names are phonetical reproduction of asian names and the fact that Mauritius is a multi-cultural country moving towards greater unity, the Commission is of the view that in our context the present flexible system is working satisfactorily. As far as inheritance is concerned, though family related in a broad sense, it is not an issue that in the view of the Commission would fall within the jurisdiction of a Family Court. A Family Court deals with the relationship between spouses and the relationship between parents and children. Inheritance being the relationship between heirs has more to do with normal civil matters than with family matters as such. The

Commission is consequently of the view that inheritance does not fall within the jurisdiction of a Family Court.

The case for the setting up of a Family Court has also been made in relation to many other matters, as diverse as juvenile delinquency and “procès civils concernant les personnes âgées” (Le Mauricien 4 October 2003). While there may be a lot of expectations in relation to the setting up of a Family Court, the Commission is of the view that matters involving senior citizens per se are unlikely to fall within the jurisdiction of a Family Court.

As far as juvenile delinquency is concerned, the tradition in countries following the English system is to have the criminal aspects of such cases dealt with by the Juvenile Court while the civil aspects are dealt with by a Family Court. In the French system, both the civil and criminal aspects are dealt with by the same judge, namely the ‘juge des enfants’. The latter in fact has very wide ranging powers which derogate from the normal powers of judges. The ‘juge des enfants’, whether it be in civil or criminal cases, carries out the necessary investigations and judges the cases he has examined. The point, however, is that, in the French system, there is a specialised jurisdiction dealing solely with all aspects related to the child.

It is not within the mandate of the Commission to deal with the criminal aspect of juvenile delinquency. However, it appears sensible that the magistrate dealing with the civil aspect of juvenile delinquency should also be dealing with the criminal aspect as well. The Commission shall deal further with this aspect in Part II below

### **At What Level Should the Family Court be Situated?**

The Commission notes that those issues falling within the jurisdiction of a Family Court are varied. Most of them are at present dealt with by the Supreme Court while some are dealt with by the District Court, as indicated above. The creation of a Family Court thus raises a number of questions. Should the Family Court be an all inclusive one? If it is to

be an all inclusive court, should it be at the level of the Supreme Court? Or should it be at the level of the District Court? Or should it be at some other level? Something like, for example, the Tax Appeal Tribunal?

There is no set answer to these questions. While some countries, like New Zealand for example, have all inclusive Family Courts, others, like England and Australia for example, grant jurisdiction to various courts for different family matters.

In Australia, with the exception of Western Australia, the Federal Family Courts deal with the private law cases (essentially cases between private parties, ex. husband/wife) while the State Courts deals with the public law cases (essentially cases where the authority intervenes, ex. Child protection cases).

In England, family matters are dealt with at three levels. Firstly at the level of Family Proceedings Courts. These are Magistrates' Courts with a family panel sitting to hear the cases. They deal with application by spouses for financial provision, family protection orders (domestic violence), exclusion orders (keeping a spouse out of the family home), emergency protection orders (threat to child), supervision orders, family assistance orders, adoption, and Non-molestation and occupation orders. Secondly at the level of County Courts. They deal with Divorce and all other family matters. And thirdly at the level of the High Court of Justice, Family Division.

In the French system, the Juge aux affaires familiales has jurisdiction in relation to “1. divorce, de la séparation de corps, ainsi que de leurs conséquences (...); 2. des actions liées à la fixation de l’obligation alimentaire, de la contribution aux charges du mariage et de l’obligation d’entretien, à l’exercice de l’autorité parentale, à la modification du nom de l’enfant naturel et aux prénoms”<sup>1</sup>. Matters dealing with the child, especially in relation to the protection of the child, are, however, dealt with by the Juge des Enfants.

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<sup>1</sup> Art. L312-1 of the Code de l’Organisation Judiciaire.

As to the level at which the Family Court should operate, countries that have all inclusive Family Courts, usually pitch it at a level lower than the High Court. In New Zealand, for example, they are in line with District Courts. In the French system, the Juge aux affaires familiales is part of the tribunal de grande instance. One should, however, be careful about direct transposition of overseas systems to Mauritius.

While there may be strong attractions in having one specialist court dealing with all family matters, the Commission is of the view that there may be practical difficulties to proceed in that direction in Mauritius.

In view of the importance of family matters as listed above, dealing for many of them, as it were, with the legal status of the Mauritian citizens, the Commission believes that, in the context of Mauritius, these matters should continue to be dealt with by the Supreme Court which would consequently have the Family Court as one of its division. This solution allows the Family Court to tap in the vast experience acquired over the years by the judges of the Supreme Court in family matters.

For other matters, however, like domestic violence cases, child protection cases and alimony, the Commission is of the view that easy access to the courts is essential. This cannot be achieved if a centrally located Family Court is to be granted an all inclusive jurisdiction. For these matters, the Commission is of the view that the present District Court structure may be more appropriate.

Further apart from domestic violence cases, child protection cases and alimony cases, the District Magistrate already deals, albeit informally, with a considerable number of family matters in Chambers. This is reminiscent of the extra-judicial powers of the former “juges de paix” in France who were replaced in 1958 by the “tribunaux d’instance”. “Plus que le jugement, la conciliation caractérise l’activité des ‘faiseurs de paix’ cantonaux”. Some authors in France though acknowledging that «la réforme de 1958 est une réussite par bien des aspects» query whether “les tribunaux d’instance ont pu complètement assumer les missions de la justice de paix dans la mesure où furent créés, dès 1978, des

conciliateurs puis des médiateurs». They further note that «alors que la France l'a abandonné, de nombreux pays ont conservé ou réintroduit le juge de paix et; en Italie; le *guidice di pace* a remplacé le conciliateur depuis 1991»<sup>2</sup>:

It is common knowledge that the Mauritian population still does have recourse to the District Magistrate in his “juge de paix” capacity. The Commission is of the view that this is a feature of our system that needs not only to be kept but reinforced and formalised more specially in relation to family matters. Thus when considering the involvement of the District Courts in family matters, one should have due consideration to these Chamber cases for which again proximity, or relative proximity, is important

The Commission is of the view that the present jurisdictional division between the Supreme Court and the District Courts should be preserved.

