

Divorce Law in Kenya: In Support of a Uniform No-Fault Regime

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Abstract

*In 2014, Kenya enacted the Marriage Act to amend and consolidate various laws on marriage and divorce. Among the amendments introduced was the irretrievable breakdown ground of divorce alongside more traditional fault-based grounds. The court in *CWL v HN* noted that the introduction of this ground had effectively done away with the need for petitioners to provide evidence of matrimonial fault in divorce proceedings. Despite this, the Act still maintains traditional fault grounds for divorce not only as independent grounds but also as factors to be considered when determining whether a marriage has irretrievably broken down. The author contends that this retention of fault-based requirements reflects an outdated position and contradicts the thinking behind the introduction of irretrievable breakdown as a divorce ground. This study, therefore, proposes adopting a uniform no-fault divorce system premised on irretrievable breakdown. To better align this system with the dual objective of protecting individual dignity while also safeguarding the dignity and sanctity of marriage, the study proposes a model that includes a mandatory requirement to attempt reconciliation before petitioning for divorce.*

Keywords: *Irretrievable Breakdown, Marriage, No-Fault Divorce System, Marriage Act, Unitary*

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I. Introduction

Family as a concept or institution is perhaps as old as humans and often denotes individuals related either by blood or brought together by marriage.¹ The institution of marriage is therefore crucial in the formation of a family and holds a special place in family law. In Kenya, marriage is the voluntary union of a man and a woman either in a monogamous or polygamous setting.² In many societies, marriage was considered a lifelong commitment. This preference is most aptly envisaged in the common Judeo-Christian marriage vows where spouses commit to one another ‘till death do us part’.³ In the Christian tradition, the belief in marriage as a life-long commitment is often traced back to the famous scripture in Mathew which speaks of marriage as a divine unification which ought not to be severed.⁴

Despite the preference for permanence in marriage, history is tainted by instances where society had to acknowledge that this ideal was unattainable.⁵ Family law has had to accommodate various grounds and reasons for which individuals would wish to dissolve their marriages. Divorce law forms an important part of family law because divorce is a legal matter which changes the legal status of the partners and has a ripple effect on other aspects of family life such as child custody and antenuptial agreements.⁶ Society’s interest in the regulation of marriage may thus be explained by the fact that marriage often creates rights and duties for the parties, some of which remain even after the dissolution of the union.⁷ This article seeks to interrogate Kenya’s current divorce laws with regard to the currently recognised grounds for divorce and particularly the dissonance that exists between the newly-introduced ground of irretrievable breakdown and more traditional fault-based grounds for divorce.

¹ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishers, Nairobi, 2016, 1.

² Section 3, *Marriage Act* (Act No. 4 of 2014).

³ Smalley G, ‘7 Traditional Marriage Vows: What They Mean and Why They’re Still Important’ Focus on the Family, 8 November 2021 - < <https://www.focusonthefamily.com/marriage/7-traditional-marriage-vows-what-they-mean-and-why-theyre-still-important/> > on 30 May 2022.

⁴ Mathew 19:4-6 reads: “Have you not read that he who created them from the beginning made them male and female, and said, “Therefore a man shall leave his father and his mother and hold fast to his wife, and the two shall become one flesh”? So, they are no longer two but one flesh. What therefore God has joined together, let not man separate.”

⁵ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 163.

⁶ Friedman L, ‘Rights of Passage: Divorce Law in Historical Perspective’ 63(4) *Oregon Law Review*, 1984, 649.

⁷ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 92–94.

Before delving into the crux of this paper, the author finds it useful to first outline the law governing marriages and divorce in Kenya and the reforms that have led to the current regime. Reform to marriage laws in Kenya has always been a complex and delicate affair, touching on deeply rooted religious beliefs and divergent views on the proper course of social development regarding the marital union.⁸ Before colonialism, marriages were governed by adherence to the different customary laws of different communities.⁹ Despite the varying ethnicities and customary laws regarding marriage, Patrick Kiage notes that there were cross-cutting aspects including the practice of exchanging gifts, the payment of bride wealth, polygamy and the understanding that marriage consisted of a union of families and not just the individual spouses.¹⁰

During the colonial period, several laws were enacted, each governing a distinct marriage regime in an attempt to represent the diverse races, religions and customs in Kenya.¹¹ Despite the *de facto* representation of different regimes, the colonial powers made every effort to superimpose their legal system above all others.¹² This subjugation was entrenched under Section 3(2) of the Judicature Act which allows courts to be guided by African customary law in civil cases only and so long as such customary law was not repugnant to justice and morality and did not contradict any written law.¹³ Today, the Kenyan constitution restricts the application of customary law to the extent that it is consistent with the Constitution.¹⁴

Before the current Marriage Act, divorces in Kenya were governed by the 1941 Matrimonial Causes Act (repealed). The repealed Act provided for four divorce grounds: adultery; cruelty; desertion for not less than three years; and, where a spouse was incurable of unsound mind and had been continuously under care and treatment for the five years preceding the petition or where a husband

⁸ Contran E, 'Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' 40(2) *Journal of African Law*, 1996, 194.

⁹ Murungi L, 'Consolidating Family Law in Kenya' 17(2) *European Journal of Law Reform* 2015, 319.

¹⁰ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 18.

¹¹ Murungi L, 'Consolidating Family Law in Kenya', 319.

¹² Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 19.

¹³ Section 3(2), *Judicature Act* (No. 16 of 1967). Midamba gives a good illustration of this subjugation in the law which allowed for the conversion of potentially polygamous unions to monogamous unions but did not allow for the opposite possibility. It was also the case that despite the racial based plurality that existed, the European-introduced Marriage Act was considered the most authoritative legislation and was open to members from all races so long as they were willing to be bound by its substantive and procedural requirements.

