

**A CRITICAL ANALYZES ON THE DEVELOPMENT OF NAMIBIAN DIVORCE
LAW: IS IT TIME FOR REFORM?**

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“I the undersigned hereby declare that the contained in this dissertation is my original work and that I have not used any other source than those listed in the bibliography.”

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Signature of supervisor:

Date:

Abstract

The information of this dissertation is gathered by means of archival research, desktop research, library research and internet research. Relevant documents, materials and cases are extensively analysed to make sure the accuracy of this paper. The list of literature review stated below shows the extent of research done to explore the views of previous writers with regard to divorce law.

The Law Reform and Development Commission of Namibia is proposing a new divorce act. One of the major changes in the draft divorce act is the change of the divorce ground in Namibia. Changing the grounds of divorce is a fundamental change in Namibian divorce law. Therefore the aim of the paper is to contribute to the on-going debate of whether or not there is a need to reform divorce law. In order to answer this, the study critically analyses the current divorce laws and the proposed divorce reform. After the first two chapters, the paper formally starts off by analyzing the current divorce laws used in Namibia.

The focus area of this paper will include identifying the types of divorce; analyzing and clarify what fault and no-fault ground based divorce is all about. In order to conclude which ground for divorce is more suited for Namibia it is pertinent to look and analyse the following; Countries that have no-fault grounds for divorce, Countries that have fault grounds for divorce, Countries that have both fault and no-fault grounds for divorce, and Countries that have only irretrievable breakdown as a ground for divorce.

While reading this paper it is possible that the reader might question the reasons for the escalating divorce rate Namibia. Whether the current divorce laws are the cause of the escalation of the divorce rates in Namibia or whether it is simply a change in how the society views the entire concept of marriage.

Before concluding the paper will look at the following;

(a) whether there is a link between divorce rates and divorce law reform,

Here I concentrate on different countries (such as England, Western Germany, France and United States) that have changed their divorce laws over the years.

(b) Effects of increasing divorce rates

(c) Divorce rates in Namibia

(d) Specific countries that failed in their divorce reform process.

It is of cardinal importance to learn from others mistakes, so we can avoid making the exact same mistakes.

Chapter 1

Background of the study

1.1 Introduction

Currently in Namibia there are two types of marriages, namely civil marriages and customary marriages. This only relates to civil marriages which are governed by the Marriage Act 25 of 1961, Married Persons Equality Act 1 of 1996, and Recognition of Certain Marriages Act 18 of 1991. Civil marriages are dissolved in three main ways a) by death of one or both of the spouses¹ b) by the annulment of a voidable marriage and c) by divorce.² This paper concentrates on the dissolution of civil marriage by means of divorce.

The purpose of divorce is to bring to end a marriage that has run its course.³ It is believed that divorce law is not the cause of the breakdown of the marriage.⁴ Divorce can be defined as ending a legal marriage by court judgement and divorce laws can simply be defined as the laws that regulate the termination of a marriage. Divorce only terminates the legal relationship between spouses. Upon granting divorce the court is left to decide on several aspects in the life of the spouses. This can be about maintenance to the one spouse or/and maintenance of children, custody, property division and any other deemed necessary order.⁵

Historically divorce was not acceptable, but over the years divorce has become acceptable and is seen as a reflection of the changes in the fundamental principles of the society. Thus developing divorce law is not as easy as developing other aspects of the law. As Eekelaar agreeably puts it “divorce itself has been a

¹ This is governed by the Dissolution of Marriages on Presumption of Death Act 31 of 1993.

² Cronjé, D.S.P., and Heaton, J. 2004. *The South African Family Law*. 2nd ed. Durban: LexisNexis. Butterworths, p. 113.

³ See Legal Assistance Centre 2000. Proposals for Divorce Law Reform in Namibia Available at <http://www.lac.org.na/projects/grap/Pdf/divlawref2.pdf> last accessed on 30 August 2011; and also Mills and Reeve. divorce.co.uk. Available at http://www.divorce.co.uk/Portals/0/pdf/Time_for_reform.pdf; last accessed on 3 August 2011.

⁴ Mills and Reeve (2011).

