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Report of the Bills Committee on Domicile Bill

PURPOSE

This paper reports on the deliberations of the Bills Committee on Domicile Bill.

BACKGROUND

2. Domicile is what is termed in private international law a "connecting factor" : it determines under which system of law and within the jurisdiction of the courts of which country or territory certain issues (principally related to an individual's status or property) are to be determined. The major areas of law where the concept of domicile is used are set out in **Appendix I**.

3. The concept of domicile is unconnected with, and distinct from, nationality, citizenship and right of abode. The meaning of the other concepts is as follows -

- (a) Nationality is about the relationship between a citizen of a nation and the nation itself, customarily involving allegiance by the citizen and protection by the nation. While a person can be stateless, or have more than one nationality at the same time, he cannot be without a domicile, and can only have a single domicile at any one time.
- (b) Citizenship means the status of being a citizen. A citizen is a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections.
- (c) The concept of domicile does not have anything to do with a person's right of abode in Hong Kong because his right of abode does not depend on his domicile. Right of abode is a concept used in the context of the Immigration Ordinance and the Basic Law (e.g. Article 24). A person who enjoys the right of abode in Hong Kong has the right to land in Hong Kong and the right not to have imposed upon him any condition of stay in Hong Kong. He also has the right not to have a deportation order or a removal order made against him. All Hong Kong permanent residents enjoy the right of abode.

4. The existing rules for determining an individual's domicile are complex and confusing, and can sometimes lead to absurd results. In April 2005, the Law Reform Commission (LRC) published a report entitled "Rules for Determining Domicile" (the Report). The LRC has examined the rules for determining a person's domicile in Hong Kong and the anomalies in those rules. It has also examined the position in a number of other common law jurisdictions (Australia, Canada (Manitoba), India, Ireland, Malaysia, New Zealand, Singapore, South Africa and the United Kingdom) before formulating options for reforming the law and making recommendations.

5. The LRC has made a number of recommendations for legislative amendment, a summary of which is in **Appendix II**. The recommendations seek to clarify and simplify the law for determining an individual's domicile, and introduce certain changes to bring the law in line with modern conditions. A table comparing the effect of the current rules and the proposed rules is in **Appendix III**.

THE BILL

6. The object of the Domicile Bill (the Bill) is mainly to implement the recommendations of the Report. The major proposals are -

- (a) the concept of domicile of origin will be abolished;
- (b) the domicile of a child will no longer be directly tied to the parents' domicile; and
- (c) a married woman's domicile will no longer depend on that of her husband.

THE BILLS COMMITTEE

7. At the House Committee meeting on 23 February 2007, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix IV**.

8. Under the chairmanship of Hon James TO, the Bills Committee has held seven meetings with the Administration.

DELIBERATIONS OF THE BILLS COMMITTEE

9. The main deliberations of the Bills Committee are summarized below. In scrutinizing the Bill, the Bills Committee has made reference to the Report. In order to give a comprehensive picture about the reform, this report refers, where appropriate, to the existing rules and problems highlighted in the Report.

Commencement

10. Under clause 1(2), the Ordinance shall come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette. The Bills Committee has requested the Administration to step up publicity to facilitate the public to be aware of the new rules for determining domicile before the Ordinance comes into force.

11. The Administration agrees that the Bill, if passed, will be brought into force not less than six months from the date of enactment. As domicile is a technical and legal concept and is of particular interest to legal professionals, the Administration would seek the cooperation of the two legal professional bodies to publicize the changes among its members.

General rules in respect of domicile

12. The LRC recommends that the proposed legislation should set out the general rules on domicile (Recommendation 14(b)) -

- (a) no person can be without a domicile;
- (b) no person can at the same time for the same purpose have more than one domicile; and
- (c) for the purposes of a Hong Kong rule of the conflict of laws, the question of where a person is domiciled is determined according to Hong Kong law.

13. The Bills Committee notes that clause 3 of the Bill sets out the general principles governing domicile. These principles broadly reflect the existing common law.

Domicile of children

Existing rules and problems

Domicile of origin

14. By the operation of law, every person receives at birth a domicile of origin which depends on the domicile of the appropriate parent at the time of his birth, but not on where he was born or where the parents live. A domicile of origin is determined in the following ways -

- (a) a legitimate child born during the lifetime of his father has a domicile of origin in the country of his father's domicile at the time of his birth;
- (b) a legitimate child born after his father's death, or an illegitimate child,

has a domicile of origin in the country of his mother's domicile at the time of his birth; and

- (c) a foundling has a domicile of origin in the country where he was found.

15. The problems of the existing rules are as follows -

- (a) it is doubtful whether there is a need to have two sets of concepts and rules for determining a child's domicile, i.e. domicile of origin which determines domicile at birth, and domicile of dependency which determines domicile during childhood;
- (b) a domicile of origin is ascribed to every person at birth by operation of law. It reflects the domicile of the relevant parent at the time of birth, and where a child is born or where his parents live is irrelevant. Therefore, the same domicile of origin can be passed on from generation to generation even though few members of the family have actually lived in the country of their domicile;
- (c) the concept of revival of domicile of origin has been much criticized since it may render a person domiciled in a country with which he has only a stale or tenuous connection, or has never visited; and
- (d) there are also a number of matters which remain unsettled in respect of domicile of origin, such as the domicile of origin of a foundling, an adopted child, a legitimate child who was born after the divorce of his parents, and a posthumous child.