¹⁴ Article 2(4), *Constitution of Kenya* (2010). See also Article 159(3) of the constitution on the application of traditional dispute resolution mechanisms.

was guilty of rape, sodomy or bestiality after the marriage was contracted.¹⁵ The Act prohibited a petition for divorce from being presented in court save for the marriage having had subsisted for three years prior unless the court was convinced that the petitioner had suffered exceptional hardship or depravity on the part of the respondent.¹⁶ In relying on the ground of adultery, a male petitioner was required to ensure that the alleged adulterer – the person who their spouse had cheated with - was enjoined in the proceedings as a co-respondent unless otherwise excused by the court.¹⁷ A female petitioner, however, could only enjoin the alleged adulterer with court direction.¹⁸

In 2010, Kenya made a monumental step in ushering in a new constitutional dispensation. The Constitution made several changes in the area of family law by not only providing the definition of a family¹⁹ but also spelling out the rights of spouses at the start, during and at the dissolution of marriage.²⁰ It also dispensed with the clause in the previous constitution which limited the application of equality in certain aspects of personal law.²¹ To better align its marriage laws with the requirements of this new constitution, parliament passed a new Marriage Act to consolidate the various laws relating to marriage and divorce and for connected purposes.²²

Some of the salient features of the 2014 Marriage Act include its requirement for registration of customary marriages, the recognition and enforcement of separation agreements signed between parties and a statutory provision requiring parties to attempt reconciliation and mediation before seeking court intervention.²³ Part X of the Marriage Act caters for matrimonial disputes and proceedings. Aside from Islamic marriages whose divorce is governed by Islamic law, the Act lists specific grounds for divorce for Christian, civil, customary and Hindu marriages.²⁴ Some of the cross-cutting grounds for divorce listed in the Act include adultery, cruelty and exceptional depravity many of which were present in the previous regime.²⁵

¹⁵ Section 8, *Matrimonial Causes Act* (Now repealed).

¹⁶ Section 6, *Matrimonial Causes Act* (Now repealed).

¹⁷ Section 9(1), *Matrimonial Causes Act* (Now repealed).

¹⁸ Section 9(2), *Matrimonial Causes Act* (Now repealed).

¹⁹ Article 45, *Constitution of Kenya* (2010).

²⁰ Article 45(3), *Constitution of Kenya* (2010).

²¹ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 24.

²² Preamble, *Marriage Act* (No. 4 of 2014).

²³ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 25.

²⁴ Part X, *Marriage Act* (No. 4 of 2014).

²⁵ Section 65, *Marriage Act* (No. 4 of 2014). See also Sections 66(2), 69 and 70 on grounds for dissolution of a civil, customary and Hindu marriages respectively.

This paper seeks to focus on the more novel ground of irretrievable breakdown of marriage available for civil,²⁶ Christian,²⁷ Hindu²⁸ and customary marriages and its relationship with the more traditional fault-based divorce grounds.²⁹ Section 66 of the Marriage Act which introduced irretrievable breakdown lists several factors that the court may consider when called upon to determine whether a marriage has irretrievably broken down. Many of these factors mirror the stand-alone fault-based grounds of divorce including adultery, cruelty and desertion. Section 66(6)(h) confers on courts the power to grant divorce petitions based on any other ground deemed appropriate.³⁰ Section 66 is therefore an inclusive rather than exclusive provision granting the courts much discretion in determining whether a divorce petition should be granted. Since these reforms were introduced, this discretion has been called upon in several cases where courts have on occasion opted to infer irretrievable breakdown even where it had not been expressly relied upon by petitioners.

This study makes the argument that the country's divorce regime should make a full transition from a fault-based regime to a no-fault system. It argues that the maintenance of fault-based requirements for divorce sustains the very faults that irretrievable breakdown is meant to cure by requiring petitioners to adduce proof of fault whilst arguing for irretrievable breakdown. This is more so given the prominence given to fault grounds as considerations to determine irretrievable breakdown. This paper also argues that fault has no place in modern divorce laws and that the maintenance of fault-based grounds even as an alternative to irretrievable breakdown would maintain a hostile and litigious divorce regime. Hence it argues that the adoption of a pure no-fault system would work well in serving the dual interest of protecting the individual dignity of spouses during divorce while safeguarding the dignity and sanctity of marriage and the family.

Part I has offered an introduction to the study. The paper now proceeds as follows: Part II offers insights into the theories that underpin different divorce regimes globally. Part III looks at the current regime as well as the harms that the author seeks to mitigate through the elimination of fault-based requirements. Part IV examines the trends emerging from the Kenyan courts and the lessons that may be drawn from these decisions. Part V looks at the potential solution

²⁶ Section 66(2)(e), *Marriage Act* (No. 4 of 2014).

²⁷ Section 65(e), *Marriage Act* (No. 4 of 2014).

²⁸ Section 70(a), *Marriage Act* (No. 4 of 2014).

²⁹ Section 69(1)(e), *Marriage Act* (No. 4 of 2014).

³⁰ Section 66(6)(h), *Marriage Act* (No. 4 of 2014).

offered by a no-fault divorce system by focusing on the critiques raised against the adoption of no-fault divorce laws. Part VI gives recommendations and concludes the paper.

II. Theories of Divorce

i. *Fault theory*

The fault theory of divorce is premised on the historical perception of marriage as an absolute and permanent union unless a spouse was found to have committed a matrimonial offence.³¹ The earliest recognised offence capable of allowing for divorce was adultery. Later on, marital faults such as cruelty, desertion and conviction of certain crimes also gained legislative recognition.³² The spouse petitioning for divorce is also required to be innocent of any matrimonial offence to succeed in their petition.³³ This is because the defences available under a fault-based regime reflect this requirement of innocence. In the defence of recrimination, a spouse faced with a divorce petition based on an alleged matrimonial offence could similarly allege a matrimonial offence by the petitioning spouse.³⁴ If such counterclaim was proven, the court would dismiss the entire petition and the marriage would subsist binding the parties to a lifetime of potential misery and disharmony. The acrimony caused by such situations – whereby proven counter-allegations would lead to collapsing of a divorce petition – was an issue of concern for advocates of irretrievable breakdown which, if properly implemented, would adequately avoid such outcomes.

To escape the rigorous requirements posed by a fault system, spouses had to resort to unlawful means and manufacture statutorily recognised faults upon which they could found their petitions.³⁵ To prevent this abuse of the law, reforms were made to introduce several new defences in favour of respondents. The first of these was collusion where parties were prevented from agreeing to a divorce.³⁶ The defence of connivance meant that a party who consented to the conduct of the other spouse which would otherwise have been recognised as a ground for divorce would be barred from subsequently relying upon that conduct to seek a divorce. The defence of condonation, on the other hand,

³¹ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 165.

³² Wadlington W, 'Divorce without Fault without Perjury' 52(1) *Virginia Law Review*, 1966, 37.

³³ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 165.

³⁴ Wadlington W, 'Divorce without Fault without Perjury', 38.

³⁵ Williams S, 'Divorce – A Case for Reform' 31 *Bracton Law Journal*, 1965, 31.

