



# LAW REFORM COMMISSION

*Report*

## Law on Divorce

[December 2008]

Port Louis, Republic of Mauritius

4<sup>th</sup> Floor, Cerné House

Tel: (230) 212-3816/212-4102

Fax: (230) 212-2132

E-Mail: [lrc@mail.gov.mu](mailto:lrc@mail.gov.mu)

URL <http://lrc.gov.mu>

## About the Commission

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (e) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission and taking the minutes of all the proceedings of the Commission.



# LAW REFORM COMMISSION

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**(I) Introductory Note:**

1. The Commission has, under section 6(1) of the Law Reform Commission Act, reviewed the law on Divorce, in particular the grounds for divorce. The evolution of our law and practice, as well as developments and discussions on this area of the law in other jurisdictions,<sup>1</sup> has been examined.
2. We reiterate the view that our law is inadequate: the law on divorce must be adapted to the realities of conjugal life. The concept of ‘divorce by mutual consent’,<sup>2</sup> which had existed in our civil code from 1808 to 1884,<sup>3</sup> should be reintroduced.

Our proposals for reform are contained in a draft Code Civil Mauricien (Amendment) Bill, which is attached as an Annex to this Report.

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<sup>1</sup> Report of the Law Commission of England on ‘Reform of the Grounds of Divorce’ [1966], Working Paper No. 76 of the Law Commission of England on ‘Time Restrictions on Presentation of Divorce and Nullity Petitions’ (1980), Report of Scottish Law Commission No 116 on ‘Reform of the Ground of Divorce’ (1989), Report of the Law Commission of England on ‘The Ground for Divorce’ (1990), Report of the Hong Kong Law Reform Commission on ‘Grounds for Divorce and The Time Restriction on Petitions for Divorce within three years of marriage’ (1992), Report of the Law Commission of India on ‘The Hindu Marriage Act, 1955 – Irretrievable Breakdown of marriage as a ground of divorce’ (1978), Report of the Law Commission of India on ‘Grounds of Divorce amongst Christians’ (1990), and Report of the law Commission of India on ‘Indian Divorce Act’ (1998). Debates in the French National Assembly on 13-14 April and 12 May 2004 in respect of ‘Loi du 26 Mai 2004 relative au divorce’, as well as debates on 29-30 May and 3-4 June 1975 in respect of ‘Loi du 12 Juillet 1975 relative au divorce’

<sup>2</sup> Vide LRC Discussion Paper, ‘Towards the setting up of a Family Court in Mauritius’ (January 2004), at pp. 34-40; Report ‘Towards the setting up of a Family Court in Mauritius’ (August 2004), at p. 11.

<sup>3</sup> From 1808 to 1884, ‘le divorce par consentement mutuel’ was recognized by our law [Article 233 of the then Code Napoleon, repealed by the 1884 Ordinance to amend the Law relating to Divorce]: vide R. D’Unienville, QC, *L’Evolution du Droit civil à l’ Ile Maurice* [Best Graphics, 1994], pp. 119 seq.

## **(II) The Case for Reform**

### **The Current Law**

3. The grounds for divorce are quite limited. Article 229 of the Code Civil Mauricien [CCM] provides that “le divorce peut être prononcé, soit en cas de faute, soit en cas de rupture de la vie commune.”
4. Under Article 230 CCM, “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 obligations du mariage.”<sup>4</sup>

The fault<sup>5</sup> could be: (a) a ‘manquement au devoir de fidélité’, such as adultery or ‘entretien de relations équivoques avec un tiers, qui peuvent être considérées comme injurieuses par le conjoint, même si l’adultère n’est pas véritablement prouvé’;<sup>6</sup> (b) a ‘manquement au devoir de secours et d’assistance’;<sup>7</sup> (c) in the nature of ‘comportements et attitudes constituant un défaut de respect et de considération et souvent une indifférence

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<sup>4</sup> Article 231 CCM further provides that “le divorce peut être demandé par un époux lorsque l’autre a été condamné à une peine criminelle de droit commun d’au moins cinq ans de servitude pénale.” Vide *Tegally v Tegally* (1982) SCJ 384 and *Thibert v Thibert* (1994) SCJ 17.