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<sup>2</sup> Une Justice de proximité: La Justice de Paix (1790-1958), Sous la direction de Jacques-Guy Petit, Université d'Angers, Centre D'Histoire des Regulations Sociales, Décembre 2002.

## **PART II –THE FAMILY DISTRICT COURTS**

Having reached the conclusion that family jurisdiction should exist both at Supreme Court and District Court level, the Commission now needs to consider how family matters are to be dealt with at these two levels. In this part, the Commission shall consider family matters at the level of the District Courts. Three issues shall be considered; firstly who should be presiding over such proceedings, secondly where these courts should be located and thirdly how family matters should be dealt with at the level of the District Courts.

### **The Family District Court Magistrates**

There is a feeling that District Magistrates consider and treat family matters as just another civil case. To a certain extent, in the present system this approach is inevitable. Indeed when the over burdened magistrate comes to consider a family matter after having considered in the same day, say a few cases of theft and a few traffic offences cases, the proper frame of mind may simply not be there. And yet family cases, dealing as they are with the very core of human relationship, require special consideration which the District Magistrate is simply unable to give to such cases.

Further the point has at times been made that District Magistrates are far too young and inexperienced to deal with family matters. While some people would agree with this view, others consider that this is not a question of age. While the Commission would agree that it is not solely a question of age, the Commission believes that family cases require a certain maturity in that they do not deal purely with legal issues but involve a deep understanding of human relationship. This is, of course, not to say that such a consideration is not relevant in other type of cases but that it is more acute in family matters. As one of the members of the Commission puts it, he prefers to deal with “les tôles froissés que les coeurs brisés”.

What the Commission wants to bring out is the following. “Family Court Judges are specialists. Specialist judges are essential to a Family Court. By this we mean judges who are genuinely interested in family law as it affects every member of the family; who are temperamentally suited to the work; with, preferably, substantial practical experience in this field, and willingness to undertake continuing education by way of study or refresher course”<sup>3</sup>. This is applicable to a Magistrate as well.

Following upon that, the Commission believes that dealing with family matters should be a question of choice. Not all magistrates may feel comfortable with family matters. The present system, however, allows them no choice.

The Commission would recommend that even at the level of the District Court, family matters should be dealt with by a specialist magistrate to be called the Family District Court Magistrate. The Commission would further recommend that the Family District Court Magistrate be one who has opted to work as a family magistrate for that part of his/her career.

The point is often made that a magistrate appointed to a specialist position should be provided with the appropriate training<sup>4</sup>. No doubt that this is the ideal situation and if at all possible it should certainly be undertaken. The Commission is, however, conscious that there may be resources problems in undertaking such training programs on a continuing basis given that the Family District Court Magistrates will move on to other duties as they progress in their career. But the Commission expects that Magistrates who opt by choice to become Family District Court Magistrate will be proactive and do the needful in order to “train” themselves in family matters. After all this is a constant in the legal profession. The authorities should, however, help in identifying the appropriate

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<sup>3</sup> Report of the Royal Commission on the Courts (New Zealand), 1978, para.520.

<sup>4</sup> See, for example, the Report of the Task Force under the Chairmanship of Ms P. Patten, p.37: “It has also been noted that very few District Magistrates are well versed with the articles of the Convention on the Rights of the Child. Since the enactment of the Child protection Act in 1994, District Magistrates have received no special training on the Convention on the Rights of the Child.”

material and making them available to all newly appointed Family District Court Magistrates.

Considering that the Family District Court Magistrate would be operating within the normal court structure and, as noted above, would move on to other duties as they progress in their career, it would be appropriate, in order that “they maintain adequate breath of interest and experience”<sup>5</sup> that they continue to hear other civil matters and criminal cases. In New Zealand, about 20% of the time of the Family Court Judges is devoted to such other matters. This may be a parameter that may be used in Mauritius as well but it will eventually depend upon the volume of work of the Family District Court Magistrates.

### **The Location of the Family District Courts**

Following upon the recommendation that family matters should be dealt with by a Family District Court Magistrate, the Commission would also recommend the creation of Family District Courts, somewhat like the Family Proceedings Court in England. Two issues need to be considered here; firstly the location of the Family District Courts and secondly where they are to be housed.

In relation to the issue of location, the Commission has considered the following figures:

#### 1. Number of civil cases lodged in:

	Port Louis	Pamplemousses	Mapou	Flacq	Moka	Rose Hill	Curepipe	Grand Port	Savanne	Bambous
2000	4,130	671	810	1,636	312	2,090	1,324	968	458	472
2001	5,322	1,076	876	1,630	539	3,609	2,315	1,137	627	631
2002	5,165	1,695	1,433	2,031	755	3,941	3,248	1,205	1,039	840

Annual Report of the Judiciary (1994-2002)

<sup>5</sup> Report of the Royal Commission on the Courts (New Zealand), 1978, para.524.