³⁶ Wadlington W, 'Divorce without Fault without Perjury', 39.

meant that a party who forgave their spouse for having committed a marital offence subsequently recanted their cause of action.³⁷ These additional defences had the effect of making divorce less probable within a fault system. According to Walter Wadlington, fault systems were weighted in favour of the less honourable party as it not only required the petitioner to prove the existence of a recognised marital offence but also ensure their innocence.³⁸

Kenya's divorce law regime has seen a transition from a system entirely premised on fault to a hybrid system currently encompassing both fault and non-fault grounds. Section 8 of the Matrimonial Causes Act allowed for very limited grounds for divorce namely adultery, desertion for three years before the petition, cruelty or that the respondent was incurable of unsound mind and had been under care and treatment for a minimum period of five years before the presentation of the divorce petition.³⁹ A wife was also permitted to seek divorce where her husband had since the celebration of marriage been guilty of rape, bestiality, or sodomy.⁴⁰ Save for the ground of insanity, the remaining grounds provided were all based on a respondent's fault.

This remained the position until the introduction of the Marriage Act in 2014 which repealed the previous Act and introduced a regime bearing both fault and no-fault grounds for divorce. Linda Osagie and Michael Attah describe such development as having imperfectly adopted the breakdown policy of divorce as it still bears fault-based grounds of divorce.⁴¹ It is this imperfect nature of the regime that the author hopes to address by adopting a single no-fault ground of divorce as enumerated later in this study.

ii. *No-fault theory*

The rigorous requirements of fault systems were responsible for the reforms that led to the enactment of no-fault divorce laws. Proponents of no-fault divorce laws often cited reasons such as the shielding of children from long and adverse divorce proceedings, the difficulty of delineating responsibility for marital breakdown and the avoidance of possible collusion of spouses in the

³⁷ Wadlington W, 'Divorce without Fault without Perjury', 39. This did not however cover subsequent instances of marital offence or of conjugal unkindness.

³⁸ Williams S, 'Divorce – A Case for Reform', 31.

³⁹ Section 8, *Matrimonial Causes Act* (Now repealed).

⁴⁰ Section 8, *Matrimonial Causes Act* (Now repealed).

⁴¹ Osagie L, and Attah M, 'Reforming the Irretrievable Breakdown Rule - Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria' 11(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2020, 45.

fabrication of fault purely for divorce purposes as reasons why no-fault divorce laws were a necessary reform.⁴² The reality of recrimination leaving irreconcilable spouses in a union with no possibility of release was simply untenable.⁴³

The essence of a no-fault system was to introduce a divorce regime where there was no necessity to prove fault as the basis of granting a divorce; all that was required was to show that a union was irretrievably broken down.⁴⁴ The concept of irretrievable breakdown is premised on the understanding that no public interest is served by forcing spouses together where their union is beyond retrieval.⁴⁵ It recognises that the reasons for the breakdown of a marriage are not always reducible to the sin of one spouse and the innocence of the other.⁴⁶

The evolution of no-fault divorce can be traced back to the introduction of insanity as the first no-fault ground for divorce in England's 1937 Matrimonial Causes Act.⁴⁷ Later on, the 1966 Law Commission of England criticised the fault-based regime for placing more emphasis on a union's past delinquencies as opposed to its present viability when courts were faced with a divorce petition.⁴⁸ Aside from avoiding the public airing of deeply personal details throughout divorce proceedings, Garg posits that the irretrievable breakdown approach may also find support from a fundamental rights perspective.⁴⁹ According to him, forcing spouses to continue subsisting in a marriage that has irretrievably broken down is akin to oppression and may therefore amount to a violation of individuals' right to dignity and liberty.⁵⁰

This argument may find solace in the case of *Tukero Ole Kina v AG*⁵¹ where the court found that the requirement for spouses to have been married for three

⁴² McHugh J, 'No-Fault Divorce Laws: An Overview and Critique' 18(3) *The Catholic Lawyer*, 1972, 238.

⁴³ Wadlington W, 'Divorce without Fault without Perjury', 41.

⁴⁴ McHugh J, 'No-Fault Divorce Laws: An Overview and Critique', 239.

⁴⁵ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 167.

⁴⁶ Osagie L, and Attah M, 'Reforming the Irretrievable Breakdown Rule - Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria' 31. Irretrievable breakdown recognises divorce not as a reward for moral virtue of one and penalty for moral delinquency of the other but as defeat of both regardless of responsibility.

⁴⁷ Osagie L, and Attah M, 'Reforming the Irretrievable Breakdown Rule - Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria', 31.

⁴⁸ Osagie L, and Attah M, 'Reforming the Irretrievable Breakdown Rule - Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria', 32.

⁴⁹ Garg P, 'Seeking the Remedy of Divorce in Cases of Irretrievable Breakdown of Marriage: A Mere Privilege or a Matter of Right' 11 *NUALS Law Journal*, 2017, 89.

⁵⁰ Garg P, 'Seeking the Remedy of Divorce in Cases of Irretrievable Breakdown of Marriage: A Mere Privilege or a Matter of Right', 95. The Constitution of Kenya in Article 28 recognises the inherent dignity of every person and accords each person to have their dignity respected and protected.

⁵¹ *Tukero ole Kina v AG and another* (2019) eKLR.

years before being allowed to file for divorce was an affront to individuals' human dignity in as far as it forced them to remain in potentially cruel unions. This line of reasoning resembles Priya Garg's thoughts on the possibility of anchoring the irretrievable breakdown theory on the constitution by arguing that restrictive divorce provisions cumulatively could lead to a violation of individual rights.⁵²

iii. Consent theory

The consent theory of divorce posits that if parties are free to marry, they maintain similar freedom to consensually opt out of marriage.⁵³ The marriage union is therefore one that upholds party autonomy and free will to determine its course. The Constitution recognises this free consent to marry and grants the parties to a marriage equal rights at the time of marriage, during the marriage, and at the dissolution of a union.⁵⁴

Llina Stefanovska notes that the onset of divorce by consent was initially camouflaged within the fault-based regimes where parties mutually agreed to separate and went on to manufacture a fault to trigger divorce proceedings.⁵⁵ This position concurs with TF McCue's assertion, focusing on the American jurisdiction, where despite many states having laws that prohibited divorce by consent, the larger majority of divorces that were granted without a respondent spouse entering appearance were granted with their tacit consent.⁵⁶ As earlier noted, it was this reality that led to the addition of the defences of connivance, condonation and collusion. The reform towards recognising consent as a basis for divorce was therefore an affirmation of an already existing reality.

In a divorce by consent, the court's role is to satisfy itself that the decision to seek divorce was taken without the coercion of either spouse.⁵⁷ The state's role in the regulatory framework is restricted to the registration of marriages and divorces and to giving unions legal recognition within their territories rather than the preservation of family living standards.⁵⁸ McCue argues that a consent

⁵² Garg P, 'Seeking the Remedy of Divorce in Cases of Irretrievable Breakdown of Marriage: A Mere Privilege or a Matter of Right', 94.