Domicile of dependency of children

16. In general terms, a legitimate child's domicile of dependency follows that of his father, while an illegitimate child's follows that of his mother.

17. The problems of the existing rules are as follows -

- (a) the existing rules differentiate between legitimate and illegitimate children, and can lead to some strange results;
- (b) it is difficult to justify in principle why the domicile of a child depends on whether his parents are married or not;
- (c) the existing rules cannot satisfactorily deal with the situation where a child's parents die (his domicile of dependency from the parents then cannot be changed), or where he is fostered or taken into the care of a local authority (the child's domicile will then continue to follow his parent's even though he is taken into the care of a local authority or lives with a third person); and

- (d) some matters concerning the domicile of dependency of children are uncertain, such as the domicile of a legitimated child and that of an adopted child.

Recommendation of LRC and clause 4 of the Bill

18. The LRC recommends that -

- (a) the concepts of domicile of origin and domicile of dependency should be discarded (Recommendation 2); and
- (b) there should be no differentiation between legitimate and illegitimate children in determining their domicile (Recommendation 3).

19. To replace the concepts of domicile of origin and domicile of dependency, the LRC recommends a single test, which ties the child's domicile to the jurisdiction with which he is most closely connected, as well as two presumptions so as to simplify the law. Clause 4 of the Bill implements Recommendation 4 of the Report by -

- (a) providing that a child is domiciled in the country or territory with which he is mostly closely connected (clause 4(1));
- (b) introducing two rebuttable presumptions to assist in the determination of the country or territory of closest connection, that is to say -
 - (i) where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory (clause 4(3)); and
 - (ii) where the child's parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it shall be presumed, unless the contrary is proved, that the child is most closely connected with the country or territory in which the parent with whom he has his home is domiciled (clause 4(4)).

Domicile of legitimate and illegitimate children

20. Hon James TO has expressed concern whether the recommendation to remove the differentiation between legitimate and illegitimate children in determining their domicile may undermine the marriage institution. He has requested the Administration to explain the basis for the LRC to formulate its recommendation. Hon Miriam LAU and Hon Audrey EU have pointed out that while they support the marriage institution, they consider the existing rule discriminatory and should be replaced by the proposed rule which takes account of the interest of the child.

21. The Administration has explained that in arriving at its recommendations, the LRC has examined the position in a number of other common law jurisdictions and has considered the following options -

- (a) to maintain the status quo;
- (b) to supplement the existing common law rules with statutory provisions;
and
- (c) to replace major common law rules with statutory provisions.

The LRC shares the view of the English and Scottish Commissions that the closest connection test not only provides clear guidance for the courts, but also allows the courts sufficient flexibility to ensure that all relevant factors can be taken into account. With this test, the law would also be better positioned to fill the gaps in the existing law and address other problematic circumstances.

22. The Administration has further explained that the enactment of the Parent and Child Ordinance (Cap. 429) has removed most of the legal disabilities associated with illegitimacy of children. However, a distinction is still drawn between legitimate and illegitimate children in respect of their domicile. The LRC finds it hard to justify in principle why a child's domicile should depend on the marital status of his parents, and therefore recommends eradicating this discriminatory differentiation.

Definition of "parents"

23. The definition of "parents" in clause 2 of the Bill means the father and the mother of that child and includes -

- (a) the adoptive parents of the child;
- (b) the step-parents of the child; and
- (c) the parents of the child who are not married to each other.

24. The Bills Committee has discussed whether the word "parents" should be in plural, as a child's parents might not always be of the same category, e.g. a natural parent and a step-parent.

25. The Administration has explained that the definition of "parents" in the Bill is based on the Domicile Act (No. 3 of 1992) of South Africa which provides in section 2(3) -

"'parents' includes the adoptive parents of a child and the parents of a child who are not married to each other."

As far as local legislation is concerned, the word "parent" appears in the singular in some ordinances and in the plural in other ordinances.

26. Having regard to the concern raised by members in using the term "parents" in the Bill, the Administration has proposed to amend the definition as follows -

"parent', in relation to a child, means -

- (a) the natural father or natural mother of the child (whether or not the natural father and natural mother are married to each other);
- (b) a parent of the child by adoption; or
- (c) a stepfather or stepmother of the child."

Priority of different categories of "parents"

27. The Bills Committee has discussed whether in applying the closest connection test in determining the domicile of children, any one category of parents would have priority over the other categories. It has suggested that the Secretary for Justice should clarify the priorities of different categories of "parents" in his speech during the resumption of Second Reading debate on the Bill. After consideration, the Administration has advised members that instead of an interpretation of the provisions of the Bill by the Secretary for Justice in his speech, members' concern should preferably be dealt with and clarified by way of CSAs.

28. On the position of adopted children, the Administration has explained that the effects of an adoption order is that all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child (the relevant matters) shall be extinguished and, in respect of the relevant matters, the child shall stand to the adopter exclusively in the position of a child born to the lawful wedlock. This rule is slightly modified where a child is adopted by a person married to the child's natural father or mother (i.e. a step-parent), in which case the extinguishment of rights, etc. does not apply to that natural parent and the child shall stand to the adopter and that natural parent exclusively in the position of a child born to them in lawful wedlock. The Administration has proposed to add a new sub-section 1A under clause 2 to make it clear that in the case of an adopted child, only the adopter or adopters (or, in the case of a child adopted by a person married to a natural parent of the child, only the adopter and that natural parent) is or are regarded as the child's parent or parents. The Administration has advised that the proposed CSAs are in line with the law of adoption.