2. Protection Orders originating from the Centers of the Ministry of Women's Rights, Child Development & Family Welfare in 2002:

	Bell Village	Flacq	Bambous	Floreal	Mare D'Albert	Goodlands
Interim Protection Order issued	321	123	228	194	218	103
Protection Order Issued	230	87	110	126	106	68
Protection order not granted or set aside	247	40	50	55	53	7

(The Commission is grateful to the Ministry of Women's Rights, Child Development & Family Welfare for having provided the Commission with these figures)

3. Protection Orders originating from all the 6 Centers of the Ministry of Women's Rights, Child Development & Family Welfare from September 1997 to June 2003:

Type of Orders	No.
Interim Protection Order issued	6,671
Protection Order issued	4,022
Protection Order not granted or set aside	1,430
Protection Order withdrawn by plaintiff	303
Occupation Orders issued	29
Interim Tenancy Orders issued	10
Tenancy Order issued	3
TOTAL	12,468
Average Per year over the 6 years	2,078

(The Commission is grateful to the Ministry of Women's Rights, Child Development & Family Welfare for

having provided the Commission with these figures)

With regard to the above figures, the Commission has taken into account the fact that the Protection orders may be asked for without necessarily going through the services of the Ministry of Women's Rights, Child Development & Family Welfare.

#### 4. Emergency Protection Orders and Committal Orders issued from 1995 – 2002

	EPO	CO	
1995	5	3	8
1996	13	8	21
1997	15	11	26
1998	25	16	41
1999	41	21	62
2000	62	25	87
2001	78	30	108
2002	43	15	58

(The Commission is grateful to the Ministry of Women's Rights, Child Development & Family Welfare for having provided the Commission with these figures)

Judging from these figures, it would appear that it would not be cost effective to attach a Family Court to each of the District Court. The Commission thus recommends that the Districts be grouped as follows:

1. A Family District Court in Mapou for the districts of Pamplemousses and Rivière du Rempart,
2. A Family District Court in Centre de Flacq for the districts of Flacq and Moka,
3. A Family District Court in Mahébourg for the districts of Grand Port and Savanne,

4. A Family District Court in Rose Hill for the districts of Plaine Wilhems and Black River, and last but not least
  
5. A Family District Court in Port Louis for the district of Port Louis.

There will still be variation in the work load of the various Family District Courts but the Commission believes that the suggested division will more or less distribute the work load equitably between them while at the same time ensuring that there is a Family District Court within a reasonable distance throughout the island and that each of the Family District Courts will have a sufficient work load to keep the Family District Court Magistrate busy.

The Commission is not making any specific recommendation in relation to Rodrigues which will continue to be governed by the present system.

Coming to the second question, namely where the Family District Courts will be housed, the Commission considered three options; firstly make use of the present infrastructure of the District Courts, secondly use other State owned facilities, like, for example, the Citizen Advice Bureau and thirdly set up new infrastructures for the Family District Courts.

Ideally new infrastructures should be set up for these Family District Courts. Should that be the case, the Commission recommends that the Family District Courts be located within the compound of the present District Courts. This will have practical advantage of allowing it to share some of the administrative staff of the District Courts and allowing the Family District Court Magistrate to move over to the District Court to hear other civil and criminal matters. However, the Family District Court should have a separate entrance and separate facilities for the public. This solution will have the added advantage of relieving the pressure on the existing facilities for normal District Court matters.

As far as making use of other State owned facilities, like the Citizen Advice Bureau, the Commission is of the view that they may lack the necessary aura that should be associated with a court of law. There may further be difficulties with the safe keeping of documents where the premises are to be shared with other services.

However to allow faster implementation of the Family District Courts, the infrastructure of the present District Courts may be considered. Indeed the Family District Courts will be part of the District Courts structure and it is not inappropriate that they should be housed in the District Courts themselves. This is the case, for example, for the French *juge aux affaires familiales*. However for this to be a viable choice, it is essential that the Family District Courts should have separate facilities and a separate entrance for the public. Some of the issues that are going to be dealt with by the Family District Courts relate to children and the atmosphere prevailing in a District Court is not a congenial one for them. This point was made by the officers of the Child Development Unit whom the Commission heard. Further the set up of a District Court may be too formal for family matters. The Commission understands that at the District Courts of Mapou, Centre de Flacq, Mahébourg, Rose Hill and Port Louis there is sufficient space to accommodate Family District Courts with separate facilities and separate entrance.

### **Dealing with Family Matters at the Family District Courts.**

It has been said that “an aim (of having a Family Court) is to remove conflict and to get away from legal issues in favour of practical solutions. This approach involves, for example:

1. A less adversarial approach than in criminal proceedings
2. An investigative role for judges and magistrates
3. Relaxed rules governing evidence and procedure
4. Liaison between the various courts in the hierarchy
5. Extensive co-operation between courts and other agencies.

There is also an emphasis on keeping matters ‘out of court’ and resolving issues by informal methods such as mediation and conciliation<sup>6</sup>. A duty is cast on legal representatives and other practitioners to encourage reconciliation.”<sup>7</sup>

The Commission agrees with this statement as to what a Family Court should all be about. However, the application of the points mentioned above will depend upon the type of cases involved. With regard to the Family District Courts, they will be dealing with two types of cases, the private law cases (essentially cases between private parties, ex. husband/wife) and the public law cases (essentially cases where the authority intervenes, ex. Child protection cases). The approach will differ according to which type of case the Court is dealing with.

The Commission shall deal first with the public law cases. These relate to domestic violence and child protection cases. “The New Zealand Boshier report<sup>8</sup> recommended that ‘ordinarily, where an application for domestic protection is made and where it is coupled with a guardianship application, mediation is inappropriate’”<sup>9</sup>.

Further, in line with point 2 above, the Commission would recommend that in these public law cases, the Family District Court Magistrate should adopt a more investigative approach. The Task Force which reviewed the legislation and mechanism dealing with children noted that magistrates were extending emergency protection orders “as a matter of routine”<sup>10</sup>. These are not ordinary civil law cases. It is imperative that in child protection cases, the Family District Court Magistrate ensures that any decision taken is taken in the best interest of the child. Similarly in protection from domestic violence

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<sup>6</sup> In this Discussion Paper these two words are used interchangeably.