⁵³ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 166.

⁵⁴ Article 45, *Constitution of Kenya* (2010). This is further illustrated in Section 3 of the Marriage Act which defines marriage as a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered according to the Act.

⁵⁵ Stefanovska I, 'Divorce by mutual consent in comparative law' 5(2) *Iustinianus Primus Law Review*, 2014, 3.

⁵⁶ McCue T.F, 'Divorce by consent' 3(1) *Philippine Law Review*, 1913, 9.

⁵⁷ McCue T.F, 'Divorce by consent', 8.

⁵⁸ Stetson D, 'The two faces of policy: Divorce Reform in Western democracies' 6(1) *Journal of comparative family studies*, 1975, 18.

system ensures lesser harm to society and the parties by reducing the otherwise demoralising effect and impact of having to prove matrimonial offences by one's spouse.⁵⁹ In Germany, where divorce by consent is recognised, courts often grant such petitions while having regard to issues such as maintenance provisions and the best interests of any children that would be affected by the dissolution.⁶⁰ In France, the procedure for granting divorce by consent involves a mandatory requirement for parties to attempt reconciliation before a court can intervene.⁶¹ Both mechanisms illustrate a compromise where the state attempts to balance the rights of spouses to opt-out of marriage and the society's objective to preserve the sanctity of marriage.

Fran Wasoff highlights that in jurisdictions that allow for consensual divorce, a majority of the negotiations and resolutions regarding ancillary issues such as child custody and maintenance that are often muddled by hostility happen in informal settings aided by lawyers and mediators.⁶² He claims that most parties view these negotiated agreements as being fairer and more acceptable as they allow for more party autonomy and can be tailored to suit individual needs.⁶³ Prior agreement on ancillary issues also makes the procedure faster since the parties have often resolved the most contentious issues beforehand.⁶⁴

III. The Kenyan Regime: Customary and Current Statutory Grounds for Divorce

i. African Customary Law and divorce

The concept of divorce is nearly universal and has existed across different cultures and communities with individual variations. Even among communities with an inherent bias towards permanence, there seems to exist a universal understanding that this ideal is not always possible and that parties should have an

⁵⁹ McCue T.F, 'Divorce by consent', 10.

⁶⁰ Stefanovska I, 'Divorce by mutual consent in comparative law', 11. In Germany, courts may deny a petition if the maintenance of the union is taken to be in the best interests of a child or where it would leave one of the spouses in severe hardship. In Bulgaria, spouses are required to agree on the custody of children, parental rights, maintenance and on the use of the matrimonial home and family name before as part of the divorce agreement. In France, parties are offered an opportunity to rectify a divorce agreement which is found not to sufficiently cater to the best interest of a child.

⁶¹ Stefanovska I, 'Divorce by mutual consent in comparative law', 13.

⁶² Wasoff F, 'Mutual consent: Separation agreements and the outcomes of private ordering in divorce' 27 *Journal of Social Welfare and Family Law*, 2007, 237.

⁶³ Wasoff F, 'Mutual consent: Separation agreements and the outcomes of private ordering in divorce', 237.

⁶⁴ Stefanovska I, 'Divorce by mutual consent in comparative law', 2.

opportunity to dissolve their unions when need be.⁶⁵ Family and family life have always played a dominant role in the lives of Africans not only because the family forms the basis of African social organisation but also because the family acts as the main agent of social control and marriage as the locus of reproduction.⁶⁶ Customary laws were therefore geared towards the sustenance of marriages and only allowed for dissolution as a measure of last resort once attempts at reconciliation had failed.⁶⁷ Communities had rites of passage ceremonies during which the community passed on its values and customs as well as educated the initiates on the importance of family and marital responsibilities.⁶⁸ These ceremonies were meant to educate initiates on the importance and prestige of marriage and successful marriage life.

Despite their emphasis on permanence as the ideal in marriage, African communities did provide for the possibility of divorce. JC Bekker notes that the lack of express legal formalities for divorce is often misconstrued as an indication that customary unions were loose or temporary.⁶⁹ This is not true given the understanding that customary laws were fluid and unwritten. The fluidity of customary law was a big attraction even to those who wed under the African Christian Marriage Act who often preferred to seek out of court divorces rather than follow the more complex and formal court divorce processes.⁷⁰ Divorce was often influenced by various factors including kinship ties which were sometimes so strong as to create differing allegiances between the individual spouses' lineages and their nuclear family unit.⁷¹ The customary practice of polygyny could also destabilise families where it created a sense of competition among the wives

⁶⁵ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 163.

⁶⁶ Takyi B, 'Marital Instability in an African Society: Exploring the Factors that Influence Divorce Processes in Ghana' 34(1) *Sociological Focus*, 2001, 79.

⁶⁷ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 217. One of the mechanisms highlighted by Kiage in this regard was the requirement in certain communities to pay back the bride price paid by the man's family upon divorce. This requirement therefore meant that the wife's family had an economic incentive to ensure that marriages survived. Chesoni in his article 'Divorce and Succession in Luyia Customary Law' notes that in communities like the Luyia, the extended family had a role to play in divorce and a man's family could refuse a purported divorce of which they did not approve unless there were good grounds to allow a separation.

⁶⁸ Omoro P, 'Investigating the Causes and Possible Solutions of Divorce in Nairobi City County, Kenya' Published LLM Thesis, University of Nairobi, 2018, 1.

⁶⁹ Bekker J, 'Grounds for Divorce in African Customary Marriages in Natal' 9(3) *Comparative and International Law Journal of Southern Africa*, 1976, 347.

⁷⁰ Chesoni Z, 'Divorce and Succession in Luyia Customary Law', 166.