⁵ See Section 5 of Matrimonial Causes Jurisdiction Act 22 of 1939 and also Maintenance Act 9 of 2003.

battleground between the pursuit of individual self interests and the interests of other parties and communal values".⁶

Divorce laws can differ from country to country as each country has its own divorce laws. Divorce Law in Namibia is governed by Roman Dutch common law which is supplemented by the Divorce Laws Amendment Ordinance 18 of 1935, the Matrimonial Causes Jurisdiction Act 22 of 1939, the Matrimonial Causes Jurisdiction Act 35 of 1945 and the Matrimonial Affairs Ordinance 25 of 1955. Currently Namibia doesn't have a Divorce Act, but the Law Reform and Development Commission of Namibia has proposed a Divorce Act for Namibia.⁷

1.2 Problem statement

It is evident from above that the laws that some statutory laws dealing with divorce are outdated. However to question whether there is a need for divorce law reform is an entirely different issue. Namibia's current laws which deal with divorce may be outdated⁸ but it is more successful than the new divorce laws in other countries, such is USA and South Africa.⁹ If the current laws which deal with divorce law are more successful than the new divorce laws in other countries, than why should we change the current divorce laws? Before instituting a new divorce act the prospects of success must be estimated by comparing statutory law on divorce in different jurisdictions and analysing their success.

There are various proposals by the divorce law reform in Namibia emphasising *inter alia* on moving away from the fault based divorce ground to an irretrievable breakdown of marriage divorce ground.¹⁰ There have been various arguments for and against these two grounds of divorce.¹¹ Which one works best is a matter of

⁶ Cited in Diduck, A. 2003. *Law's Families*. United Kingdom: LexisNexis, Butterworths, p. 70.

⁷ For the proposed divorce act see the Law Reform and Development Commission. (November, 2003). LRDC 13 - *Report on Divorce* (ISBN 0-86976-654-6)

⁸ They were all promulgated before than decades ago – Divorce Laws Amendment Ordinance 18 of 1935, the Matrimonial Causes Jurisdiction Act 22 of 1939, the Matrimonial Causes Jurisdiction Act 35 of 1945 and the Matrimonial Affairs Ordinance 25 of 1955.

⁹ See Chapter 5 which deals with the lessons Namibia can learn from other countries.

¹⁰ Law Reform and Development Commission. (November, 2003). LRDC 13 - *Report on Divorce* (ISBN 0-86976-654-6)

¹¹ Legal Assistance Centre 2000. Proposals for Divorce Law Reform in Namibia Available at <http://www.lac.org.na/projects/grap/Pdf/divlawref2.pdf> last accessed on 30 August 2011.

analysing, comparing, interpretation and arguing. However one of the possible problems that Namibia might will face when changing from fault based divorce to irretrievable breakdown of marriage is an increase in divorce rates which in-turn cause economic problems.¹²

1.3 Research questions

This dissertation looks at some aspects of the proposed divorce Act by the Law Reform and Development Commission. Different sources of divorce laws in various countries is analysed and compared. Based on the above the research questions are follows;

The main research question: Is it time to reform the current Namibian divorce laws?

1. Why does the Law Reform and Development Commission of Namibia want to change the current divorce laws? i.e. the rationale for the proposed divorce law change.
2. What are the possible effects of the changing the current divorce laws?
3. What lessons can Namibia learn from other countries?

1.4 Purpose of the study

The purpose of the study is to find out whether or not changing from fault based divorce to irretrievable breakdown of marriage is really needed. In order to answer this, the study critically analyses the current divorce laws and the proposed divorce reform.

The paper explains what the concept fault based divorce and irretrievable breakdown of marriage as a ground of divorce is. Than the paper highlights the countries that has fault, no-fault and irretrievable breakdown of marriage.

¹² See the Chapter 4 which deals with the effects of divorce law.

The analyses of this topic would not be complete without also drawing attention to the divorce rates. The aim of this is to show that there is a link between divorce reform and divorce rates.

The aspects of all this is addressed in the manner stated in the research questions above.

1.5 The significance of the study

Divorce is no-longer a personal problem, but rather social problem. Therefore divorce law direct or indirect affects our lives. Consequences of divorce do not only affect the parties that are divorcing but also the society at large. Most people (in most cases it is women) that get divorced end up living in poverty, thus cannot adequately care for themselves and their children.¹³ Riley formulates that; divorced people who live in poverty “work little, often in dead-end jobs, and frequently cannot provide their children with vocational training or higher education. Society as a whole suffers from this under utilization of resources.”¹⁴

As pointed out by Lord Westbury more than a century ago: “Marriage is the foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, of dissolving the marriage contract.”¹⁵

Various people opt that marriage is a valid contract and as such must be treated according to contract law in cases of breach of contract, i.e. the person that breached the contract must be held liable.¹⁶ This is one way to understand the current fault based divorce. No-fault base law eliminates the bases for liability.

¹³ Riley, G. 1991. *Divorce – An American Tradition*. Oxford: Oxford University Press, p. vii-ix.

¹⁴ *Ibid*, p. ix.

¹⁵ *Shaw v Gould*, [1868] 1 E.R.A. 454 at 467; [1868] L.R. 3 H.L. 55 at 82. Cited in Hussain, S. J. (1983). *Marriage Breakdown and Divorce Law Reform – A Comparative Study of USA, UK & India*. New Delhi, India: Naurang Rai Concept Publishing Company, p. 23.