<sup>7</sup> Introduction to the Family Proceedings Court, E. Laken, C. Bazell, W. Gordon, Waterside Press, 1997)

<sup>8</sup> Summarised in Boshier, “New Zealand Family Law Report,” Family and Conciliation Courts Review (Apr 1995) vol 33 (2) 182-193

<sup>9</sup> The Law Reform Commission of Hong Kong , Report on The Family Dispute Resolution Process, p.93-94

<sup>10</sup> Report of the Task Force, p. 37

cases, the Family District Court Magistrate should ensure that any order made is made in the best interest of all parties concerned.

The Task Force also noted a lack of follow up actions in child protection cases. A lack of follow up actions in cases of protection from domestic violence has also been noted. In view of the far reaching consequences of any order made under the Protection from Domestic Violence Act, the Commission would recommend that there should be statutory follow up actions under the supervision of the Family District Court Magistrate on any order made by the Court. For that to be effective, however, there should be, as noted in point 5 above, extensive co-operation between the Family District Courts and other agencies, namely the Probation and After-Care Service and the appropriate services of the Ministry of Women's Rights, Child Development & Family Welfare.

As regard the private law cases, the emphasis here will be on keeping matters 'out of court' and resolving issues by informal methods such as mediation and conciliation.

In fact apart from alimony, civil status matters, orders under the Lunacy Act and "les mesures d'urgence à la suite d'une demande en divorce", the private law cases to be dealt with by the Family District Court Magistrates will be the Chamber cases. As noted in Part I above, in these cases the Magistrate is in fact acting as a sort of "juge de paix". The magistrate here acts essentially as a conciliator and often does this work in collaboration with the Probation Officer. The Commission is of the view that this conciliation role of the District Court Magistrate is important and should be strengthened with the creation of the Family District Courts. The Commission recommends that the Family Magistrate be formally given jurisdiction to act as counsellor/conciliator for any family matter. Where the issue relates to any matter that is dealt with by the Family Division of the Supreme Court, the Family Magistrate shall refer it to the latter.

Considering the vast experience acquired over the years by the Probation and After-Care Service in family matters, the Commission recommends that the collaboration between the Family District Court Magistrates and the Service continues and that it be formalised.

It is expected that the Service will provide the necessary support to the Family District Court Magistrates in their role as conciliators.

### **Juvenile Courts**

It was noted in Part I above that the criminal aspects of juvenile delinquency are dealt with by the Juvenile Courts which in accordance with the Juvenile Offenders Act are in fact the various District Courts “sitting for the purpose of hearing any charge against a juvenile ...”<sup>11</sup>. The Task Force has recommended the establishment of one single Juvenile Court having jurisdiction over the whole island of Mauritius. The Commission supports this recommendation. As a first step towards a national Juvenile Court, the Commission is of the view that the various Family District Courts may be granted jurisdiction to sit as Juvenile Courts. This solution would have the advantage of making use of Magistrates who would have acquired the experience of dealing with children and allowing them to deal with both the civil and criminal aspect of juvenile delinquency somewhat on the model of the French *juge des enfants*.

## **PART III –THE FAMILY DIVISION OF THE SUPREME COURT**

The Commission shall deal in this part with the Family Division of the Supreme Court.

### **The Family Judge**

The Commission is of the view that the points made in relation to the Family District Court Magistrates apply equally to the Judge sitting in the Family Division of the Supreme Court. Ideally two judges (the reason why the Commission is suggesting two judges will be developed later in this part) are to be appointed to sit as a Family Judge for a period of time with a rotation being established among the various judges wishing to sit as a Family Judge. This will allow the Family Division of the Supreme Court to sit every day instead of only on Fridays. In line with the point made about maintaining adequate breath of interest and experience, the Family Judge will continue to devote part of his time to other civil matters.

### **Dealing with Family Matters – Preliminary Consideration**

While the Family District Court Magistrates will be dealing with both private law and public law cases, the Family Judge will be dealing solely with private law matters. In relation to these cases the aim, as noted above, of having a Family Court is to place the emphasis on keeping matters ‘out of court’ and resolving issues by informal methods such as mediation and conciliation. To that the Commission would also like to add counselling

Most cases dealing with family matters revolve around the question of divorce and its consequences. The Commission would thus consider the procedures mainly in relation to divorce. Many of the points raised will, however, equally be applicable to other types of family cases. Further the Commission would like to point out that reconciliation in divorce cases should not be seen solely in terms of the reconciliation of the parties to the

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<sup>11</sup> S.3 of the Juvenile Offenders Act

marriage. At times one has to accept the fact that the marriage has indeed broken down and there would be no possibility of bringing them back together. In such cases the reconciliation will focus on trying to get agreed solution to the consequences of the divorce, essentially arrangements in relation to the children and financial and patrimonial arrangements.

In the law as it stands now, the various steps to be followed in order to obtain a divorce are to be found in the Divorce & Judicial Separation Act 1982. When a divorce petition has been lodged with the Registrar, the latter fixes the date on which it shall be presented to a Judge in Chambers. The latter is required to inquire from the parties whether attempts to effect reconciliation have been made. If no attempt has been made or if the Judge in Chambers is satisfied that the parties are likely to be reconciled, the Judge shall try to reconcile them or adjourn the proceedings with or without a direction that the parties seek help on the possibility of reconciliation.

There is thus, even in the present system, this element of trying to resolve disputes by means of conciliation. There is a perception that this step is but a mere formality with no real attempt at reconciliation being made at this level.