⁷¹ Takyi B, 'Marital Instability in an African Society: Exploring the Factors that Influence Divorce Processes in Ghana', 79. Among the Akan community for example, Takyi notes that the ties between the spouses were subordinate to their individual lineages. Any decision they took therefore had to prioritise the community's interests first before that of their nuclear unit.

or where it led to a situation where a much older man married a much younger wife - sometimes even 20 years younger - whose values sometimes differed from those of the older generation.⁷²

For most communities, a divorce would be denied if there were inadequate reasons to grant it but the grounds upon which a divorce could be granted were neither limited nor set in stone.⁷³ Unlike a fault system where petitioners have to rely upon a fixed set of grounds to sustain a divorce petition, the grounds for divorce in customary law more closely resemble circumstances that render a marriage irretrievably broken down.⁷⁴ The possible grounds available included disobedience, denial of conjugal rights without reason, habitual theft, witchcraft, adultery, incest, or desertion.⁷⁵ The list of possible grounds was not a conclusive list and, as noted by Chesoni in the analysis of the Luyia community, the possible grounds also seemed to differ in terms of severity; from adultery which was considered a grave offence to nagging or the growing of a beard by a woman.⁷⁶ Regardless of the wide range of potential reasons, the person seeking divorce still had the obligation of proving that their spouse had committed the offence claimed. This position reflects a customary preference for continuation and was often reinforced by various mechanisms which disincentivised divorce.⁷⁷ Reliance on African customary law therefore would not adequately solve the issue of requiring a petitioner to show proof of fault before being granted a divorce and would similarly require a reconceptualization to enable petitioners to seek divorce without having the burden of proving fault.

ii. *Divorce under the Marriage Act 2014*

To consolidate the divorce laws for unions contracted under different regimes

⁷² Takyi B, 'Marital Instability in an African Society: Exploring the Factors that Influence Divorce Processes in Ghana', 80. Takyi also notes that the presence of children also played an important part in divorce proceedings as African communities placed a high premium on childbearing and thus childless marriages were reasonably less stable than those blessed with children. The presence of issues also acted as a deterrent to divorce in communities that lacked child support laws.

⁷³ Bekker J, 'Grounds for Divorce in African Customary Marriages in Natal', 355.

⁷⁴ Bekker J, 'Grounds for Divorce in African Customary Marriages in Natal', 355

⁷⁵ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 217.

⁷⁶ Chesoni Z, 'Divorce and Succession in Luyia Customary Law', 170.

⁷⁷ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 217. In this regard Kiage notes that some communities required that a woman's family pay back the bride price to the man's family and therefore a woman's family had an economic incentive to maintain marriages. See also, Makwanise N and Masuku M, 'African Traditional Views on Divorce: A Case of the Ndebele and in the Vukuzenzele Ward at Esikhoveni, Esigodini' on the instrumental part played by the payment and return of *lobola* in marriage and deterring divorce among the Ndebele.

the Marriage Act lists several grounds for divorce for Civil, Christian, Hindu and Customary marriages.⁷⁸ Five grounds – adultery, cruelty, exceptional depravity, desertion, and irretrievable breakdown – are common grounds. Section 69(1) (f) on customary marriages allows for reliance on any other valid ground under the petitioner’s customary law.⁷⁹ In Hindu marriages, the conversion of either spouse to a different religion would also suffice for divorce.⁸⁰ The introduction of the irretrievable breakdown option follows global divorce law reform and is a pragmatic recognition that it is not ideal to keep parties tied to a marriage that is a sham in all but name.⁸¹

One of the main issues surrounding the grounds of divorce enumerated in the Act is the question of the requisite standard of proof. The Matrimonial Causes Act required that a court moved by a divorce petition had a duty to inquire into the facts alleged and to pronounce a decree only if satisfied that the petitioner had not colluded or condoned any act of adultery and that the petition was not brought by way of collusion of the spouses.⁸² In this regard, the law did not allow for the consensual divorce of parties. The Marriage Act today contains no such express restriction in Part X.

The standard of proof required has also shifted in the courtrooms from requiring proof beyond reasonable doubt to requiring petitioners to prove their assertions on a balance of probabilities.⁸³ This shift is considered a reflection of society’s view towards marriage as being a private institution and its dissolution as more of a civil rather than criminal matter regardless of the reasons given.⁸⁴ Parties will often fail to meet the standard of proof required and thus be subjected to unhappy marriages, which would be contrary to the public interest as it would undoubtedly infringe on the dignity and liberty of the spouse who would otherwise prefer divorce.⁸⁵ The new stance regarding the requisite standard of proof is illustrated in the case of *RPM v PKM*⁸⁶ which reiterated the

⁷⁸ Long title, *Marriage Act* (No. 4 of 2014).

⁷⁹ Section 69(1)(f), *Marriage Act* (No. 4 of 2014).

⁸⁰ Section 70(c), *Marriage Act* (No. 4 of 2014).

⁸¹ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 204.

⁸² Section 10, *Matrimonial Causes Act* (Now Repealed).

⁸³ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 176. The historical position is illustrated in the case of *Wangari Mathai v Andrew Mwangi Mathai* where the court held the position that a petitioner had to establish matrimonial fault so as to satisfy the court beyond reasonable doubt.

⁸⁴ Balganes S and Reddy V, ‘The Standard of Proof Required in Divorce Proceedings: An Unresolved Controversy’ 44(3) *Journal of the Indian Law Institute*, 2002, 426.

⁸⁵ Balganes S and Reddy V, ‘The Standard of Proof Required in Divorce Proceedings: An Unresolved Controversy’ 44(3) *Journal of the Indian Law Institute*, 2002, 426.

⁸⁶ *RPM v PKM* (2015) eKLR. See also *DKK v RMK* (2019) eKLR; when a petitioner for divorce raises

already established practice of requiring proof on a balance of probabilities. This standard can often be satisfied by relying upon circumstantial evidence proving both a disposition and opportunity to commit adultery.⁸⁷ Evidence such as the birth of a child in circumstances where a husband had no access to the wife or the birth of a mixed-race child to parents of the same race would also satisfy the standard.⁸⁸ Courts have also inferred a presumption of adultery in instances of a spouse visiting a brothel or where there is evidence of undue familiarity by one spouse with another person where they had an opportunity to commit adultery.⁸⁹

From this analysis, it is evident that the nature of the fault-based grounds of divorce in the Marriage Act 2014 still requires some evidence—circumstantial as it may be—for the court to grant a decree of divorce. This means that parties relying upon fault-based reasons are still drawn into the position of having to air out deeply personal and, oftentimes, embarrassing details regarding the reasons for their marital breakdown. As postulated in the previous chapter, it was the pitfalls of fault regimes that brought forth the reforms which saw the birth of no-fault divorce laws. The first goal was to reduce the hostility of divorce litigation by doing away with the need to prove fault.⁹⁰ The second was to safeguard the integrity of the judicial system that was increasingly being faced with instances of spouses perjuring themselves by creating marital faults to satisfy the stringent requirements of divorce laws.⁹¹

The shift from fault grounds was also caused by the rising understanding that marital breakdown was not always the result of the unilateral fault of one spouse.⁹² This was closely tied to the criticism that fault grounds required judges to engage in a philosophical enquiry into the private lives of spouses and to attach intrinsic moral quality to specific conduct warranting them worthy grounds for divorce.⁹³

the ground of cruelty, the same can be proved by a preponderance of probabilities and the same varies with the individual circumstances of each case.