<sup>5</sup> Vide A. Breton, Répertoire de Droit Civil, Vo. Divorce (Conditions).

<sup>6</sup> In *Deschezeaux v Deschezeaux* (1992) MR 209, the Court observed that a close relationship of a husband with another man or of a wife with another woman may constitute a ‘faute’.

<sup>7</sup> Op. cit., note 5, at para. 366 seq. For instance, “manquement à l’obligation de contribuer aux charges du ménage”; “le fait pour l’un des époux de traiter avec une négligence excessive les affaires ménagères et l’entretien du foyer”; “le fait pour l’un des époux de ne pas apporter de soins à son conjoint”; “le défaut de soins et d’attention à l’égard des enfants: bien que l’autre parent n’en soit pas directement victime, on considère que ses sentiments s’en trouvent certainement atteints”; “le défaut de respect et d’attention à l’égard des parents de l’autre époux constitue un manquement à l’obligation pour cet époux d’avoir égard aux sentiments de son conjoint.”

pour la personne de l’autre époux constituant un manquement à l’obligation d’adopter un comportement rendant possible la vie en commun’, such as the ‘attitude injurieuse de l’un des époux à l’égard de l’autre’;<sup>8</sup> (d) a ‘manquement au devoir de loyauté des époux’, such as the ‘dissimulation par l’un des époux à l’autre de faits antérieurs au mariage.’<sup>9</sup>

The fault in respect of a matrimonial obligation must be such as to render ‘intolérable le maintien de la vie commune’, there being no prospect for reconciliation and resumption of conjugal life.<sup>10</sup>

5. Under Article 235 CCM “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.”<sup>11</sup>

In *Bissessur v Bissessur* (1990) MR 366, the Court held that over and above the overt act of separation there must also be a clear intention in both spouses, or in one only made clear to

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<sup>8</sup> In *Saka v Saka* (1985) SCJ 281, the Court observed that by contracting a marriage a woman does not bind herself to be the unpaid servant of her husband. In *Pellegrin v Pellegrin* (1990) MR 326, the Court held that this rule applies equally to the husband.

<sup>9</sup> In *Mohideen v Mohideen* (1996) MR 18, the wife petitioner successfully sought a divorce on the ground that the respondent had concealed the fact that he had, before the marriage, been convicted of larceny and forgery and sentenced to undergo 12 months imprisonment. In *Jootun v Jootun* (1987) MR 173, the petitioner sought divorce as shortly after marriage he discovered that the respondent had epilepsy, which had been concealed from him. The Court granted a provisional decree of divorce. In *Mungur v Mungur* (1993) MR 308, the Court examined the legal effect of non-disclosure before marriage to one’s future spouse of any ante-nuptial sexual relation which one has had with a third party. The Court held that the concealment by respondent of her ante-nuptial relation with a third party, taking into account the petitioner’s attitude, amounts to a ‘faute’ entitling the petitioner to obtain a provisional decree of divorce. The Court observed that the institution of marriage could not be dissociated from its underlying moral shell so that someone who genuinely feels that he has been cheated should be allowed to reject the deceiving spouse. But in *Lalljee v Lalljee* (1992) MR 125, it was held that pre-marital relationships, concealed by one spouse to the other, and unproductive of ill-effects after the marriage do not constitute a ground of divorce. As regards sexual relationship prior to marriage as a cause of divorce see also *Ramdani v Ramdani* (1985) MR 29 and *Dihal v Dihal* (1986) MR 242.

<sup>10</sup> Op. cit., note 5, at para. 371 seq.

<sup>11</sup> In *Ricaud v Ricaud* (1998) SCJ 414, the Court observed there must be a minimum of five years “entre la cessation de la vie commune [tant matérielle qu’affective] et l’assignation en divorce” and that “si cette durée était insuffisante la demande sera rejetée mais cela n’empêcherait pas le dépôt d’une deuxième demande lorsque la séparation atteint la durée exigée par le texte.” Vide also *Soogun v Soogun* (1992) MR 246.

the other, that marital life had ended. Where one spouse decides to put an end to ‘la vie commune’, his ‘séparation (rupture)’ must be accompanied by definite and clear acts which would leave the other spouse in no doubt whatsoever that a complete breakdown of conjugal life has taken place at a specific time.<sup>12</sup> There must not have been an interruption in the ‘séparation de fait’<sup>13</sup>.