29. The Administration considers that other than the case of parents by adoption, there are no clear policy reasons for making a general rule to accord priority to one category of parents over another. In applying the closest connection test in determining the domicile of children, the court will consider all circumstances of the case.

Domicile of adults

Existing rules and problems

30. At common law, where a person has left his homeland with the intention of not returning, his domicile of origin continues until he acquires a domicile of choice. The existing rules have long been criticized as artificial and uncertain. They are artificial because a person's domicile of origin persists long after any connection with the country concerned has ended, making it difficult to establish a new domicile of choice. They lead to uncertainty because of the difficulties in determining a person's intention.

31. Under the existing law, the act required to acquire domicile is "residence" which the courts have held that that "means very little more than physical presence". The word "residence", however, gives the impression of connoting something more than mere physical presence. The LRC is of the view that "presence" in the country concerned can best bring out the essence of the act required to acquire a domicile.

32. According to some older authorities, the existing law also requires an intention to reside permanently in a place before a person can acquire a new domicile. The courts have criticized this stringent requirement as unrealistic since it may well mean that "no man would ever have a domicile at all, except his domicile of origin". The LRC favours a different test, namely, an intention to make a home in the country concerned indefinitely.

Recommendations of LRC and clauses 5, 6 and 7 of the Bill

33. The LRC recommends that an adult's domicile should continue to be based on his acts and intention. Clauses 5, 6 and 7 of the Bill implement Recommendations 6 and 7 of the Report.

34. Clause 5 implements Recommendations 6(a) and 7 of the Report. Under clause 5(1), an individual will retain his last childhood domicile on becoming an adult (i.e. on reaching the age of 18), unless he acquires a new domicile. Two requirements are set out in clause 5(2) for the acquisition of a new domicile by an adult, namely -

- (a) he is present in another country and territory; and
- (b) he intends to make a home in that country or territory for an indefinite period.

35. Clauses 6 and 7 implement Recommendation 6(b) and (c) of the Report -

- (a) lawful presence in Hong Kong is required for an adult to acquire a domicile in Hong Kong (clause 6(1));

- (b) an adult's presence in Hong Kong is to be presumed to be lawful unless the contrary is proved (clause 6(2));
- (c) in exceptional circumstances where strict adherence to the general rule would result in injustice, an adult may acquire a domicile in Hong Kong even when his presence in Hong Kong is unlawful (clause 6(3)).

Clause 7 provides that in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors to be considered is whether his presence in that country or territory is lawful by the law of that country or territory.

Definition on "lawful presence"

36. As lawful presence in Hong Kong is required for an adult to acquire a domicile in Hong Kong, the Bills Committee has deliberated at length whether a definition of "lawful presence" should be provided in the Bill. The Bills Committee has considered, for example, if a person has unlawfully landed in Hong Kong and is then sentenced to prison for an immigration offence or any other offence, whether -

- (a) his presence in Hong Kong during his imprisonment would be regarded as lawful as he is sentenced to prison by a lawful order of the court; and
- (b) he could acquire a domicile in Hong Kong if he intends to make his home in Hong Kong during the imprisonment.

37. The Administration has explained that the Immigration Ordinance (Cap. 115) regulates, inter alia, whether a person has lawfully landed and stayed in Hong Kong. In order to satisfy the "lawful presence" requirement in clause 6(1) of the Bill, a person has to comply with the relevant provisions in Cap. 115. While a court order of imprisoning an illegal immigrant, who has committed an offence in Hong Kong, is made according to the law, this does not necessarily turn the illegal presence of the illegal immigrant or his imprisonment according to the court order into lawful presence for a specific purpose under a specific statute, i.e. for the purpose of obtaining a Hong Kong domicile under the Bill. Clause 6 is included in the Bill having regard to paragraph 4.100 of the Report which states that "... not requiring the requisite presence to be lawful,...could render the law confusing and uncertain. ... [Requiring the presence to be lawful] would achieve certainty, and consistency with some other common law jurisdictions...".

38. In response to members on whether there is a common law definition of "lawful presence" or "unlawful presence" in the context of domicile, the Administration has advised that there has been no judicial consideration of "lawful presence" in the context of domicile. The term "lawful presence" appears in section 32(2)(a) of the Public Order Ordinance (Cap. 245) which deals with the offence of carrying of offensive weapons during curfew. However, the term "lawful presence" is not defined in Cap. 245 and is used in a different context from clause 6(1) of the Bill.

39. Having regard to the example quoted in paragraph 36 above, some members have asked the Administration to consider providing a definition of "lawful presence" in the Bill to avoid uncertainty. The Administration has responded that it is questionable how often and how likely Hong Kong courts will be asked to determine such a person's domicile, bearing in mind that a person's domicile, as a connecting factor, connects him to a system of law which would determine his personal matters, such as his capacity to marry or devolution of his personal property. It is in these contexts that his domicile will need to be ascertained. The Administration has reservation on the need of including a provision in the Bill to cover a rare scenario.