⁸⁷ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 182.

⁸⁸ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 184. See also case of *Preston Jones v Preston Jones* (1951).

⁸⁹ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 186.

⁹⁰ Boyd K, 'The Tale of Two Systems: How Integrated Divorce Laws Can Remedy Unintended Effects of Pure No-Fault Divorce' 12(2) *Cardozo Journal of Law and Gender*, 2006, 613.

⁹¹ Wardle L, 'No-Fault Divorce and the Divorce Conundrum' *Brigham Young University Law Review*, 1991, 93.

⁹² Osagie L, and Attah M, 'Reforming the Irretrievable Breakdown Rule - Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria', 31.

⁹³ Osagie L, and Attah M, 'Reforming the Irretrievable Breakdown Rule - Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria', 37. See also Stefanovska I, 'Divorce by mutual consent in comparative law', 3.

Without urgent reform, these pitfalls are likely to plague the Kenyan divorce system. The introduction of irretrievable breakdown in Section 66 of the Marriage Act, whilst still maintaining fault-based grounds as considerations to determine irretrievable breakdown, is unlikely to offer much solution to this problem. McHugh criticises such an approach by noting that the use of fault grounds, even as corroborating factors in determining irretrievable breakdown, will often lead to these grounds being used as the metric to determine irretrievable breakdown.⁹⁴ Judges would still need to engage in the same philosophical enquiry of attaching moral quality to conduct in determining the fate of divorce petitions. Similarly, such a position would likely result in the same shortcomings as those of a fault system requiring an element of blame on one spouse which contradicts the rationale of introducing irretrievable breakdown.⁹⁵

IV. Lessons from the Judiciary

Since the introduction of irretrievable breakdown in 2014, courts in Kenya have on several occasions interpreted it as a sign of the country's shift away from the culture of blame as regards marital breakdown. Justice Odero in *CWL v HN*⁹⁶ expressly noted that the current Act has effectively done away with the need to adduce evidence of matrimonial fault to support a divorce petition. The courts have also been faced with instances where they have made determinations of irretrievable breakdown based on fault-based considerations. In *ZYSA v YSA*,⁹⁷ the court concluded that the marriage had irretrievably broken down after the petitioner had successfully proved that adultery had been committed. In *NM v DOO*,⁹⁸ the court reached a similar determination of irretrievable breakdown after the petitioner had proved that their spouse had been cruel to them.

The crux of these cases was that the court concluded an irretrievable breakdown after having been satisfied with the existence of recognised marital fault on the part of the respondents. The crutch, however, is that irretrievable breakdown is meant to avoid this exact conundrum of adducing evidence of fault. What the courts did in these cases was to use fault grounds as a metric to determine irretrievable breakdown.

⁹⁴ McHugh J, 'No-Fault Divorce Laws: An Overview and Critique', 239.

⁹⁵ Hussain S, 'Breakdown of Marriage in Zambia: Judicial Response and Challenge' 13 *Zambia Law Journal*, 1981, 20.

⁹⁶ *CWL v HN* (2014) eKLR.

⁹⁷ *ZYSA v YSA* (2015) eKLR.

⁹⁸ *NM v DOO* (2017) eKLR. See also *WKC v FNN* (2019) eKLR.

Contrastingly, the court has also developed a trend of reading in irretrievable breakdown to dispense with petitions that from the onset were relying upon fault grounds but had failed to prove the same to the court's satisfaction. The case of *JMM v JMN*⁹⁹ best illustrates this trend where the court opined that the petitioner had failed to prove cruelty – which was the initial ground for the petition – but still found the marriage to have irretrievably broken down. Here, the court relied upon more observable factors of separation seeing as the parties had been separated for the two years preceding the petition. The court also noted that there was mistrust between the parties noting specifically that the petitioner had gone to the extent of hacking their spouses' email to obtain the necessary evidence to support their petition. This, the court noted, was a clear indication that the marriage was irretrievably broken down.

It is no surprise that the most common reliance on the irretrievable breakdown has been on Section 66(6)(d) of the Act which allows for irretrievable breakdown to be found in instances where spouses have lived separately for a period of two or more years whether voluntarily or by court decree.¹⁰⁰ In these instances, all that is required is proof that the parties have lived separately for more than two years without delving into the cause of the separation. This factor seems to best align with the purpose of irretrievable breakdown as a mechanism to avoid having to prove fault or air out the details leading up to marital breakdown.

Despite this advantage over more traditional fault grounds, the author contends that the two-year separation period in itself poses a hindrance that in due time may face challenge before the courts. A similar challenge was already raised in the case of *Tukero ole Kina v AG*¹⁰¹ where the court held that the requirement for spouses to have been married for three years before being allowed to file for divorce was an affront to individuals' human dignity as far as it forced them to remain in potentially cruel unions. A similar argument may be made for the two-year separation period seeing as it leaves spouses restricted and has direct implications on issues such as division of matrimonial property which only occurs once a marriage has been dissolved. Just like the critique historically posed to no-fault laws regarding its disregard for protecting innocent spouses in compensation issues, this two-year separation period is likely to have the same impact on the economically weaker party by denying them unilateral access to the property which is considered matrimonial property or which the other spouse

⁹⁹ *JMM v JMN* (2016) eKLR. See also *HR v NJAC* (2015) eKLR.

¹⁰⁰ See *WK v BAA* (2017) eKLR. The petitioners had lived separately for nine years before seeking a divorce. See also *SKJ v KKVJ* (2015) eKLR and *CWC v JPC* (2017) eKLR.

¹⁰¹ *Tukero ole Kina v AG and another* (2019) eKLR.

may have contributed to improving. It also means that neither spouse would be permitted to move on to new, potentially better unions within the two years; a situation which many would find burdensome.

The author, therefore, while also relying on the ruling in *CWL V HN*, suggests the adoption of a uniform no-fault divorce system with the irretrievable breakdown as the single ground for divorce.