Divorce for ‘rupture de la vie commune’ does not require, however, as a necessary condition that there should be a ‘dualité d’habitation’. Where there is no ‘dualité d’habitation’, the petitioner must have cut off all links (physical, economic and social) with his spouse.<sup>14</sup>

Under Article 236 CCM “l’époux qui demande le divorce pour rupture de la vie commune en supporte toutes les charges” and “dans sa demande il doit préciser les moyens par lesquels il exécutera ses obligations à l’égard de son conjoint et des enfants.” Article 237 further provides that “s’il est établi que les moyens précisés par le demandeur sont insuffisants pour préserver les intérêts matériels de l’autre époux et des enfants communs, le juge rejette la demande.”<sup>15</sup>

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<sup>12</sup> There can be ‘rupture de la vie commune’ owing to ‘l’altération des facultés mentales de l’autre conjoint’: *Marie v. Marie* (1992) MR 238.

<sup>13</sup> *Sundrum v Sundrum* (1989) MR 228.

<sup>14</sup> Vide *Ramsamy v Ramsamy* (1990) MR 58; *Ramdane v Ramdane* (1991) MR 213.

<sup>15</sup> In *Peeroo v Peeroo* (1998) SCJ 430, the Court observed that, under Article 254 CCM, the obligation which rests on the petitioner who has entered a divorce petition on ground of ‘rupture de la vie commune’ is only one of ‘devoir de secours’ and which, under Article 255 CCM, takes the form of an alimony. The Court considered the proposed alimony of Rs 1000 was insufficient to meet the needs of the other spouse. In *Ramnochane v Ramnochane* (1999) SCJ 245, it was pointed out that “il faut que l’origine et le montant des ressources du demandeur soient indiqués; la requête est recevable dès lors que le demandeur entend consacrer partie de son salaire, dont il précise le montant, à l’exécution de son obligation de secours”. Vide also *Bastide v Bastide* (1982) SCJ 467; *Larhubarbe v Larhubarbe* (1990) MR 153.

### **Inadequacies of the Current Law**

6. A divorce must surely be one of the most stressful and damaging experiences that a couple or a family can ever go through. It is not simply ‘a day in court’ but a whole ‘process’ of painful change and adjustment which will affect the parties and their children for years to come, if not the rest of their lives.
  
7. A good law on divorce must seek to achieve the following two objectives: (a) to buttress, rather than undermine, the stability of marriage; and (b) 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. If the marriage is dead, the object of the law should be to afford it a decent burial. It should achieve this in a way that is just to all concerned, including the children as well as the spouses, and which causes them the minimum of embarrassment and humiliation. Above all, it should seek to take the heat out of the disputes between husband and wife and certainly not further embitter the relationships between them or between them and their children. It should not merely bury the marriage, but do so with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future.<sup>16</sup>
  
8. Our law fulfils the first objective by ensuring that every encouragement is afforded to a reconciliation and that the procedure is not such as to inhibit or discourage approaches to that end.<sup>17</sup>

We do not consider the current law and practice fulfils the second objective. The need to file a petition for divorce, to make allegations, most probably causes considerable

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<sup>16</sup> Report of the Law Commission of England on ‘Reform of the Grounds of Divorce’ [1966], at para. 15 seq.

<sup>17</sup> Section 7 of the Divorce and Judicial Separation Act.



bitterness and resentment, distress and humiliation.<sup>18</sup> It is not astonishing in the circumstances that the number of undefended cases is relatively high.

9. We are of the opinion that a legal process which facilitates agreement can help couples to re-organize their lives and relationships in a humane and civilized way, whereas a process which concentrates on establishing which spouse is the guilty party increases antagonism and discourages constructive solutions.<sup>19</sup> There is thus the need for re-introducing in our law divorce by mutual consent, with certain safeguards so as not to reduce marriage to the level of a private contract and to ignore the community interest that is involved: a period of two years must have elapsed since the celebration of marriage.<sup>20</sup>

Divorce by mutual consent would spare the parties to divorce proceedings the embarrassment and humiliation to which they are now subjected and would make the proceedings less of a source of bitterness and recrimination.