¹⁶ Weitzman, L.J 1985. *The Divorce Revolution – The unexpected Social and Economic consequences for Women and Children in America*, 22-21.

The significance of the study is to contribute to the on-going debate of whether or not changing the divorce grounds to irretrievable breakdown is the right direction in the development of Namibian divorce law.

Over the years Namibia's divorce rate has been less than most countries that have implemented divorce Acts. Before we can implement a new Act we first need to make sure whether there is a need for one. Although we cannot force people that don't want to stay together to stay together, do we want to implement an act that might help increase the divorce rates radically? It has been observed that some countries divorce rates increased since the Divorce Reform Act.¹⁷ Thus the nexus of ideas proposed by the Namibian Law Reform and Development Commission with regard to divorce law deserves a closer look.

1.6 Limitation of the study

In Namibia there are two types of marriages, namely civil marriages and customary marriages. This paper only concentrates on divorces in civil marriages and therefore does not deal with divorce in customary marriages.

There are certain consequences that flow from a divorce such as the division of matrimonial property, maintenance orders in divorce matters and the position of children in divorce matters. This paper does not deal with the aforesaid aspects.

Some of these consequences of marriage such as the division of the matrimonial property are determined by the regimes of marriage, e.g. in community of property or out of community of property. This paper does not discuss the regimes of marriage.

Due to constraint of time and resources I was unable to conduct interviews to hear the society's opinions and I could not deal with all the aspects regarding divorce law as divorce law is a broad subject. Therefore this paper concentrates on the grounds of divorce, namely irretrievable breakdown and fault based divorce. The paper determines which ground of divorce is more suitable for Namibia. .

¹⁷ Cretney, S.M., and Masson, J.M. 1997. *Principles of Family Law*, London: Sweet & Maxwell, p. 302-303.

1.7 Research Methodology

This dissertation is conducted by means of qualitative research. The information of the dissertation is gathered by means of archival research, desktop research, library research and internet research. Relevant documents, materials and cases are extensively analysed to make sure the accuracy of this paper. The list of literature review stated below shows the extent of research done to explore the views of previous writers with regard to divorce law.

Chapter 2

Review of relevant literature

Introduction

This chapter will review relevant literature with regard to divorce law. Writers such as Nathan, Ekirikubinza, Cretneyn, Diduck and Eekelaar are just few of the writers that have written about divorce law. Divorce Law in Namibia is governed by Roman Dutch common law which is supplemented by the Divorce Laws Amendment Ordinance 18 of 1935, the Matrimonial Causes Jurisdiction Act 22 of 1939, the Matrimonial Causes Jurisdiction Act 35 of 1945 and the Matrimonial Affairs Ordinance 25 of 1955.¹⁸ This chapter is arranged according to the research questions which are listed above.

2.1 Defining Divorce

Divorce laws can simply be defined as the laws that regulate the termination of a marriage.¹⁹ Nathan defines divorce as the dissolving a marriage relationship.²⁰ This definition is similar to Waite and Hawker's definition. Waite and Hawker's define divorce as the legal ending of a marriage.²¹

2.2 Grounds of Divorce

a) Fault based divorce

According to Meyer fault based divorce was made easy by introducing no-fault grounds. Spouses can now just file for divorce on no-fault grounds claiming

¹⁸ This Acts are discussed in Chapter 3.

¹⁹ Eekelaar, J. 2006. *Family Law and Personal Life*. Oxford: Oxford University Press.

²⁰ Nathan, C. J. M 1970. *South African Divorce Handbook*. Durban: Butterworth & Co. (S.A) (Pty.) Ltd, p.3.

²¹ Waite, M. And Hawker, S. 2009. *Oxford Paperback Dictionary and Thesaurus*. 3rd ed. Oxford: Oxford University Press, p. 273.

“irreconcilable differences. The writer points out statistics that shows the divorce rate increased since the implementation of no-fault laws.²²

The author of the article titled “*Why is divorce Reform Legislation Needed?*”²³ Views no-fault divorce as “Unilateral Divorce” as the majority of divorces which are based on no-fault grounds are unwanted by one spouse, but the court usually ends up granting the divorce. The writer agreeably asserts that no-fault divorce is unconstitutional as it obstructs the due process of the law. The court never refuses divorce and the defendant always loses. It is the conclusion of the writer that many studies showed that divorce rates did increased since no-fault divorce was implemented in USA. This paper adopts the view of this article to show all readers that the proposed no-fault divorce by the Namibian Law Commission has a lot of disadvantages.