40. The Administration has also pointed out that of the jurisdictions examined by the LRC, only section 1(2) of the Domicile Act 1992 in South Africa expressly requires a person's presence to be lawful in order to acquire a domicile in a particular place. The Domicile Act 1992, however, does not contain a definition of "lawful presence".

41. The Administration has further explained that case law and academic opinion available at the time of publication of the Consultation Paper on "Rules for determining domicile" suggested that in order to obtain a domicile, the requisite presence or residence had to be lawful in Hong Kong. However, with *Mark v Mark*, a recent Court of Appeal case in England (at the time of publishing the Report), the position has become less certain. In that case which was later appealed to the House of Lords, the Court of Appeal affirmed that the wife, an over-stayer in England, was domiciled in England at the time of issuing a divorce petition. In the light of this case, the LRC has expressed concern that strict adherence to the requirement of lawful presence may lead to injustice or hardship in certain circumstances. LRC has subsequently recommended in its report that as a general rule for the sake of certainty the presence necessary to acquire a Hong Kong domicile should be lawful, but that the court should have discretion to depart from the rule where in exceptional circumstances, strict adherence to the rule would lead to injustice. This recommendation is reflected in clause 6(3) of the Bill. Under this sub-clause, the court can exercise discretion in "exceptional circumstances" where the requirement for lawful presence would result in injustice. Where the court does exercise its discretion in deviating from the "lawful presence" requirement, the person in question will be domiciled in Hong Kong.

42. Given the complicated concept of domicile and the lack of a definition of "lawful presence" in the laws of Hong Kong and overseas jurisdictions, as well as the discretion of the court in exceptional circumstances under clause 6(3), the Bills Committee agrees that it is unnecessary to provide a definition of "lawful presence" in the Bill.

Acquiring a domicile in another country or territory

43. Clause 7 provides that, in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors to be considered is whether his presence in that country or territory is lawful by the law of that country or territory.

44. In response to members' enquiry about the meaning of the phrase "one of the factors" in clause 7, the Administration has clarified that the court will take into account all relevant factors in determining an adult's domicile in a country other than Hong Kong. However, an adult is not necessarily prevented from obtaining a domicile in another jurisdiction simply because his presence there is unlawful. The Administration has proposed to revise the drafting of clause 7 by way of a CSA to reflect the policy intent.

Domicile of adults under disability

Existing rules and problems

45. Two aspects of the existing law on domicile of the mentally incapacitated lead to artificiality. First, the domicile of a mentally incapacitated person freezes at the time of the onset of his incapacity. Second, if his incapacity commences before the age of majority, his domicile will be determined as if he were a child as long as he remains incapacitated.

Recommendation of LRC and clause 8 of the Bill

46. The LRC recommends that -

- (a) a mentally incapacitated adult should be domiciled in the country with which he is most closely connected;
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he has held before his recovery, and he may then acquire a domicile of his choice; and
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention (Recommendation 10).

Clause 8 of the Bill implements these recommendations.

47. The legal adviser to the Bills Committee has pointed out that under clause 8(1), an adult lacking the intention necessary for acquiring a domicile would have a domicile based on the closest connection test. However, under clause 5, a normal adult seems to have a domicile of choice with actual presence. The two tests may result in a different outcome, as in the example of an individual freshly arrived in a foreign country intending to set up his new home there while his family and other connections are still with his former home. If he then becomes incapacitated in that foreign country, his domicile may well change back from that of the foreign country to that of his former home. When his capacity is restored to him while he is still in the foreign country, he retains under clause 8(3) the domicile that he had immediately before the capacity was restored. The Bills Committee has discussed whether and if

so, how the person can acquire a new domicile in that foreign country as he originally intended.

48. The Administration has explained that under clause 8 of the Bill, the court will look at all the circumstances before deciding with which jurisdiction a disabled adult is most closely connected, apart from just where his family and friends are. It all depends on the facts, and it is difficult to foretell the court's determination without knowing the facts. Upon restoration of his capacity, the person in the example is at liberty to acquire a domicile in any place by having his presence there and intending to make a home there indefinitely in accordance with clause 5.

Provisions against manipulation in determining domicile of a child, an adult, or a mentally incapacitated person

49. Hon James TO has expressed concern whether the closest connection test would be subject to manipulation for the benefit of another person in deciding the domicile of a child, an adult, or a mentally incapacitated person.

50. The Administration has advised that -

- (a) the English and Scottish Law Commissions consider the closest connection test would provide some built-in protection against a third party's attempt to manipulate a child's domicile for improper purposes. The court would have sufficient flexibility in such a case to take account of circumstances where, for ulterior motives, a child has been removed from the country to which he is most closely connected;
- (b) the LRC has considered the possibility of manipulation in the case of a child or a person under mental disability by a third party so as to trigger the application of a system of law more favourable to the third party's own interests in, for instance, the devolution of property, and is satisfied that the closest connection test would allow the court to have regard to all the circumstances of the case. The LRC does not consider that there is a need to have special provisions to guard against possible manipulation; and
- (c) domicile determines what system of law applies to a person's civil status, rather than direct entitlement to benefits. An adult capable of forming the required intention is free to change his intention as to where to have his home and that he can make a will to express his testamentary intention. Therefore, it appears unlikely that manipulation of a person's domicile for an ulterior motive would occur.