10. We are also of the view that the period of separation required for lodging a petition for ‘divorce pour rupture de la vie commune’, which is currently five years, is rather long. To

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<sup>18</sup> What the Scottish Law Commission in its Report on ‘Reform of Ground for Divorce’ (1989) had to say on the matter, at para. 2.3, appears to us to be quite pertinent:

“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.”

The Scottish Law Commission was also of the opinion that it was not very constructive or civilized for the pursuer in a divorce case to be asked by his or her solicitor to recount the worst things the other spouse had done in the marriage.

<sup>19</sup> Loc. Cit.

<sup>20</sup> As pointed out by F. Boulanger, *Droit Civil de la Famille, Tome II Aspects Comparatifs et internationaux*, (Economica, 1994), at para.404 : «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.»

our mind, the current time-limit may impose unnecessary hardship on people whose marriages have genuinely and irretrievably broken down and who may be in a severe state of distress as a result.

We consider a period of two years for establishing irretrievable breakdown of marriage would be more appropriate.

### **(III) Our Proposals for Reform of the Law**

11. As far back as 2004, a draft Code Civil (Amendment) Bill was prepared by the Commission, in the context of proposals for the setting-up of a Family Court, providing for ‘divorce by consent’.<sup>21</sup> We consider many of the provisions contained in that Bill and in the draft Family Court and Family Proceedings Bill are still appropriate in the Mauritian context.
12. Our proposals for reform are contained in the draft Code Civil Mauricien (Amendment) Bill, which is attached as an Annex to this Report.
13. The Bill provides for a plurality of grounds for divorce. The proposed new Article 229 provides that ‘le divorce peut être prononcé en case soit de consentement mutuel;

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<sup>21</sup> Vide Report ‘Towards the setting up of a Family Court in Mauritius’ (August 2004), at pp. 11, 39-45. Amendments were then proposed to the Code Civil Mauricien for ‘divorce by mutual consent’ by addition of provisions based partly on the French ‘Loi du 12 Juillet 1975 relative au divorce’ (which were in force from 1 January 1976 to 31 December 2004) and ‘Loi du 26 Mai 2004 relative au divorce’ (which are those which now are in force as from 1 January 2005).

soit d’acceptation du principe de la rupture du mariage; soit de rupture de la vie commune; soit de faute.’

The existing grounds of ‘divorce pour faute’, which is a ‘corollaire of the devoirs et obligations du mariage’, and ‘rupture de la vie commune’ are retained.

Divorce by mutual consent is recognized: when parties to a marriage agree to the divorce and the consequences thereof, they may give a joint notice to the Supreme Court of their intention to divorce [the proposed new Article 238-1].

When the parties agree to the principle of divorce, but not the consequences thereof, notice of divorce may be given by one or both parties on the ground of the ‘acceptation du principe de la rupture du mariage sans consideration des faits à l’origine de celle-ci’ [the proposed new Article 238-4].

14. We have ensured that our divorce law does not undermine the institution of marriage. Divorce by consent would thus only be possible if the parties have been married for at least twenty four months. The decree of divorce would only be pronounced after a period of three months had elapsed since the petition had been lodged, during which the parties would have had the time to further reflect on the implications of their choices.
15. The attached Bill contains provisions regarding ‘mesures provisoires’ and about the consequences of divorce, to bring the necessary adaptations which changes in the grounds for divorce entail.
16. We are proposing consequential amendments to the Divorce and Judicial Separation Act. The procedure applicable to divorce ‘par consentement mutuel’ cannot be the same as divorce based on any other ground.

The procedure for divorce is somewhat cumbersome and needs to be simplified so as to be better understandable by the parties: we do not consider there is a need for ‘presentation’ of the petition followed by ‘preliminary hearing’. We therefore propose that there should be a preliminary hearing, during which the Court would also consider whether or not there are prospects of reconciliation.

New Regulations would have to be made by the Supreme Court under section 21(1) of the Divorce and Judicial Separation Act, as a result of changes we are proposing to the Act.

#### **(IV) Concluding Remarks**

17. We are confident our proposals would go some way towards improving our law on divorce, by ensuring marriage is dissolved with dignity and in a matter which is fair to the parties and their children.