b) Irretrievable breakdown of marriage

Visser and Potgieter stresses that the current divorce Act²⁴ in South Africa satisfies the needs of the South African society which is that divorce must be granted with relative ease and based on irretrievable breakdown. The writer explains these grounds of divorce and disregards previously applied fault based ground for divorce. Although the law reform on divorce laws in Namibia prefers irretrievable breakdown based ground for divorce, and would most likely agree with the writers’ views. This paper rejects the writers views due to the endless reasons stated in the paper.²⁵

In the book titled *Family Law, Gender and that State: Text, Cases and Materials*, Diduck and Kagana express their views in light of irretrievable breakdown of marriage and the fault based ground for divorce. The writers maintain that irretrievable breakdown of marriage is “contradictory” in many ways. “It displays tension between theory and practices...”²⁶ This paper evaluates and adopts the

²² Meyer, C. 2011. *The Issue of No-Fault Divorce*. Available at http://divorcesupport.about.com/od/maritalproblems/i/nofault_fault.htm; last accessed on 22 August 2011

²³ ReformDivorce.com. 2 August 2011. *Why is divorce Reform Legislation Needed?* Available at <http://www.reformdivorce.org/why-is-divorce-reform-needed.html>; last accessed on 3 August 2011.

²⁴ Divorce Act 70 of 1979.

²⁵ Visser, P. J and Potgieter, J.M 1998. *Introduction to Family Law*. 2nd ed. South Africa: Juta & Co, Ltd.

²⁶ Diduck *et el* (2006: p. 525).

views of the writers, since irretrievable breakdown of marriage is the fundamental aspect upon which the proposed divorce law reform in Namibia is focussed.²⁷

According to Hosten, Edwards, Bosman and Church fault based divorce is “unrealistic”. The writers are in-favour of irretrievable breakdown of marriage as according to them it takes “account of social reality”.²⁸ The views of the writers are expressed and analysed in this paper.²⁹

The views of Cronjé and Heaton in *The South African Family Law* are expressed in light of irretrievable breakdown of marriage as a ground of divorce. The views of the authors are used in this paper to explain irretrievable breakdown of marriage as Namibia wants to change from fault based divorce to irretrievable breakdown of marriage. With reference to cases on page 124, the authors looks at the wording of the South African Divorce act 70 of 1979. The act uses the word “may” in sections 3, 4 and 5 of the Divorce Act which creates an impression that the court has the power to refuse or grant divorce. The proposed divorce act uses the word “may” in section 3.³⁰

According to Diduck the increase in divorce rate in 1980 was caused by the “undefended divorce actions” that was introduced in 1977. Diduck’s views are expressed in light of the irretrievable breakdown of marriage as a divorce ground. The paper adopts the view of the writer as the proposed law reform on divorce laws is focussing on changing to irretrievable breakdown of marriage.³¹

In *South African Divorce Handbook*, Nathan scrutinises various aspects of divorce law and outlines the procedure used in divorce proceedings. This book is very helpful as the divorce law which is being scrutinised is based on the current used Namibian divorce laws.³²

²⁷ Diduck *et el* (2006: p. 525).

²⁸ Hasten, W.J., Edwards, A.B., Bosman, F., & Church, J. 1995. *Introduction to South African Law and Legal Theory*. Durban: Butterworths, p. 602.

²⁹ *Ibid.*

³⁰ Cronjé *et el* (2004).

³¹ Diduck, A. 2003. *Law’s Families*. United Kingdom: LexisNexis, Butterworths.

³² Nathan (1970).

2.3 Effects of Divorce

In the book titled *The End of Marriage? Individualism and Intimate Relations*, Lewis stresses on four main aspects namely, the concept of marriage, divorce, cohabitation and childbearing outside marriage. In this book the writer explains how and why marriage has increased and decreased over the years. To support findings, the writer has quite substantial data of empirical research and quoted sources. The writer views marriage as an important aspect of society, and raises awareness of Family law reform.³³

Örücü and Nelken³⁴ compared divorce laws of different jurisdictions, namely Spain, England, France, Sweden, Germany and others. They maintain that France, England and Wales, and Belgium failed in attempt of getting rid of fault based divorce. It is the view of the writer that despite the many grounds of divorce available in various countries, spouses always tend to choose the easiest way to divorce. The easiest way for divorce in these countries, e.g England and Wales is by fault based divorce. This paper briefly outlines some views of the writers.

In his book Riley³⁵ evaluates the entire concept of divorce in the United States. The writer discusses in a unique way and in great detail the reasons/causes for divorce, the effects of divorce, and the history of divorce. The writer maintains that “divorce is a remedy for mismatches.”³⁶

According to the Everett the economic consequences of divorce is “closely linked to the determination of fault.”³⁷ This is by determining who is at fault or committed a matrimonial offence. In the book titled the ‘*The Consequences of divorce: Economic and custodial impact on children and adult*’, Everett discusses the economic consequences of women and children after divorce. The author agreeably views

³³ Lewis, J. 2001. *The End of Marriage? Individualism and Intimate Relations*. Edward Elgar Publishing Limited: Cheltenham, UK.