51. The Administration has emphasized that the Bill does not purport to be a comprehensive code but merely seeks to reform outdated concepts (e.g. domicile of origin and domicile of dependency) to reflect modern realities.

Domicile in country comprising two or more territories

Existing rules

52. Under the existing Hong Kong law, where a person lives in a federal or composite state without deciding in which constituent part of that state to settle permanently or indefinitely, he will not acquire a new domicile in any constituent part of that state.

Recommendation of LRC and clause 10 of the Bill

53. Clause 10 makes special provisions for the acquisition of a domicile in a country comprising two or more territories. This implements Recommendation 12 of the Report by providing that an adult who is present in a country comprising two or more territories, and who intends to make a home somewhere in that country for an indefinite period but has not formed an intention to make a home in any particular territory in that country, will be domiciled in the constituent territory with which he is most closely connected.

54. The Bills Committee has asked whether the operation of the clause would create an uncertainty in the domicile of those who alternate his residence and workplace between Hong Kong and the Mainland frequently.

55. The Administration has clarified that clause 10 would only apply where a person has not made up his mind as to where to have his home indefinitely in a federal or composite state (clause 10(b)). If a person has intended to make his home in Hong Kong indefinitely, his frequent trips to the Mainland would not change his domicile. Clause 5, instead of clause 10, applies in determining his domicile.

Closest connection test

56. The Bills Committee has pointed out that clauses 4(1), 8(1) and 10 refer to a closest connection test. In determining the domicile of a child, the court is required under clause 4(2) to take into account all relevant factors including the intention of the child. However, the same requirement is absent in determining the domicile of an adult under disability (clause 8) and the domicile of an adult in country comprising two or more territories (clause 10).

57. The Administration has explained that in response to the Consultation Paper on "Rules for Determining Domicile", the Hong Kong Bar Association stressed that the child's intention should not be ignored in applying the closest connection test. The LRC has therefore recommended that the child's intention should be one of the relevant circumstances for determining the country or territory with which a child is most closely connected which is implemented by clause 4(2). On the other hand, no specific guidance has been recommended for determining the country or territory with which an adult under disability, or an adult in a country comprising two or more territories, is most closely connected. Hence, no provision similar to clause 4(2) is made in relation to clause 8(1) and 10.

58. In order to address members' concerns, the Administration has proposed to delete the existing clause 4(2) and include a general provision on "closest connection" in the Bill by adding a new clause 10A. The new clause provides that -

- (a) in determining for the purposes of clause 4, 8 or 10 the country or territory with which an individual is for the time being most closely connected, account may be taken of any relevant matter;
- (b) in determining for the purposes of section 4 the country or territory with which a child is for the time being most closely connected, account shall be taken of any preference that the child may have as to the country or territory in which to have his home; and
- (c) in determining for the purposes of clause 8 the country or territory with which an adult lacking the capacity to form the intention necessary for acquiring a domicile is for the time being most closely connected, account shall be taken of any intention that he might have, immediately before losing that capacity and as an adult, as to the country and territory in which to make a home for an indefinite period; and
- (d) any matter taken into account under paragraph (a), (b) or (c) above may be given such weight as is appropriate in all the circumstances of the case.

Domicile of dependency of married women

Existing rules and problems

59. For the purpose of the law of domicile, a married woman is a dependent person. A married woman's domicile is the same as, and changes with, her husband's domicile. The rule applies even where the spouses live apart in different countries, whether or not according to a formal separation agreement, or where a wife has obtained a decree of judicial separation.

60. However, section 11C of the Matrimonial Causes Ordinance (Cap. 179) allows a married woman to have her own independent domicile for certain limited purposes, i.e. the jurisdiction of court in respect of divorce, nullity, judicial separation, etc.

61. The LRC has expressed concern that -

- (a) the common law rule on the domicile of married women seems to contravene Article 15(4) of the Convention of Elimination of All Forms of Discrimination against Women which applies to Hong Kong; and
- (b) it is questionable whether this rule satisfies Article 22 of the Hong Kong Bills of Rights, as set out in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) and Articles 25 and 39 of the Basic Law.

Recommendation of LRC and clauses 14 and 15 of the Bill

62. The LRC recommends that the domicile of dependency of married women be abolished (Recommendation 9).

63. The Bills Committee has noted that clauses 14 and 15 are consequential amendments to the Matrimonial Causes Ordinance (Cap. 179) -

- (a) section 11C(2) of Cap. 179 is an exception to the common law rule of domicile of dependency of a married woman. With the abolition of that rule, section 11C(2) will no longer be necessary. Clause 14 repeals section 11C(2); and
- (b) under section 59 of Cap. 179, a divorce or legal separation obtained in, or is recognized as valid in, the country of a married couple's domicile is recognized as valid in Hong Kong. With the abolition of the domicile of dependency of a married woman, the husband and the wife may have different domiciles. Clause 15 amends section 59 so that a divorce or legal separation obtained in, or is recognized as valid in, the country of either spouse's domicile is recognized as valid in Hong Kong.

Standard of proof

Existing rules

64. Under existing law, the standard of proof may be higher than a mere balance of probabilities applied in other civil cases, where the domicile to be displaced is a domicile of origin.

Recommendation of LRC and clause 11 of the Bill

65. The Bills Committee notes that clause 11 implements Recommendation 11 of the Report and provides that the normal civil standard of proof on a balance of probabilities applies in all disputes about domicile.