**ANNEX:**

**THE CODE CIVIL MARICIEN (AMENDMENT) BILL**

**(No            of            2009)**

**Explanatory Memorandum**

The object of this Bill is to amend the Code Civil Mauricien to make provision for –

- (a) Divorce by consent; and
- (b) Other related matters.

2009

Attorney-General

## THE CODE CIVIL MAURICIEN (AMENDMENT) BILL

(No. of 2009)

### ARRANGEMENT OF CLAUSES

#### Clause

1. Short title.
2. Article 229 of the Code amended
3. Article 235 of the Code amended
4. New Articles 238-1 to 238-7 inserted in the Code
5. Articles 239 and 240 of the Code amended
6. Article 246 of the Code amended
7. New Articles 253-1 and 253-2 inserted in the Code
8. New Article 262-1 inserted in the Code
9. New Articles 280 and 281 inserted in the Code
10. Consequential Amendments
11. Transitional Provisions
12. Commencement

**A BILL**

To amend the Code Civil Mauricien to make provision for Divorce by Consent and other related matters.

ENACTED by the Parliament of Mauritius, as follows –

**1. Short title.**

This Act may be cited as the Code Civil Mauricien (Amendment) Act 2009.

**2. Article 229 of the Code amended**

The Code Civil Mauricien is amended by deleting Article 229 and replacing it with the following-

**Article 229**

Le divorce peut être prononcé en cas:

- soit de consentement mutuel;
- soit d’acceptation du principe de la rupture du mariage;
- soit de rupture de la vie commune;
- soit de faute.

**3. Article 235 of the Code amended**

The Code Civil Mauricien is amended by deleting Article 235 and replacing it with the following -

**Article 235**

Un époux peut demander le divorce, en raison d’une rupture de la vie commune lorsque les époux vivent séparés de fait depuis deux ans.

#### **4. New Articles 238-1 to 238-7 inserted in the Code**

The Code Civil Mauricien is amended by inserting immediately after Article 238 the following provisions:

##### **III : Du divorce par consentement mutuel**

###### **Article 238 - 1**

Le divorce peut être demandé conjointement par les époux lorsqu'ils s'entendent sur la rupture du mariage et ses effets en soumettant à l'approbation du juge une convention réglant les conséquences du divorce.

La demande peut être présentée, soit par les avoués respectifs des parties, soit par un avoué choisi d'un commun accord.

Le divorce par consentement mutuel ne peut être demandé au cours des vingt-quatre premiers mois de mariage.

###### **Article 238 - 2**

Le juge examine la demande avec chacun des époux, puis les réunit. Il appelle ensuite le ou les avoués.

Si les époux persistent en leur intention de divorcer, le juge leur indique que leur demande doit être renouvelée après un délai de réflexion de trois mois.

A défaut de renouvellement dans les six mois qui suivent l'expiration de ce délai de réflexion, la demande conjointe sera caduque.

###### **Article 238 – 3**

Le juge prononce le divorce s'il a acquis la conviction que la volonté de chacun des époux est réelle et que chacun d'eux a donné librement son accord. Il homologue, par la même décision, la convention réglant les conséquences du divorce.



Il peut refuser l'homologation et ne pas prononcer le divorce s'il constate que la convention préserve insuffisamment les intérêts des enfants ou de l'un des époux.

#### **IV : Du divorce par acceptation du principe de la rupture du mariage**

##### **Article 238 - 4**

Le divorce peut être demandé par l'un ou l'autre des époux ou par les deux lorsqu'ils acceptent le principe de la rupture du mariage sans considération des faits à l'origine de celle-ci.

Le divorce par acceptation du principe de la rupture du mariage ne peut être demandé au cours des vingt-quatre premiers mois de mariage.

##### **Article 238 – 5**

Le juge examine la demande avec chacun des époux, puis les réunit. Il appelle ensuite le ou les avoués.

Si les époux persistent en leur intention de divorcer, le juge leur indique que leur demande doit être renouvelée après un délai de réflexion de trois mois.

A défaut de renouvellement dans les six mois qui suivent l'expiration de ce délai de réflexion, la demande conjointe sera caduque.