³⁴ Örücü, E., and Nelken, D. (Eds). 2007. *Comparative Law: A Handbook*. Oxford: Hart Publishing.

³⁵ Riley, G. 1991. *Divorce – An American Tradition*. Oxford: Oxford University Press.

³⁶ *Ibid*, p. vii.

³⁷ Everett, C. A. (ed). 1991. *The Consequences of divorce: Economic and custodial impact on children and adults*. USA, New York: The Haworth Press, Inc., p. 5.

that women suffer great economic hardship after divorce than men. The views of this author will be briefly addressed in the chapter dealing with divorce rates.³⁸

In the book titled '*Untying the knot – A short history of divorce*' Phillips discussed the history of divorce in Western world from a broad perspective. The Western world consists of Great Britain, North America, Scandinavia, Australasia, and Western Europe. The writer evaluates whether or not the divorce law reforms has an effect on the divorce rates. It is the opinion of the writer that divorce law reforms have little or no effect to the divorce rates of countries. The writer identifies aspects such as employment of women, lack of affection, change of societies view on the concept of marriage and divorce as the few factors that contribute to the increasing divorce rate.³⁹

In the book titled *Family Law and Personal Life*, Eekelaar expresses views with regard to fault and no-fault based divorce. In light of the divorce rates in England the writer maintains that there is a weak link between divorce reform and divorce rates. As much as I would like to disagree with the writer there is solid evidence that this is true with regard to England.⁴⁰

Cretney and Masson discusses the two grounds for divorce (namely fault based divorce and irretrievable breakdown of marriage) and the increasing divorce rates. They maintain that making divorce readily available would create a habit to divorce in the "mind of the people and thus does play a part in weakening the security of marriage."⁴¹ Therefore some restrictions should be placed on the availability of divorce in order to uphold respect for the sanctity of marriage. Making divorce readily available would increase divorce rates, and give people an escape route when things start to go wrong. Getting divorce is supposed to be the last resort. It is the view of the writer that irretrievable breakdown of divorce allows divorce to be granted quickly and easily.⁴²

³⁸ *Ibid.*

³⁹ Phillips, R. 1991. *Untying the knot – A short history of divorce*. Cambridge: Cambridge University Press.

⁴⁰ Eekelaar (2006).

⁴¹ Cretney *et al* (1997: p. 304).

⁴² *Ibid.*

2.4 What Namibia can learn from other jurisdictions

De Cruz⁴³ in his book *Family law, sex and society – A Comparative study of Family Law* explores the developments of family law in several jurisdictions. This includes jurisdictions such as Europe, Africa, Asia, Russia Federation, United States, Australia, New Zealand, and Japan. By exploring the developments of different jurisdictions the writer addresses different aspects of family law (such as divorce law) in a comparative manner.

Divorce law in Great Britain (UK) is regulated by the Matrimonial Causes Act of 1973. This Act contains only one main ground for divorce which is irretrievable breakdown of marriage. The new Family act of 1996 is still to be enacted. In the book titled '*Family Law & Practice*' Burton explains the concept of divorce, outlining the grounds and causes of divorce and the effect that divorce has on children. The writer uses the provisions laid down in the Matrimonial Causes Act and different previous cases to explain the concept of divorce in Great Britain.⁴⁴

In the book titled *The Law of Marriage* Sinclair discusses different aspects that flow from the law of marriage. The book concentrates on South African family law. Our point of concentration is only on the parts relating to divorce law. The writer uniquely outlines the historical development of divorce laws in South Africa. The section relating to the historical development of divorce laws in South Africa is important as Namibian laws and South African laws are closely related due to the shared history of the two countries. The writer's view expressed throughout the book is seen mainly as informative. However, some views that are expressed by the writer are seen in the proposed law reform on divorce laws in Namibia. It is the conclusion in this paper that there is no need for Namibia to adopt and implement South African laws.⁴⁵

In *Comparative Law in a changing world*, De Cruz points out the fact that various countries have moved away from the fault based ground of divorce to the

⁴³ De Cruz, P. 2010. *Family law, sex and society – A Comparative study of Family Law*. 2nd ed. USA, New York: Routledge.

⁴⁴ Burton, F. 1997. *Family Law & Practice*. Great Britain: Cavendish Publishing Limited

⁴⁵ Sinclair, J. D. 1996. *The Law of Marriage*. Vol. 1. South Africa: Juta & Co, Ltd.

irretrievable breakdown of marriage ground of divorce. Some countries like France failed in the reform process, while others like Germany succeeded. Countries such as Sweden have moved away from irretrievable breakdown and “started to speak of divorce in terms of an entitlement and a right.”⁴⁶ While Italy, Portugal, Spain and Ireland have both fault and non-fault divorce.⁴⁷ The adopts and analyses the writer’s views as the paper intends to find out whether Namibia is only implementing a new act because (a) the fault based ground we have in our divorce laws is “out-dated” or (b) because other countries have implemented divorce reform and we just want to follow the trend.