V. Proposing No-Fault Divorce

The onset of no-fault divorce laws was a direct consequence of society's need to escape the stringent requirements of fault-based divorce systems. No-fault divorce laws were meant to make the divorce procedure less hostile by ostracising the requirement to prove marital fault, a requirement which often required the publicization of intricate and deeply personal details regarding marital relationships.¹⁰² This is often achieved by relying upon irretrievable breakdown where a marital breakdown is based on observable conduct from a morally neutral standpoint. Consequently, divorce is meant to be viewed as a gradual deterioration of the marital union rather than as a reward for the moral virtue of one spouse and punishment for the delinquency of the other.¹⁰³

In countries such as Bulgaria which have embraced divorce by consent, parties are required to prove that the decision to divorce has been mutually consented to by both parties without delving into the reasons for the decision.¹⁰⁴ A consent model, however, requires the assent of both parties to the divorce petition. No-fault systems are designed to avoid situations where one party may decline to give their outright consent to divorce. In such a case, the interests of the party in favour of divorce would best be safeguarded in a no-fault system where failure to get assent from one's spouse would not in itself be an outright hindrance to divorce.

Since the onset of no-fault divorce laws, however, several criticisms have been proffered against them. One of the main criticisms is that no-fault divorce laws have led to a growing lack of appreciation for public values regarding family life.¹⁰⁵ This criticism recognises that while the law cannot create happy marriages,

¹⁰² Garg P, 'Seeking the Remedy of Divorce in Cases of Irretrievable Breakdown of Marriage: A Mere Privilege or a Matter of Right', 88-89.

¹⁰³ Osagie L, and Attah M, 'Reforming the Irretrievable Breakdown Rule - Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria', 43.

¹⁰⁴ Stefanovska I, 'Divorce by mutual consent in comparative law', 2.

¹⁰⁵ Boyd K, 'The Tale of Two Systems: How Integrated Divorce Laws Can Remedy Unintended Effects of Pure No-Fault Divorce', 615.

it does have a role to play in shaping societal conduct and perspectives. Fault-based grounds emphasised the message that marriage was a social responsibility and, consequently, those who failed to uphold it were held responsible.¹⁰⁶ Some scholars have made correlations between the adoption of no-fault divorce laws and an upsurge in divorce rates.¹⁰⁷ This correlation is contested, however, by scholars like Scott Drewianka who argue that divorce laws have only played a minor role in influencing the shift in perspective regarding traditional family arrangements.¹⁰⁸ Shelley Clark and Sarah Brauner-Otto contend that the upsurge in divorce rates may have been influenced by other factors such as the increased empowerment of women and the reduced kin involvement in marital relations all of which have an impact on family dynamics.¹⁰⁹ The argument of scholars with this viewpoint, therefore, is that other factors may similarly have contributed to increased rates of divorce and that the adoption of no-fault laws is not the only trigger for the upsurge—even if it might have contributed to the statistics.

Another major critique against no-fault divorce laws relates to the impact that such laws have on the distribution of alimony and mutual property. Historically, the verification of fault played a key role in determining questions regarding alimony and property dispensation.¹¹⁰ Innocent parties were often rewarded for their moral aptitude by being awarded more property while the guilty party was reprimanded by having a lesser share. At the onset of no-fault divorce laws, the disregard for fault often had the unintended consequence of leaving innocent spouses, most of whom were women, in impoverished positions as there was a significant reduction in compensation.¹¹¹ This disregard for fault meant that there was less incentive to commit to marriage vows given that divorce was no longer a penalty for the abrogation of marital values.¹¹² Critics were therefore wary that the adoption of no-fault systems would derogate the institution of marriage by

¹⁰⁶ Boyd K, 'The Tale of Two Systems: How Integrated Divorce Laws Can Remedy Unintended Effects of Pure No-Fault Divorce', 611.

¹⁰⁷ Wardle L, 'No-Fault Divorce and the Divorce Conundrum', 117. Wardle argues that statistics across American states show an upsurge in divorce rates during the period when no-fault divorce laws were being introduced. Similarly, after the adoption of these laws the rate seems to have stabilised at a rate higher than that recorded before these laws were passed. See also Marvell T, 'Divorce Rates and the Fault Requirement' 23 *Law and Society Review*, 1989, 547.

¹⁰⁸ Drewianka S, 'Divorce Law and Family Formation' 21(3) *Journal of Population Economics*, 2008, 488.

¹⁰⁹ Clark S and Brauner S, 'Divorce in Sub-Saharan Africa: Are Unions Becoming Less Stable?' 41(4) *Population and Development Review*, 2015, 585.

¹¹⁰ McHugh J, 'No-Fault Divorce Laws: An Overview and Critique', 239.

¹¹¹ Moir D, 'No Fault Divorce and the Best Interests of Children' 69(3) *Denver University Law Review*, 1992, 664.

¹¹² Boyd K, 'The Tale of Two Systems: How Integrated Divorce Laws Can Remedy Unintended Effects of Pure No-Fault Divorce', 620. See also Parkman A, 'Reforming Divorce Reform' 41 *Santa Clara Law Review*, 2001, 387.

making divorces less costly for spouses who breached their marital vows and ultimately caused the divorce.

Currently, the 2013 Matrimonial Properties Act significantly mitigates this critique. Section 7 of the Act recognises that ownership of matrimonial property is to vest in the spouses according to their contribution towards its acquisition.¹¹³ A crucial innovation of the Act is found in the Act's definition of 'contribution' to include monetary and non-monetary contribution: this includes farm work, childcare, domestic work, management of matrimonial home and companionship.¹¹⁴ Section 9 of the Act further recognises the acquisition of an interest in the property by contribution by a spouse who contributes towards the improvement of property that otherwise cannot be considered matrimonial property.¹¹⁵ The Act also prescribes a rebuttable presumption of trust in instances where the matrimonial property is acquired yet registered in one spouse's name in favour of the other spouse.¹¹⁶ The critique that no-fault divorce laws may leave women and children sufficiently unprotected has been mitigated through the robust provisions of the Matrimonial Property Act which aptly protects both spouses including those whose contribution may not be economically tangible.¹¹⁷ The Act leaves ample discretion to the courts to decide regarding the distribution of property based on the contribution of spouses.

A third critique of no-fault divorce laws is that rather than lead to less scrutiny or state intrusion into what is now considered private affairs, the laws have led to more intrusion as courts are now more concerned with the relationship of the parties post-divorce.¹¹⁸ This is more so in instances such as Kenya where the corroborating factors for irretrievable breakdown include fault grounds that demand that some element of fault be proved. Related to this critique is the argument that no-fault divorce laws have simply shifted the hostility previously experienced in open litigation to more subtle and auxiliary issues such as child custody.¹¹⁹

This critique calls into question the law's efficacy in the preservation of marital unions. Society today recognises that marital unions may deteriorate

¹¹³ Section 7, *Matrimonial Property Act* (Act No. 49 of 2013).

¹¹⁴ Section 2, *Matrimonial Property Act* (Act No. 49 of 2013).