Given that one of the aims of having a Family Court is to resolve issues by informal methods and given that the present system is not achieving that aim, the Commission shall consider it can be promoted.

While everyone agrees that conciliation should be promoted, there are different views as to how it should be done. The view has been put forward to the Commission that all the aspects of conciliation and counselling should be distinct from court proceedings so that at the stage where the case reaches the court the judge will merely formally ascertain that conciliation has been attempted. The suggestion here is that it should be a completely separate body which should provide the conciliation services. This is what can be referred to as the stand-alone model.

The other view put forward is that “conciliation and counselling are the services that are at the root of establishing a proper Family Court System”<sup>12</sup>. and should consequently be court-based. The Commission is equally of that view. The following recent pronouncement of Mr. Justice Balancy appears to go in the same direction. When dealing with the question of “droit de visite” and “droit d’hébergement”, Mr. Justice Balancy commented that “it is equally a pity that we still do not have a family court fully equipped to deal with this kind of problem”<sup>13</sup>. In that case, the wife objected to the “droit de visite” and “droit d’hébergement” on the part of the husband as the “child has been traumatised as a result of the husband’s “general attitude” and ”especially the kind of negative conversation that he holds with him whenever he visits him at school”. The Judge ultimately ordered (1) that the mother should arrange for the child to follow treatment with a psychologist whose services the Ministry dealing with children’s rights and family welfare may wish to provide; or, if such services are not available, with a private psychologist provided that the father be willing to, and does pay, the latter’s fees; and (2) that the father should also, if he wishes to pursue his quest for a *droit de visite* and eventually, may be, a *droit d’hébergement*, follow treatment with the same psychologist at his own expense, the purpose of the treatment to the child being to try to restore his serenity and make possible the resumption of a relationship with his father, and the purpose of the treatment to the father being to help him to change his attitude to one more conducive to a harmonious relationship with his son.

By being court based, it allows control of the Court over the provision of the services and ensures easy access to these services whenever required by the Court. Further court based services will be better perceived by the public and will have an aura which services distinct from the court will not have. Though court-based, it is, however, not being suggested that the court should actually be employing counsellors and conciliators. It is envisaged that these services will be provided by outside services but monitored by the Court.

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<sup>12</sup> The Law Reform Commission of Hong Kong, The family dispute resolution process, para.5.7

<sup>13</sup> S v S, SCJ No. 281 of 2003

The Commission has considered various systems. The one it is proposing is based on the system that prevails in New Zealand. The Commission is aware that the New Zealand system is itself under scrutiny and various changes are being contemplated<sup>14</sup>. The Commission, however, believes that considering that this is the first step towards a non-adversarial system for resolving family disputes, it would be best to advance cautiously taking into account the resources that are at present available and the resources that the Commission can reasonably expect the country to afford in the near future for the implementation of the system. Indeed the system in place in many countries that have adopted the non-adversarial system for family dispute resolution requires the ready availability of a pool of duly accredited mediators and these are simply not available at the present point in time in Mauritius. It would require some time before such a system is put in place and it would be futile to wait for this to happen before taking the decision to set up a Family Court.

### **The Proposed Model**

In order to administer the system, the Commission recommends the creation of a post of Family Court Co-ordinator. The Commission shall consider further the role of the Co-ordinator at the end but his/her role shall become evident as the system is explained. Suffice it to say for the moment that s/he shall be the key to the proper functioning of the system.

An application to the Court with respect to a family dispute will be examined in the first instance by the Family Court Co-ordinator. In the exercise of this duty, the Family Court Co-ordinator shall be acting under the supervision of the Family Judge. The Family Court Co-ordinator may take one of two decisions; refer the parties for counselling or obtain a dispensation from the Family Judge for such a reference.

In order to enable the Family Court Co-ordinator to take the appropriate decision, in

addition to examining all documents filed in support of and against the application, the latter may also, if necessary, interview the parties. It is to be stressed that the Family Court Co-ordinator has a key role in determining the most appropriate service to which to refer the parties.

“It is generally accepted that mediation is inappropriate for couples locked in an intractable dispute, or with a history of domestic violence, alcohol or drug dependency, psychopathology, or extreme power imbalance”<sup>15</sup>. While we are not here dealing with pure mediation but with counseling, these considerations may be relevant in taking a decision as to whether counselling is appropriate in any particular case.

“Counselling can be useful in several ways. It can give couples who are unsure about separating an opportunity to explore options, including staying together, and addressing relationship difficulties. For most of the couples that come to the family Court, at least one party will have decided on separation. One partner may need counselling to come to terms with the separation, while the other may be ready to discuss post-separation arrangements for children, and division of property”<sup>16</sup>. While the more immediate aim of counselling is to help the parties to adjust to the emotional aspect of family disputes, an ultimate objective is eventually to provide the parties with an opportunity to resolve the various issues confronting them,.

It is to be noted that though parties have been referred for counselling, it is expected that the Family Judge would be able to order any urgent measures that are required.

Should the issues not have been resolved at this first stage, either the parties or the Family Judge may request that these be taken up at a mediation conference before the

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<sup>14</sup> See Law Commission of New Zealand, *Dispute Resolution in the Family Court*.

<sup>15</sup> Law Commission of New Zealand, *Dispute Resolution in the Family Court*, para.300.

<sup>16</sup> Law Commission of New Zealand, *Dispute Resolution in the Family Court*, para.263. In Australia this is also known as Conciliation counselling. The Law Reform Commission of Hong Kong recommended that it be referred to as Counselling Conference.

Family Judge. The Family Judge will be assisted at the mediation conference by the Family Court Co-ordinator. Attendance at the mediation conference should be compulsory, though it is obvious that the Judge cannot compel a party who does not want to participate to do so. If agreement is reached, the Judge can make orders in accordance with the agreement.