2.5 Conclusion

Cretney and Masson⁴⁸ asserts that law has an influence on people’s behaviour and that irretrievable breakdown of marriage as a ground for divorce does make divorce to be granted easily and quickly. Meyer’s⁴⁹ and Ekirikubinza⁵⁰ views are similar to Cretney and Masson’s views. From all that has been said above, now I wonder which ground is more suitable for Namibia?

⁴⁶ De Cruz, P. 1999. *Comparative Law in a changing world*. 2nd ed., Great Britain: Cavendish Publishing. p. 249.

⁴⁷ *Ibid*.

⁴⁸ Cretney *et al* (1997). .

⁴⁹ Meyer (2011).

⁵⁰ Ekirikubinza, L. T. 2002. Family relations and the law in Uganda: Insights into current issues, in Bainham, A. (ed). *The International Survey of Family Law – 2002 Edition*. Great Britain: Jordan Publishing Limited, p. 436.

Chapter 3

Findings of the Research

Introduction

It is unnecessary to discuss the Native Administration Proclamation 15 of 1928 as the paper does not deal with the marital regimes and the division of the estate of a person.

3.1 Divorce Laws currently used in Namibia

In Namibia there are four grounds for divorce. Two are common law grounds and the other two are statutory grounds which were enacted by the Divorce Laws amendment ordinance, 1935⁵¹. We should keep in mind that Namibia follows the fault based divorce which differs from South Africa's irretrievable breakdown of marriage. The Namibian fault based divorce does not look at the failure of the marriage, but only at the fault aspect with regards to the spouses. In order to attribute guilt to one of the spouses the Namibian fault based divorce looks at the conducts of the spouses during the marriage.

3.1.1 DIVORCE LAWS AMENDMENT ORDINANCE 18 OF 1935

This ordinance amends the common law by adding two new grounds of divorce to the common law grounds. These two new grounds of divorce are seven years of incurable insanity, and imprisonment for more than five years after a declaration of habitual criminality. Initially the common law consisted of only two grounds for divorce, which is malicious dissertation and adultery.

3.1.2 MATRIMONIAL CAUSES JURISDICTION ACT 22 OF 1939

This act deals with the following;

a) jurisdiction

⁵¹ 18 of 1935

- b) Preliminary orders
- c) Setting aside of judicial separation decreed by another division of Supreme Court
- d) Claims in reconvention
- c) Orders as to property rights of spouses and custody guardianship and maintenance of children
- d) Law and practice applicable in actions or claims in reconvention for divorce or restitution of conjugal rights dealt with under this Act
- e) Recognition of certain decrees and orders

By virtue of the Matrimonial Causes Jurisdiction Act the court has the power to make financial orders on divorce.

Section 7*bis* of the Matrimonial Causes Jurisdiction Act, 1939⁵² defines “Republic” to include the territory of South West Africa. Section 7*ter* states “This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel referred to in section 38(5) of the South West Africa Constitution Act, 1968 (Act No. 39 of 1968).”

The Married Persons Equality Act, 1996⁵³ amends section 1 of the Matrimonial Causes Jurisdiction Act⁵⁴.

3.1.3 MATRIMONIAL CAUSES JURISDICTION ACT 35 OF 1945

This act mainly deals with two (2) aspects of divorce namely; ⁵⁵

- a) the temporary jurisdiction in proceedings for divorce or nullity of marriage where husband domiciled outside Union and South-West Africa at time of marriage;
- b) certain decrees and orders recognized in Union and South-West Africa

⁵² No. 22 of 1939.

⁵³ No. 1 of 1996

⁵⁴ No. 22 of 1939.

⁵⁵ Matrimonial Causes Jurisdiction Act 35 of 1945

3.1.4 MATRIMONIAL AFFAIRS ORDINANCE 25 OF 1955

The aim of this Ordinance is similar to the South African Matrimonial Affairs Act, 1953⁵⁶. In accordance to this Ordinance certain limitation on placed with regard to the marital power of the husband in a civil marriage.

This Ordinance was amended by Ordinance, 1967⁵⁷ and by the Married Persons Equality Act 1 of 1996. The Married Persons Equality, 1996⁵⁸ which amends section 4 and repeals sections 1, 2 and 3.