¹¹⁵ Section 9, *Matrimonial Property Act* (Act No. 49 of 2013).

¹¹⁶ Section 14, *Matrimonial Property Act* (Act No. 49 of 2013).

¹¹⁷ This is as seen in the landmark case of *Kivuitu v Kivuitu* (1991) eKLR.

¹¹⁸ Boyd K, 'The Tale of Two Systems: How Integrated Divorce Laws Can Remedy Unintended Effects of Pure No-Fault Divorce', 615. See Wardle L, 'No-Fault Divorce and the Divorce Conundrum', 108.

¹¹⁹ Wardle L, 'No-Fault Divorce and the Divorce Conundrum', 100.

for reasons that do not always fit into the dichotomy of fault and innocence postulated by fault-based systems and that what may be regarded as visible faults may be symptoms of more underlying problems for which the law offers a little remedy.¹²⁰ No-fault laws recognise that courts are not necessarily fit to investigate the root causes of divorce, a task that would be better served if left to marriage counsellors and assessors.¹²¹ This is the rationale adopted in countries such as Germany where the determination as to the impossibility of reconciliation is settled by the consent of the parties to divorce.¹²² The courts in these instances play no role in making value judgements as to the gravity or morality of conduct capable of warranting a divorce. In France, for example, an attempt at reconciliation is mandatory before petitioning for divorce.¹²³ The court is therefore only called upon in instances where attempts at reconciliation have failed and thus the marriage cannot be salvaged. This requirement may be fused into no-fault divorce laws to mitigate the perception of the law abdicating its formative role and therefore safeguarding society's ever-present interest in preserving the sanctity of the marriage union.

VI. Recommendations and Conclusion

i. Recommendations

This study seeks to highlight the purpose and intention behind the introduction of irretrievable breakdown as an available ground for divorce. Furthermore, it demonstrates that the use of fault grounds to illustrate irretrievable breakdown contrasts with the purpose of irretrievable breakdown and makes it not too dissimilar to traditional fault grounds. The study also highlights the need to make the divorce process less hostile and litigious. It is, therefore, necessary to adopt a divorce system capable of allowing married individuals to go through the divorce process with minimal hostility while at the same time protecting the spouses' interests and the interests of society in preserving the dignity of the family and the marital institution. These objectives are achieved in the proffered recommendation.

Kenya should seek to adopt a single and uniform no-fault divorce regime that does not rely upon fault-based grounds as a metric for breakdown. The system should be one where the court is not required to make value judgements

¹²⁰ Williams S, 'Divorce – A Case for Reform', 33.

¹²¹ Williams S, 'Divorce – A Case for Reform', 34.

¹²² Stefanovska I, 'Divorce by mutual consent in comparative law', 11.

¹²³ Stefanovska I, 'Divorce by mutual consent in comparative law', 12.

as to the conduct and wishes of the petitioning spouses but rather seek to enforce their desire to bring their union to an end. There is a need, however, to balance these wishes against those of society in rescuing the marriage institution from being rendered no more valuable than a contract for the acquisition of services. It was this consideration that prompted the inclusion of the two-year separation requirement during which time lawmakers hoped the spouses would reconcile and opt to maintain their union.

This dual objective can be achieved by including a mandatory requirement to attempt reconciliation before petitioning for divorce through extra-judicial mechanisms such as mediation or family counselling. Such mechanisms are more apt to allow for private and more intricate analysis and discussion and therefore, vindicating innocent spouses by allowing them to ventilate and discuss their spouse's faults. The denial of such an opportunity to ventilate in court would therefore be catered for by these alternative mechanisms. Regardless, limiting choice in this instance serves a greater public interest by reducing the amount of judicial time and resources spent adjudicating disputes whose resolution may be accelerated by the use of Alternative Dispute Resolution (ADR) mechanisms. Not only would this be in line with Article 159(2)(c) of the Constitution,¹²⁴ but also the principle of overriding objectives enshrined in the Civil Procedure Act under which courts are to ensure the efficient use of available judicial and administrative resources and facilitate just, expeditious, proportionate and affordable resolution of civil disputes.¹²⁵

Having a mandatory provision to attempt reconciliation may prove more effective than the current regime which stipulates a two-year separation period but does not specifically call upon the parties to attempt to reconcile. Most parties would therefore simply opt to wait out the two years before petitioning for divorce; a situation which counteracts the legislative intention of having the separation period. As analysed in earlier sections of this paper, many of the contentious issues that arise during divorce proceedings such as division of property and child custody are capable of being resolved amicably through ADR mechanisms. In this model, the court's role would simply be necessary to adopt a mediator's report of failed conciliation and grant a divorce based on irretrievable breakdown.

As an auxiliary advantage, the enactment of this mechanism would open up the possibility of having divorce by registration as postulated by Hussain.¹²⁶

¹²⁴ Article 159(2)(c), *Constitution of Kenya* (2010).

¹²⁵ Section 1B, *Civil Procedure Act* (Act No. 43 of 1948).

¹²⁶ Hussain S, 'Breakdown of Marriage in Zambia: Judicial Response and Challenge', 23.

It would not be far-fetched to imagine a divorce regime where spouses whose marriage is completely broken and who have unsuccessfully attempted to reconcile move to have their marriage dissolved by registration at the Registrar of Marriages' office. This would fast-track the divorce process and lessen the case burden on the Judiciary.

ii. Conclusion

Modern divorce laws face a dilemma: on one hand, these laws seek to lessen the suffering caused by divorce by making the process easier while also trying to promote marital stability.¹²⁷ The author argues that the current laws are not doing enough to make the process less hostile and litigious, and the maintenance of fault grounds similarly does not seem to be reducing the divorce rates. The retention of fault-based grounds as well as their use in determining irretrievable breakdown of marriage means that divorce petitioners are still at risk of having to prove marital fault. The introduction of irretrievable breakdown as a ground for divorce was meant to alleviate this very situation.

To solve this, the author proposes the adoption of a single and uniform no-fault divorce law where an irretrievable breakdown would be the sole ground for divorce. This law should also embody a mandatory requirement to attempt conciliation before petitioning for divorce.

It may be time to realise that the placing of legal obstacles to divorce does not translate to more stable unions. Efforts should be better placed seeking to understand the causes of marital instability and seeking to better address them. This however falls outside the author's thesis and that of law-oriented persons and has therefore not been discussed in the article. The article simply focuses on redefining the parameters posed towards the divorce ground of irretrievable breakdown of marriages.

¹²⁷ Wardle L, 'No-Fault Divorce and the Divorce Conundrum', 120.