Should this still not resolve the matter, the case is then set down for a hearing. The Judge, who presided over the mediation conference, may adjudicate at the subsequent hearing of the case unless he withdraws or the parties request him to do so. This explains the recommendation made earlier on that two judges be appointed Family Judge. However, it seems obvious that the second Family Judge will devote less time on family matters.

### **The Family Court Co-ordinator**

The Commission wishes to reiterate that it considers the Family Court Co-ordinator to be the key to the proper functioning of the system. The Family Court Co-ordinator will in fact be a high ranking officer in the hierarchy of the Family Court. S/He shall be the first port of call for any person wishing to avail him/herself of the services of the Family Court and s/he shall be seeing the case through the system until final disposal. It is also expected that in addition to the duties referred to above, the Family Court Co-ordinator shall provide guidance and information to any person approaching the Family Court for that purpose.

Should the recommendation for the creation of the post of Family Court Co-ordinator be accepted, the Commission recommends that the incumbent should have a tertiary qualification in social work and counselling and/or clinical psychology and have good administrative skills. It is also expected that he will have experience, if not extensive experience, in family matters.

### **Judge led Mediation**

The Commission acknowledges that there is considerable debate as to the appropriateness of judges also acting as mediators. The arguments against are as follows. Firstly the primary role of a judge is to adjudicate and this involves different skills from that required of a mediator. Secondly, considering that the parties know that the judge will eventually have to adjudicate, there may be pressure to settle in terms of the suggestion of the judge.

However, given the lack of mediators in Mauritius that was noted earlier on, the Commission considers that it would be best at this stage of our development to proceed in this direction. Mediation indeed requires an element of trust that, at this stage, the judge may be the only person to be able to provide.

When such time comes when the country will have an adequate pool of accredited mediators, the scheme suggested above will allow the Family Court Co-ordinator to alternatively refer the parties to a mediator or successively to a counsellor and a mediator.

### **The Services**

Considering that the services, though provided by outside providers, will be court based, it is recommended that space be made available to them within the Family Court for dispensing their services. The Commission understands that the Supreme Court is at present facing an acute shortage of space. But the Commission also understands that the Government is at present considering various options for offering more space to the Supreme Court. In order not to be caught unexpected, it is recommended that thoughts be given to the provision of separate facilities for the Family Court which will include consultation rooms for use by the services annexed to the Court.

The Commission now comes to the most difficult question; who shall provide these services? With time it is expected that non-Government and private counselling and conciliation services will become available and parties may be referred to them by the Family Court Coordinator to the extent that they are accredited by the Court. In New Zealand

these services are provided by Relationship Services Whakawhanaungatanga which is a not-for-profit organisation. It obtains its funding essentially from service contracts with key government agencies, grants, donations, and income from its workplace services<sup>17</sup>.

Until such time these services become available, it is expected that they will be provided by Government services. The Commission understands that at the moment whenever the Court requires a social enquiry report, it is provided by the Probation and After-Care Services. In producing these reports, the Probation officer acts as an investigator or as an expert to the Court. It is expected that they will continue to produce these social enquiry reports. The following figures are quite interesting.

#### Social Enquiry Report Submitted to the Supreme Court

1998	1999	2000	2001	2002
100	106	190	193	189

(The Commission is grateful to the Probation and After Care Services for having provided the Commission with these figures)

The bulk of these figures relates to custody, with quite high numbers linked also to “droit de visite” and “droit d’hébergement”, and appointment of guardian.

This role is, however, quite different from the counselling/conciliation role being envisaged here. Nonetheless, the Commission must take note of the vast experience that these officers have, considering that the Probation Service was set up way back in 1947. Further the Commission understands that Probation Officers are already performing a counselling role at District Court level. The numbers are as follows:

1998	1999	2000	2001	2002
6,500	6,207	5,853	5,794	5,053

<sup>17</sup> Web site: <http://www.relate.org.nz/>

(The Commission is grateful to the Probation and After Care Services for having provided the Commission with these figures)

The bulk of these figures relates to matrimonial and family disputes.

The Commission understands that the Minister of Social Security, National Solidarity & Senior Citizens is keen on providing training to Probation officers in conciliation.

Given the vast experience accumulated by these officers and the plans for further training being envisaged for them, the Commission is of the view that at this stage the counseling role should be conferred to the Probation and After-Care Service. In the provision of this service the Ministry of Social Security, National Solidarity & Senior Citizens could possibly, however, consider an alternative name.

The Commission noted above that the service will continue to provide the social enquiry reports. It must be stressed that these two roles are quite distinct and must be performed by different officers, hence the suggestion in the preceding paragraph that a new section be created by the Ministry of Social Security, National Solidarity & Senior Citizens when providing the counseling services.

### **Duty on Legal Advisers to Promote Conciliation**

In order to discourage the adversarial type litigation, the Commission recommends that legal advisers should be under a statutory duty to inform and encourage their clients to consider the possibility of reconciliation. The Commission notes that there is such an obligation in many countries, for example Australia, Canada and New Zealand.