3.2 Current Fault grounds for divorce in Namibia

3.2.1 ADULTERY

In *Clarkson v Clarkson*,⁵⁹ adultery is defined as “voluntary sexual intercourse between a man and a woman who is not married to each other but one of whom at least is a married person.”⁶⁰ This is similar to Nathan’s definition which defines adultery as a “voluntary sexual intercourse between a spouse and a person other than his or her wife or husband.”⁶¹ With reference to the case of *Cunningham v Cunningham*⁶² Nathan extends his definition to include sodomy and bestiality.⁶³ The sexual act must be voluntary, as involuntary sexual act does not constitute adultery. A married person who is raped does not commit the act of adultery.

The entire concept of marriage is said to be based on fidelity, thus adultery breaches the fundamental grounds upon which marriage is based.

⁵⁶ No. 7 of 1953

⁵⁷ No. 9 of 1967

⁵⁸ No. 1 of 1996

⁵⁹ (1930) 143 LT 775, 46 TLR 623

⁶⁰ Quoted in Conway, H. L. 2004. *The comprehensive Guide to all the Facts - Family Law*. London: Hodder & Stoughton, p. 7.

⁶¹ Nathan (1970: p. 3).

⁶² 1952 (1) SA 167 (C)

⁶³ Nathan (1970: p. 3).

By using a global survey Koning noted that adultery is commonly used ground for divorce globally.⁶⁴

3.2.2 CONSTRUCTIVE DISSERTATION AND MALICIOUS DISSERTATION

Constructive dissertation and malicious dissertation are two concepts which are closely related. Malicious dissertation is said to take place in the following two respects;

- i) Where one spouse physically leaves the matrimonial home with no intention of coming back to it.⁶⁵
- ii) Where the one spouse stays away from the matrimonial home with no intention of returning to it.⁶⁶

When a spouse constructively disserts the other spouse he/she does not leave or stay away from the matrimonial home, but the spouse

- i) acts in a way that the other spouse is coerced to leave the matrimonial home⁶⁷.
- ii) portrays behaviour that it is evident the marriage relationship can no longer continue.⁶⁸

In *Belfort v Belfort*⁶⁹ the Appellate Division laid down that

“the policy of the courts is to uphold the sanctity of marriage and not lightly to put an end to what is the very foundation of the most important unit of our social life, the family ... It is for this reason, too, that the orbit of the doctrine of constructive desertion should not be extended.”⁷⁰

In *Froneman v Froneman*⁷¹ it was stated as follows:

⁶⁴ Konig, R. 1974. Sociological Introduction, in Glendon (ed). *International Encyclopedia of Comparative law*. Mohr and Martinus-Nijhoff, Vol. IV, Ch. 1, p. 59.

⁶⁵ Nathan (1970: p. 4).

⁶⁶ *Ibid.*

⁶⁷ *Ibid*, p. 5.

⁶⁸ *Ibid.*

⁶⁹ 1961 (1) SA 257 AD at p. 259.

⁷⁰ Also cited in Nathan (1970: p. 5).

⁷¹ 1972 (4) SA 197 (T) at 198G to H

The law, as I understand it, is this: No conduct, however reprehensible, will constitute constructive desertion unless the necessary animus is present. The animus may take the form of *dolus directus* in the sense of a positive intention to put an end to cohabitation; or it may take the form of *dolus eventualis* in the sense of a knowledge by the defendant that the probable or possible effect of his conduct would be a termination of cohabitation, coupled with a wilful disregard of that possibility or probability. The animus may be proved by direct or indirect evidence of the defendant's state of mind; it may, in a proper case, be inferred from the circumstances, including the nature of the defendant's unlawful conduct.

The court will order for restitution of conjugal rights before it grants a degree of divorce. The order for restitution of conjugal rights will only be done in cases where the divorce is based on constructive or malicious desertion. The degree of divorce will only be granted after the spouse to whom the order is given fails to adhere to the order for restitution of conjugal rights.

With regard to order for restitution of conjugal rights Judge Muller AJ pointed out in *James v James*⁷² that Hahlo, in his work *The South African Law of Husband and Wife*,⁷³ sums up the law in this regard in the following words:⁷⁴

A final decree of divorce may not be granted if it appears on the return day that the defendant has complied with the restitution order by restoring or offering to restore conjugal rights to the plaintiff.

Restitution of conjugal rights means the restoration of cohabitation as man and wife. The *factum* of the return must restore the marital relationship. There is consequently no restoration of conjugal rights if the defendant returns to the plaintiff under circumstances which show that he has no intention to resume marital cohabitation.

Hahlo continues saying⁷⁵:

The return or offer to return must be genuine and *bona fide*, and not a mere ruse or stratagem to escape an order of divorce. In *Corbett v Corbett* the defendant wife returned to the plaintiff and lived with him for a few days. Then she deserted him again. The Court held that the defendant's return was not *bona fide*, but was a ruse on her part. In

⁷² 1990 NR 112 (HC); Also reported at 1991 (3) SA 476 (Nm)

⁷³ Hahlo, H. R. 1969. *The South African Law of Husband and Wife*, 3rd ed, p. 410.