Domicile before, on or after commencement date

Recommendation of LRC

66. The Administration has explained that if the rules for determining domicile are reformed, it is likely that the existing domicile of some persons may be affected. It is therefore necessary to consider the transition from the existing rules to the new rules. The LRC recommends that -

- (a) the new legislation should not have retrospective effect;
- (b) a person's domicile at any time before the commencement date of the new legislation should be determined as if the legislation had not been passed; and

- (c) his domicile at any time or after that date should be determined as if the new legislation had always been in force.

Clauses 12 and 13 of the Bill

67. Clause 12 (relating to domicile before commencement date) and clause 13 (relating to domicile on or after commencement date) implement Recommendation 13 of the Report. Clause 13(3) provides that, for the purposes of determining the domicile of a person on or after the commencement date, various common law rules (including that relating to the domicile of origin) are abolished.

68. The Bills Committee has raised the following concerns -

- (a) whether the application of clause 12 should be subject to clause 13(1) in order to remove doubt as to whether clause 12 or 13 should apply in the event that a child became an adult on the commencement date of the Domicile Ordinance; and
- (b) whether clause 13(3) should be included in the Bill, having regard to members' concern that some of the common law rules set out therein and proposed to be abolished might not be inconsistent with the Domicile Ordinance.

The Administration has agreed to move CSAs to clause 13 to address members' concerns.

COMMITTEE STAGE AMENDMENTS

69. The CSAs to be moved by the Administration to the Bill are supported by the Bills Committee.

CONSULTATION WITH THE HOUSE COMMITTEE

70. The Bills Committee made a report on its deliberations to the House Committee on 25 January 2008 and recommended support of the resumption of the Second Reading debate on the Bill at the Council meeting on 20 February 2008.

Appendix I

Major Areas of Law Where the Concept of Domicile Is Used

(a) Legal capacity to marry

Legal capacity to marry is governed by the law of each party's antenuptial domicile. A marriage is valid in respect of legal capacity if each of the parties has capacity to marry under the law of his or her antenuptial domicile.

(b) Succession to an intestate's movables

Succession to an intestate's movables, wherever situated, is governed by the law of his domicile at the date of his death. By contrast, all questions of succession to an intestate's immovables are governed by the *lex situs* (i.e. the law of the place where the land is situated).

(c) Personal capacity to make a will

A testator's personal capacity to make a will of movables is governed by the law of his domicile. Personal capacity is determined by criteria which relate to a person himself, rather than his property. Those criteria, according to which domiciliary law applies, may include his physical or mental state, or his age or marital status.

(d) Formal validity of a will

A will is treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, the testator was domiciled or had his habitual residence, or was a national.

(e) Jurisdiction of court in proceedings for divorce, etc

The court has jurisdiction in proceedings for divorce and nullity if either party to the marriage was domiciled at the date of the petition or habitually resident for a period of three years before that date, in Hong Kong. The court has jurisdiction in proceedings for judicial separation if either party to the marriage was domiciled at the date of the petition in Hong Kong.

(f) Jurisdiction of court in proceedings for presumption of death and dissolution of marriage

The court has jurisdiction in proceedings for presumption of death and dissolution of marriage if a petitioner was domiciled at the date of the petition

or habitually resident for a period of three years before that date, in Hong Kong.

(g) Declarations of legitimacy, etc

A person may, if he is domiciled in Hong Kong, apply by petition to the court for a decree declaring that he is a legitimate child of his parents; or that the marriage of his parents or of his grand-parents was a valid marriage; or that his own marriage was a valid one.

(h) Recognition of overseas divorces or legal separations

An overseas divorce or legal separation will be recognised in Hong Kong if, at the time of the institution of the proceedings in the country concerned, either spouse was domiciled in, habitually resident in, or a national of, that country.

(i) Legitimation by subsequent marriage of parents

If the father of an illegitimate child is domiciled in Hong Kong at the date of his subsequent marriage with the mother of the child, the child will be legitimated.

(j) Declaration of a person's status

If a person is domiciled or habitually resident in Hong Kong, he may apply to the court for a declaration that (1) a person named in his application is or was his parent; (2) he is a legitimate child of his parents; or (3) he has become a legitimated person.

(k) Service of process out of the jurisdiction

Service of a writ out of the jurisdiction is permissible in Hong Kong if relief is sought against a person domiciled or ordinarily resident within the jurisdiction, or the claim is made for the administration of the estate of a person who died domiciled within the jurisdiction.

(l) Direct application of Chinese law and custom as Hong Kong domestic law

The direct application of Chinese law and custom as Hong Kong domestic law (e.g., in relation to a union of concubinage entered into before 7 October 1971) is confined to Chinese persons domiciled in Hong Kong. Hong Kong law does not treat Chinese law and custom as the personal law of all ethnic Chinese, regardless of their domicile. Merely being an ethnic Chinese or a Chinese inhabitant of Hong Kong does not suffice.

**Report of Law Reform Commission on
"Rules for Determining Domicile"**

**Chapter 5
Summary and practical effects of
recommendations**

Summary of recommendations

Chapter 3 - Should domicile be retained as a general connecting factor?