S'il a acquis la conviction que chacun des époux a donné librement son accord, le juge prononce le divorce et statue sur ses conséquences.

## **V : Des modifications du fondement d’une demande en divorce**

### **Article 238 - 6**

Les époux peuvent, à tout moment de la procédure, demander au juge de constater leur accord pour voir prononcer leur divorce par consentement mutuel en lui présentant une convention réglant les conséquences de celui-ci.

### **Article 238 - 7**

Les époux peuvent également, à tout moment de la procédure, lorsque le divorce aura été demandé pour faute ou pour rupture de la vie commune, demander au juge de constater leur accord pour voir prononcer le divorce pour acceptation du principe de la rupture du mariage

## **5. Articles 239 and 240 of the Code amended**

The Code Civil Mauricien is amended by deleting Articles 239 and 240 and replacing them with the following new Articles-

### **Article 239**

En cas de divorce par consentement mutuel, les époux règlent eux-mêmes les mesures provisoires dans la convention temporaire qui doit être annexée à leur requête initiale.

Toutefois, le juge pourra faire supprimer ou modifier les clauses de cette convention qui lui paraîtraient contraires à l’intérêt des enfants

### **Article 240**

A la suite d’une demande en divorce pour faute ou rupture de la vie commune ou pour acceptation du principe de la rupture du mariage, le magistrat de district peut prendre, dès la requête initiale, toutes les mesures d’urgence qu’il estime nécessaires.

Nonobstant les mesures d’urgence prises par le magistrat de district, le Juge en Chambre peut prendre toutes les mesures provisionnelles qu’il estime nécessaires pour assurer l’existence des époux et celle

des enfants jusqu’à la date à laquelle le jugement prend force de chose jugée.

Le juge peut notamment:

1. Statuer sur les modalités de la résidence séparée des époux;
2. Attribuer à l’un d’eux la jouissance du logement et du mobilier du ménage ou partager entre eux cette jouissance, en précisant son caractère gratuit ou non et, le cas échéant, en constatant l’accord des époux sur le montant d’une indemnité d’occupation;
3. Ordonner la remise des vêtements et objets personnels;
4. Fixer la pension alimentaire et la provision pour frais d’instance que l’un des époux devra verser à son conjoint, désigner celui ou ceux des époux qui devront assurer le règlement provisoire de tout ou partie des dettes;
5. Accorder à l’un des époux des provisions à valoir sur ses droits dans la liquidation du régime matrimonial si la situation le rend nécessaire;
6. Statuer sur l’attribution de la jouissance ou de la gestion des biens communs ou indivis autres que ceux visés au 2 ci-dessus, sous réserve des droits de chacun des époux dans la liquidation du régime matrimonial;
7. Désigner tout professionnel qualifié en vue de dresser un inventaire estimatif ou de faire des propositions quant au règlement des intérêts pécuniaires des époux;
8. Désigner un notaire en vue d’élaborer un projet de liquidation du régime matrimonial et de formation des lots à partager.

## 6. Articles 246 of the Code amended

The Code Civil Mauricien is amended by deleting Article 246 and replacing it with the following new Article-

### Article 246

Le jugement de divorce prend effet dans les rapports entre les époux, en ce qui concerne leurs biens:

- lorsqu’il est prononcé par consentement mutuel, à la date de l’homologation de la convention réglant l’ensemble des conséquences du divorce, à moins que celle-ci n’en dispose autrement;
- lorsqu’il est prononcé pour acceptation du principe de la rupture du mariage, pour rupture de la vie commune ou pour faute, à la date d’assignation.

A la demande de l’un des époux, le juge peut fixer les effets du jugement à la date à laquelle ils ont cessé de cohabiter et de collaborer.

**7. New Articles 253-1 and 253-2 inserted in the Code**

The Code Civil Mauricien is amended by inserting immediately after Article 253 the following new Articles:

**Article 253-1**

Quand le divorce est prononcé par consentement mutuel, les époux décident eux-mêmes du sort des donations et avantages qu’ils s’étaient consentis; s’ils n’ont rien décidé à cet égard, ils sont censés les avoir maintenus.