S.8 of the New Zealand Family Proceedings Act 1980 provides as follows:

*(1) In all matters in issue between a husband and wife that are or may become the subject of proceedings under this Act or the Guardianship Act 1968, every barrister or solicitor acting for then husband or wife shall-*

- a) *Ensure that the husband or wife for whom the barrister or solicitor is acting is aware of the facilities that exist for promoting reconciliation and conciliation; and*
  - b) *Take such further steps as in the opinion of the barrister or solicitor may assist in promoting reconciliation or, if reconciliation is not possible, conciliation.*
- (2) *Every barrister or solicitor who-*
- a) *Is acting for a husband or wife;*
  - b) *Applies to the Court to have set down for hearing any matter in issue between the husband and wife under this Act or the Guardianship Act 1968-*
- shall certify on the application that he has carried out his responsibilities under subsection (1) of this section.*

The Commission is fully aware that such facilities may not at the moment exist in Mauritius and that the only conciliation services that will probably exist for sometime to come will be the one provided through the Family Court. The Commission, however, believes that such a duty is, nonetheless, not redundant as firstly it may actually encourage NGO's in actually offering such services and secondly in ensuring that the parties, when they do come to Court, are fully aware of the new approach to family disputes.

At this stage, however, the Commission is not necessarily recommending that legal advisers should provide a certificate that they have carried out this duty.

## PART IV - DIVORCE

Considering that the Commission is recommending in terms of procedures a move away from conflict, the Commission would also recommend a move away from a litigious approach in relation to the substantive law relating to divorce.

The law on divorce is at present provided for in Art.229 and following of the Civil Code.

Under Art. 230 “le divorce peut être demandé par un époux pour des faits imputables à l’autre, lorsque ces faits constituent une violation grave ou renouvelée des devoirs ou obligation du mariage”. This is what is referred to as “divorce pour faute”.

Under Art. 235 “un époux peut demander le divorce, en raison d’une rupture de la vie commune, lorsque les époux vivent séparés de fait depuis cinq ans”. This is what is referred to as “divorce pour rupture de la vie commune”. It is to be stressed that a “divorce pour rupture de la vie commune” is to be assimilated to a “divorce pour faute” as against the party who initiated the “divorce pour rupture de la vie commune” (see Art.250)

The number of divorce cases lodged from 1994 to 2002 is as follows:

1994	1995	1996	1997	1998	1999	2000	2001	2002
1,012	1,060	1,050	1,266	1,582	1,580	1,570	1,626	1,480

Annual Report of the Judiciary (1994-2002)

The number of cases lodged has increased over the years but seems to have stabilised at around 1,500 per year

The number of divorces granted over the same period is as follows:

1994	1995	1996	1997	1998	1999	2000	2001	2002
733	801	792	891	1,012	1,150	1,191	1,512	1,293

Annual Report of the Judiciary (1994-2002)

The number of divorce granted has also increased and seems to have stabilised at around 1,200 per year.

Of the cases lodged with the Supreme Court, the number of cases that went undefended is as follows.

2000	2001	2002
1099	1141	1100

(The Commission is grateful to the Director of Court Services for having provided the Commission with these figures)

Over the past three years, the number of undefended cases was thus around 70% of cases lodged in the year. The Commission is aware of the case-law of the Supreme Court on the relevance of an undefended divorce case. The following pronouncement of Mr Justice Ahnee in *K. v K.* (SCJ No. 80 of 1990) sums up adequately this case-law: “A divorce petition must not be assimilated to ordinary pleadings where any allegation not specifically denied is deemed to be admitted. Divorce by mutual consent does not exist in Mauritius and even in an undefended petition the burden of processing the allegations contained in a petition lies on the petitioner. That burden is particularly high where the alleged faute is adultery.”

Nonetheless the Commission cannot help noting that in about 70% of cases lodged in a year, the respondent does not mind, to put it in a neutral way, that divorce be granted. Of course it is possible that the respondent, aware of the case-law on undefended cases, has merely decided not to defend because he/she is of the view that the petitioner will not be

able to persuade the judge to grant the divorce. Apart from the fact that the Commission doubts that respondents would adopt such tactical moves in what is after all highly emotionally charged cases, the figures show that in the vast majority of the undefended cases if not all, divorce is eventually pronounced. This can be extrapolated from the number of divorce cases dismissed over the past three years.

2000	2001	2002
16	27	39

Annual Report of the Judiciary (1994-2002)

If in law divorce by consent does not exist, in practice it is very much a reality.

The arguments for and against a system of divorce based on fault are well rehearsed<sup>18</sup>.

In favour of a “no-fault” system for divorce is the argument that a fault-based divorce requires the production of evidence that may be expensive to obtain, undignified to the parties, and not conducive to the welfare of their children. As the Scottish Law Commission puts it, "there may, in some cases, be an unnecessary dredging up of incidents which would be best forgotten, an unnecessary emphasis on blame and recrimination and an unnecessary increase in bitterness and hostility... Even if the pursuer's case is justified it may not help the relationship between the parties to have it set out in detail. If the pursuer's case is exaggerated, or unfairly one-sided, or not entirely true, the position is worse. The defender may resent the allegations made against him or her but may well be advised that there is no point in defending. To a feeling of bitterness may be added a feeling of injustice. Of course, if the defender decides to defend or to raise a cross action for divorce on the basis of the pursuer's behaviour (which nowadays is unusual) the scene is set for an unsavoury, destructive and costly process of mutual recrimination"<sup>19</sup>. In certain circumstances parties may even be tempted to manufacture

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<sup>18</sup> The following is taken from the Family Court of Australia web site which briefly sums up the respective arguments. See

[http://www.familycourt.gov.au/education/html/divorce\\_law.html](http://www.familycourt.gov.au/education/html/divorce_law.html)

<sup>19</sup> Scottish Law Commission, Report on Reform of the Ground for Divorce, Para. 2.3

such evidence. Further a no-fault system would be less costly and reduce the length of time of proceedings before the courts.

On the other hand, opponents of the no-fault system see it as a direct attack on the institution of marriage and think that it will lead to the breakdown of the family by making divorce too easy.