5.1 Domicile should be retained as a general connecting factor, but the existing rules for determining a person's domicile should be modified as recommended in this Report. (*Recommendation 1*)

Chapter 4 - The law in other jurisdictions, options for reform and recommendations

5.2 We recommend that the concept of domicile of origin and that of domicile of dependency should be discarded. (*Recommendation 2*)

5.3 We recommend that there should be no differentiation between legitimate and illegitimate children in determining their domicile. (*Recommendation 3*)

5.4 We recommend the following rules for determining a child's domicile:

- (a) a child's domicile should be in the country with which he is most closely connected;
- (b) where a child's parents have their domicile in the same country and the child has his home with either or both of them, he is presumed to be domiciled in that country, unless he is proved to be most closely connected with another country; and
- (c) where a child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be domiciled in the country where the parent with whom he has his home is domiciled, unless he is proved to be most closely connected with another country.

In this context, "parents" includes adoptive parents of a child. In applying the closest connection test, the courts should take account of all relevant factors, including the child's intention. (*Recommendation 4*)

5.5 We recommend that any person who is not mentally incapacitated may acquire a domicile of his choice once he attains the age of 18. (*Recommendation 5*)

5.6 We recommend that :

- (a) the act necessary for a person of full age and capacity to acquire a domicile should be presence in the country concerned;
- (b) as a general rule, lawful presence in Hong Kong should be required to acquire a domicile in Hong Kong, but in exceptional circumstances, where strict adherence to the rule would lead to injustice, the court should have discretion to depart from the rule; and a person's presence should be presumed to be lawful, unless and until the contrary is established; and
- (c) in deciding whether an individual has acquired a domicile in a country other than Hong Kong, one of the factors to be considered by the Hong Kong courts should be whether or not the presence in that country is lawful by the laws of that country. (*Recommendation 6*)

5.7 We recommend that the requisite intention for a person of full age and capacity to acquire a domicile should be that the individual intends to make a home in the country concerned for an indefinite period. (*Recommendation 7*)

5.8 We recommend that the domicile a person has at any time should continue until he acquires a different one, whether by choice or by operation of law. (*Recommendation 8*)

5.9 We recommend that the domicile of dependency of married women should be abolished. (*Recommendation 9*)

5.10 We recommend that:

- (a) a mentally incapacitated adult should be domiciled in the country with which he is most closely connected;
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and he may then acquire a domicile of his choice;

- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention. (*Recommendation 10*)

5.11 We recommend that the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile. (*Recommendation 11*)

5.12 We recommend that a person who is present in a federal or composite state and intends to make his home there indefinitely should, if not held to be domiciled in any law district within that state under the general rules recommended in this Report, have his domicile in the law district with which he is for the time being most closely connected. (*Recommendation 12*)

5.13 We recommend that:

- (a) the Recommended Legislation should not have retrospective effect;
- (b) a person's domicile at any time before the commencement date of the Recommended Legislation should be determined as if the legislation had not been passed;
- (c) his domicile at any time after that date should be determined as if the Recommended Legislation had always been in force. (*Recommendation 13*)

5.14 We recommend:

- (a) that the Recommended Legislation on the rules for determining natural persons' domicile should be as comprehensive as possible;
- (b) that the Recommended Legislation should set out the following general rules on domicile:
 - no person can be without a domicile;
 - no person can at the same time for the same purpose have more than one domicile;
 - for the purposes of a Hong Kong rule of the conflict of laws, the question of where a person is domiciled is determined according to Hong Kong law;

- (c) that the Recommended Legislation should include a saving provision for the existing common law rules which are not inconsistent with the new statutory rules. (*Recommendation 14*)

Practical effects of recommendations

5.15 We hope that the recommendations in this Report will improve this complex and confusing area of common law by simplifying the concept of domicile and making the ascertainment of a person's domicile easier. Annex 3 tabulates the current rules and the proposed rules for comparison. In practical terms, we do not think that the recommendations would change the domicile of many people, with the exception of the proposed abolition of the married women's domicile, which would change the domicile of some married or recently divorced women. Those changes may have already taken effect as a consequence of Article 8 of the Basic Law., but we feel it is important to resolve this matter clearly, to remove any uncertainty, to deal with transitional problems expressly, and to eliminate a discriminatory rule from Hong Kong law once and for all.

5.16 Another major change is that relating to the domicile of children. The existing rules are essentially based on the Victorian idea of the father being the *pater familias*, and we believe that our proposals would more closely reflect modern realities. Lastly, the abolition of the concept of domicile of origin may also impact on some people's domicile. It is worth mentioning that the formation of the concept and its special tenacity were influenced by the desire of those resident in colonies overseas at the height of the British Empire more than a century ago to have their private and family life governed by the law of their homeland. In a different age, we question the validity of this special bias in favour of a person's first domicile, especially in the light of greatly increased mobility. We believe that the abolition of domicile of origin would make the domiciliary rules more in tune with the modern world.