**Article 253-2**

Quand le divorce est prononcé par acceptation du principe de la rupture du mariage, chacun des époux peut révoquer tout ou partie des donations et avantages qu’il avait consentis à l’autre.

**8. New Article 262-1 inserted in the Code**

The Code Civil Mauricien is amended by inserting immediately after Article 262 the following new Article:

**Article 262-1**

En cas de divorce par consentement mutuel, les dispositions de la convention homologuée par le juge relatives à l’exercice de l’autorité parentale peuvent être révisées, pour des motifs graves, à la demande de l’un des époux ou du ministère public.

**9. New Articles 280 and 281 inserted in the Code**

The Code Civil Mauricien is amended by inserting immediately after Article 279 the following new Articles:

**Article 280**

Dans tous les cas de séparation de corps, celle-ci peut être convertie en divorce par consentement mutuel.

Quand la séparation de corps a été prononcée par consentement mutuel, elle ne peut être convertie en divorce que par consentement mutuel.

**Article 281**

Du fait de la conversion, la cause de la séparation de corps devient la cause du divorce; l’attribution des torts n’est pas modifiée.

Le juge fixe les conséquences du divorce. Les prestations et pensions entre époux sont déterminées selon les règles propres au divorce.

## **10. Consequential Amendments**

*(a) By deleting sections 5 to 12 of the Divorce and Judicial Separation Act and replacing them with the following new sections-*

### **5. Contents of petition**

(1) Subject to subsection (2), a petition for divorce or judicial separation under Article 230, Article 231 or Article 235 of the Code Civil Mauricien shall set out all the facts on which the petitioner relies to satisfy the Court that he is entitled to a decree and no facts other than those set out in the petition, shall be admitted in evidence.

- (2) Where new facts arise or come to the knowledge of the petitioner after the presentation of the petition, the petitioner may, with the leave of the Court, adduce in evidence the new facts and thereupon the new facts shall be deemed to form part of the petition.
- (3) A petition for divorce or judicial separation under Article 238-1 of the Code Civil Mauricien shall be accompanied by a copy of the draft agreement agreed upon by the parties.
- (4) A petition for divorce or judicial separation under Article 238-4 of the Code Civil Mauricien shall be accompanied by a statement that the parties accept that the marriage has broken down.
- (5) There shall be annexed to every petition –
  - (a) a copy of the marriage certificate of the parties; or
  - (b) where the marriage certificate is not available, an affidavit containing –
    - (i) the names of the parties;
    - (ii) the date on which and the place where the marriage was celebrated;
    - (iii) the matrimonial regime under which the parties are married; and
  - (c) where appropriate, a list of the witnesses which the petitioner intends to call;
  - (d) where any agreement under section 14 has been reached between the parties, a copy of the agreement; and
  - (e) where the petitioner is willing to make arrangements for the welfare of the children, a copy of the proposed arrangements.

**5A. Petition for Divorce or Judicial Separation under Article 230, Article 231, or Article 235 CCM**

- (1) On receipt of a petition for divorce or judicial separation under Article 230, Article 231, or Article 235 of the Code Civil Mauricien, the Registrar shall fix a date and time for the preliminary hearing of the application.
- (2) Subject to subsection (3), when a date and time is fixed for the preliminary hearing of an application under subsection (1), the petitioner shall cause a copy of the petition to be

served on the respondent in person and shall give at least 15 days notice to the respondent of the date of the preliminary hearing.

- (3) Where the respondent is in Mauritius and personal service cannot be effected, and the judge in Chambers is satisfied that the respondent is avoiding service of process, he may order that service be effected at the respondent's last known place of residence.

#### **6. Petition for Divorce or Judicial Separation under Article 238-1 CCM**

- (1) On receipt of a petition for Divorce or Judicial Separation under Article 238-1 of the Code Civil Mauricien, the Registrar shall immediately fix a date and time for its examination by the judge.
- (2) Pending the renewal of the petition in accordance with Article 238-2 of the Code Civil Mauricien, the judge may request the parties to explore prospects of reconciliation.

#### **6A. Petition for Divorce or Judicial Separation under Article 238-4 CCM**

- (1) On receipt of a petition for Divorce or Judicial Separation under Article 238-4 of the Code Civil Mauricien, the Registrar shall immediately fix a date and time for the hearing of the application.
- (2) Pending the renewal of the petition in accordance with Art. 238-5 of the Civil Code, the judge may request the parties to explore prospects of reconciliation.