While the arguments for are usually based on practical problems, the arguments against are based on principles. While practical problems are real and there is no doubt that the practical problems referred to here are real ones, principles are debatable and various persons may eventually have different principles, one as valid as the other. Further even if one were to have a principle, and it is agreed that this should be the principle, its validity will depend upon the extent to which it is enforceable. Yet, as we have seen, through the simple expediency of undefended cases, Mauritian citizens can achieve the same result as in the case of a no-fault divorce.

In any case, the Commission is not convinced by the argument that a no-fault system is a direct attack on the institution of marriage. Far from making divorce easier to obtain, the system of counselling and conciliation, that the Commission is recommending, aims at addressing the real problems which are undermining any particular marriage with a view precisely to avoid divorce.

Should the legislature decide to move away from a pure fault-based system and to avoid any doubt as to its support for the institution of marriage, the Commission recommends, on the model, of the English Family Law Act 1996, that the following general principles, to which the courts and any persons in the exercise of their function under the law must have regard, be firmly stated in the amending act:

- that the institution of marriage is to be supported;
- that the parties to a marriage which may have broken down are to be encouraged to take all practical steps, whether by marriage counselling or otherwise, to save the marriage;

- that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end
  - with minimum distress to the parties and to the children affected
  - with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances
  - without costs being unreasonably incurred in connection with procedures to be followed in bringing the marriage to an end; and
- that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

Ultimately what is important is that "a legal process which facilitates agreement can help couples to re-organise their lives and relationships in a humane and civilised way, whereas a process which concentrates on establishing which spouse is the guilty party increases antagonism and discourages constructive solutions"<sup>20</sup>. The Commission believes that the introduction of a cause of divorce that is not based on fault is a necessary element to the introduction of the counselling and conciliation scheme that the Commission is also recommending.

There are basically two no-fault systems<sup>21</sup>; the pure no fault system and the divorce by consent system which operates along side a fault system.

In the first category, there is, for example, the Australian and the New Zealand system. According to the Australian Family Law Act 1975, an application for a decree of

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<sup>20</sup> . Parkinson, *Conciliation in Separation and Divorce* (1986)11, cited in Scottish Law Commission, Report on Reform of the Ground for Divorce, Para.2.3

<sup>21</sup> The Commission is fully aware that there are variants to these systems but feels that they may be too bold for consideration in the Mauritian context. There is, for example, the system of period of notice as ground for divorce without any need for separation. A variant of this system was introduced in England by the Family Law Act 1996. The Lord Chancellor's Department has now announced that this part of the law will not be implemented. It was considered that the complex procedures would be likely to lead to significant delay and uncertainty in resolving arrangements for the future.

dissolution of a marriage shall be based on the ground that the marriage has broken down irretrievably and this ground shall be held to have been established, and a decree of dissolution of the marriage shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage. However a decree of dissolution of marriage shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

Under New Zealand law irreconcilable difference is the only grounds for divorce. This means that the relationship has broken down and is at an end and neither party is to be blamed for this. Irreconcilable differences can be established by proving that the parties have been living apart for two years.

In the second category, there is, for example, the French system and Scottish system. In French law, while keeping the fault-based system, the legislature has also introduced a system of divorce by consent in those cases where the parties agree to divorce. A divorce by consent can be asked for after 6 months of marriage. Where the parties agree upon the consequences of the divorce (ex. provision as to the children, alimony and dissolution of the matrimonial regime), the demand is made jointly. Where they do not agree, then the demand is made separately. Otherwise the “divorce pour faute” and the “divorce pour rupture de la vie commune” have been kept.

The Commission has considered the two systems and finds that while the first system has undoubted attractions, it presents a major disadvantage. Unless the period of separation is to be very short, it will prevent any divorce before the lapse of that period even in circumstances where because of the totally unacceptable behaviour of one party, a divorce before that period would be desirable. The Commission feels that too short a period will not command wider public support and approval at the present time. The Commission recommends, therefore, that the dual fault based divorce and divorce by consent on the French model be adopted. Apart from the fact that this is very much in line with the tradition of following French law in matters of civil law, this solution has the attraction of not requiring an overhaul of the present law on divorce that a pure no-fault system would have required. Further it allows spouses who feel that fault should be the

only cause for the dissolution of a marriage to insist on the petitioner proving that the respondent was at fault.

The Commission now needs to consider what would be the required period of separation before a divorce by consent can be asked for. As the Commission commented above, too short a period will not command wider public support and approval at the present time. There is no doubt that the six months provided for by French law is too short. When examining this issue the Scottish Law Commission remarked that “there is clearly a fairly widespread concern that to allow divorce after a period of separation of less than a year would alter the public perception of marriage as a serious long-term commitment. This concern may or may not be justified but it undoubtedly exists and has to be taken into account”<sup>22</sup>. The Commission feels that there may be a similar perception in Mauritius as well. The idea, however, is that the “divorce par consentement mutuel suppose ... que certains délais depuis la célébration du mariage démontrent l’échec de l’union, que les intéressés aient aussi une certaine maturité pour en maîtriser les conséquences”<sup>23</sup>.

At the end of the day the period chosen, within a certain range, will necessarily be arbitrary. The Commission recommends a separation period of two years. This period of two years, however, should not be looked at in isolation. Legislations which adopt this system normally require that the parties meet with the judge and renew that demand after a certain period of reflection failing which the demand lapses.

As noted above certain legislatures require in addition that the parties “aient une certaine maturité” which is normally reflected in a minimum age requirement. The Commission is not at this stage making any recommendation on this aspect but would welcome comments on it.

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<sup>22</sup> Scottish Law Commission, Report on Reform of the Ground for Divorce, Para.2.13

<sup>23</sup> Droit Civil de la Famille, Tome II Aspects Comparatifs et internationaux, F. Boulanger, Economica, 1994, Para.404