**Table Comparing the Effects of the Current Rules
with the Proposed Rules**

| | <i>Under the Current Rules</i> | <i>Under the Proposed Rules</i> |
|--|--|--|
| <p><i>Abolition of domicile of origin</i></p> <p>(1) F and his wife (M) lived and were domiciled in Hong Kong when C, their child, was born within wedlock. M then remarried an Englishman and moved permanently to England with C.</p> | <p>C's domicile of origin follows F's domicile at the time of C's birth (ie Hong Kong), even though C has only maintained a loose link to Hong Kong after moving to England. In addition, C's domicile of dependency, during F's lifetime, is the same as, and changes with, F's domicile.</p> | <p>There will be no domicile of origin, and C, as a child, will be presumed to be domiciled in the jurisdiction where M, the parent with whom he has his home, is domiciled. In this case, if M has a domicile in England (which is probably the case), C will be presumed to be domiciled there. If, for any reason, the presumption does not apply, C will be domiciled in the jurisdiction with which he is most closely connected. In other words, his domicile will not artificially follow F's, and the court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that is likely to be England.</p> |
| <p>(2) When B was born, his parents</p> | <p>Since B had abandoned his New Zealand domicile</p> | <p>There will be no domicile of origin and so no</p> |

| | <i>Under the Current Rules</i> | <i>Under the Proposed Rules</i> |
|--|--|---|
| were domiciled in Hong Kong. At the age of 5, he moved with his parents to New Zealand, and then acquired a domicile of choice there on reaching the age of majority. He left New Zealand at the age of 50 with the intention of settling permanently in Australia. On his way to Australia, B died in a plane accident. | of choice and had not acquired a new domicile, his Hong Kong domicile of origin, received at birth, would revive upon the abandonment. This is so, even though he only had had a weak connection with Hong Kong. | revival of it. A person's domicile will continue until he acquires another one. Since B had not acquired a new domicile when he died, his New Zealand domicile would persist. |
| <i>Domicile of children</i> (3) B, a child born within wedlock, migrated to Sydney from Hong Kong with his parents who then acquired a New South Wales domicile. Both of his parents subsequently died in Sydney and B returned to Hong Kong to be brought up by his grand-parents. | B's domicile of dependence follows his father's (ie New South Wales). Despite the fact that B has not returned to, and has had a weak connection with, Sydney, his New South Wales domicile of dependence persists until he acquires a domicile of choice after attaining the age of majority. | B will be domiciled in the jurisdiction with which he is most closely connected, and the presumptions will not apply as his parents have already passed away. His domicile will not artificially follow his deceased parents', and the court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that is probably Hong Kong. |
| <i>Domicile of Married women</i> (4) W, domiciled in Hong Kong, | W is still domiciled in France because of her domicile of dependency as a married woman, | W's domicile would be determined in the same |

| | <i>Under the Current Rules</i> | <i>Under the Proposed Rules</i> |
|--|--|---|
| <p>married H who was domiciled in France. The couple lived in France after the wedding in Hong Kong. A few years later, W went back to Hong Kong, and then obtained a decree of judicial separation.</p> | <p>despite the decree of judicial separation and the fact that the couple are living in different jurisdictions.</p> | <p>way as that of other adults, instead of artificially linking her domicile to her separated husband's. Accordingly, W may be domiciled in Hong Kong, provided that she intends to make her home in Hong Kong indefinitely.</p> |
| <p><i>Domicile of adults under disability</i></p> <p>(5)</p> <p>B, domiciled in Hong Kong, became a person under disability when he was 25 years old and was then sent to Shanghai for treatment so that his sister, his remaining next-of-kin, could take care of him. B has already lived in Shanghai for a number of decades since then.</p> | <p>B's Hong Kong domicile persists so long as he remains a person under disability.</p> | <p>B will be domiciled in the jurisdiction with which he is most closely connected. The court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that may be the Mainland of the PRC.</p> |
| <p>(6)</p> <p>C, a child born within wedlock, became a person under disability. At 16, he was sent by his father (F), domiciled in Hong Kong, to an institution in Guangdong province and has</p> | <p>C's domicile of dependency continues even though he has already passed the age of majority. Hence, his domicile changes with that of his father. C is, therefore, domiciled in British Columbia, even though he has never been there.</p> | <p>C will be domiciled in the jurisdiction with which he is most closely connected. The court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that may be the Mainland of the PRC.</p> |

| | <i>Under the Current Rules</i> | <i>Under the Proposed Rules</i> |
|--|---|--|
| remained there since then. C was still a person under disability at 29 when F migrated to Vancouver permanently so that F could be looked after by F's married daughter. | | |
| <p><i>Domicile in a federal or composite state</i></p> <p>(7)</p> <p>B, with a Hong Kong domicile of origin, left Hong Kong at the age of 2 and later acquired a domicile of choice in New Zealand. At 60, he moved to Australia with the intention of settling there permanently. He has been living in New South Wales for a few months, without deciding in which city to make his home.</p> | <p>Since B has abandoned his New Zealand domicile without acquiring a new one, his Hong Kong domicile of origin would revive although he has rarely returned to Hong Kong and has had a weak connection with it since the age of 2.</p> | <p>B will be domiciled in the jurisdiction within Australia with which he is most closely connected. The court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that may be New South Wales.</p> |

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Bills Committee on Domicile Bill

Membership list

| | |
|----------------------|--|
| Chairman | Hon James TO Kun-sun |
| Members | Hon Martin LEE Chu-ming, SC, JP (since 30 April 2007) Hon Jasper TSANG Yok-sing, GBS, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Audrey EU, SC, JP Total : 5 Members |
| Clerk | Mrs Percy MA |
| Legal Adviser | Mr Arthur CHEUNG |
| Date | 30 April 2007 |