#### **7. Preliminary hearing**

- (1) On the day fixed for preliminary hearing, the Judge in Chambers shall inquire from the petitioner and from the respondent, if in attendance, and their counsel or attorney, whether an attempt has been made to effect a reconciliation of the parties.

(2) (a) Where the Judge in Chambers is satisfied that proper efforts have been made to effect a reconciliation and the parties are unlikely to be reconciled, he shall fix the case for trial to the earliest possible date but not before one month.

(b) Where the Judge in Chambers is satisfied that no proper efforts have been made to effect a reconciliation or that the parties are likely to be reconciled, he shall give consideration to the possibility of reconciling the parties and, where appropriate, try to reconcile them or adjourn the proceedings for such period as he thinks fit not exceeding one month with or without a direction that the parties seek help on the possibility of a reconciliation.

(c) Where the parties cannot be reconciled under paragraph (b), the Judge in Chambers shall make the order provided under paragraph (a).

(3) On the day fixed for the preliminary hearing of the petition, the respondent may-

(a) file a cross-petition; or

(b) admit the contents of the petition.

(4) Where the respondent intends to defend the petition, he shall, not later than 15 days before the date fixed for the trial of the case, give notice to the petitioner of his objections and a list of the witnesses he intends to call.

## **8. Provisional decree**

At the trial of the case, where the Court is satisfied that the petitioner has established his case, the Court shall, in the first instance, grant a provisional decree.



### **9. Permanent decree**

- (1) Subject to subsection (2) and section 10, any party may apply to the Court for a provisional decree to be made permanent.
- (2) No decree shall be made permanent, except after the expiry of 3 months from the date on which the provisional decree was made.

### **10. Restrictions on permanent decree**

- (1) The Court shall not make permanent a provisional decree unless the Court is satisfied-
  - (a) that there is no child in relation to whom financial arrangements ought to be made; or
  - (b) that financial arrangements have been made for every child in relation to whom such arrangements should be made and that the arrangements made are satisfactory or the best that can be devised in the circumstances; or
  - (c) it is impracticable for the party or parties appearing before the Court to make such arrangements.
- (2) Where a provisional decree has been made in proceedings for a decree of dissolution of marriage, the Court may, at any time before the decree becomes permanent, upon the application of the parties to the marriage, rescind the decree on the ground that the parties have become reconciled.

### **11. Certificate as to decree**

- (1) Where a provisional decree becomes permanent, the Registrar shall prepare and file a memorandum of the fact and of the date upon which the decree became permanent.
- (2) Where a provisional decree has become permanent, any person is entitled, on application to the Registrar, to receive a certificate signed by the Registrar that the provisional decree has become permanent.
- (3) A certificate given under subsection (2) shall, in all courts and for all purposes, be evidence of the matters specified in the certificate.

## **12. Judicial Separation**

- (1) A petitioner who has been granted a decree of judicial separation may at any time apply to the Court for the conversion of the decree into a decree of divorce.
- (2) The respondent to a decree of judicial separation may, not earlier than 2 years after the date of the decree, apply to the Court for the conversion of the decree into a decree of divorce.
- (3) The Court shall, upon an application being made under subsection (1) or (2), grant the application unless good cause is shown against the grant of the application.

*(b) By deleting section 15 of the Divorce and Judicial Separation Act and replacing it with the following new section-*

## **15. Amendment of orders and agreements**

The Court may at any time on application made by either party amend or discharge an order made under section 13 or an agreement under section 14, or an agreement under Article 238-1 of the Code Civil Mauricien if it appears necessary to do so, having regard to any material change in the circumstances relating to either of the parties or to any child.

**11. Transitional Provisions**

- (1) Any petition for divorce or judicial separation or any application connected with it pending before the Court at the commencement of this Act shall be deemed to have been made under this Act.
- (2) The provisions of this Act shall apply to such petition.

**12. Commencement**

- (1) Subject to subsection (2), this Act shall come into operation on a date to be fixed by proclamation.
- (2) Different dates may be fixed for different provisions.