⁷⁴ 1990 NR 112 (HC); Also reported at 1991 (3) SA 476 (Nm)

⁷⁵ Hahlo (1969: p. 411).

Schepers v Schepers the fact that the parties had had intercourse on an isolated occasion was held not to amount to a resumption of cohabitation as man and wife.

In *James v James*⁷⁶, Judge Muller AJ had to decide whether the defendants offer to return to the marital home was genuine or not. The court held that after the final analysis of all the evidence before it, it could not find that the defendant had “proved that he was *bona fide* or genuine in his offer to restore conjugal rights.” The court concluded that the defendants “offer to return was not a genuine attempt to resume the marriage.”

3.2.3 SEVEN YEARS OF INCURABLE INSANITY

In terms of section 1 (1) (a) of the Divorce Laws Amendment Act⁷⁷, divorce may be granted on grounds that one spouse is subject to the Mental Diseases Act 1916 for not less than seven years. The insanity must be incurable and other spouse should not be responsible for causing the insanity of the spouse.

3.2.4 IMPRISONMENT FOR MORE THAN FIVE YEARS AFTER A DECLARATION OF HABITUAL CRIMINALITY

In terms of section 1 (1) (a) of the Divorce Laws Amendment Act⁷⁸, a spouse may only be granted divorce if the other spouse has been declared a habitual criminal in terms of the criminal in terms of the Criminal Procedure and Evidence Act, 1917 and detained in prison for at least five years after such declaration.⁷⁹

3.3 Conclusion

Along with Roman Dutch common law, Namibia is currently using four divorce acts which can sometimes be confusing for some people. The divorce laws should be compiled into one divorce act. Changes can be made to some aspects of the

⁷⁶ 1990 NR 112 (HC); Also reported at 1991 (3) SA 476 (Nm)

⁷⁷ 32 of 1935.

⁷⁸ 32 of 1935.

⁷⁹ Nathan (1970: p. 10).

divorce laws, but fault based grounds that was outlined and briefly discussed above should be retained.

In *Schwartz v Schwartz*⁸⁰ Corbett pointed out the court's approach as follows;

In determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties it is important to have regard to what has happened in the past, ie the history of the relationship up to the date of trial, and also to the present attitude of the parties to the marriage relationship as revealed by the evidence at the trial.

Proponents of no-fault base law maintain that there will be less embarrassment for the spouses as the court will not go into the facts of the case. The above mentioned case *Schwartz v Schwartz*⁸¹ is a South African case which is based on irretrievable breakdown of marriage. It is evident from the principles of this case that even with no-fault based divorce the courts will (in some cases) still look into the facts of the case and evidence will still be presented in court by the spouses.

3.4 Analysing of some aspects of the new proposed Namibian divorce act

The proposed divorce bill of Namibia is similar to the South African Divorce Act⁸². Looking at the South African Divorce Act⁸³ we cannot help but wonder whether the new divorce bill is merely an imitation of the South African Divorce Act. Let's have a closer look at nexus of ideas proposed by the Namibia Law Reform and Development Commission with regard to divorce law.

The proposed divorce bill makes divorce possible on two grounds, namely (1) irretrievable breakdown and (2) mental illness or the continuous unconsciousness of a party to the marriage.

⁸⁰ 1984 (4) SA 467 (A) 475

⁸¹ 1984 (4) SA 467 (A) 475

⁸² 70 of 1979

⁸³ *Ibid.*

3.4.1 Irretrievable Breakdown

According to the proposed divorce bill the guidelines for irretrievable breakdown of marriage are listed as follows:⁸⁴

- (a) the spouses have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date on which the divorce application is instituted.
- (b) Either spouse committed adultery.
This is different from the South African Divorce act⁸⁵ which states that the defending spouse has committed adultery and the spouse instituting the divorce finds it “irreconcilable with a continued marriage relationship.”⁸⁶
- (c) either spouse has committed physical, sexual or psychological abuse against the other; or
- (d) either spouse has been sentenced to a minimum of 5 years imprisonment.

With regards to a divorce which is based on irretrievable breakdown the court held in *Coetzee v Coetzee*⁸⁷ that “the plaintiff must prove that there has been a change in the pattern of the marriage form which breakdown can be deduced.”⁸⁸

Cronjé and Heaton point out the difficulty of distinguishing between “divorce on demand by one of the spouses, consensual divorce, and irretrievable breakdown.”⁸⁹

3.4.2 Mental illness or continues unconsciousness as one of the grounds for divorce

Mental illness or continues unconsciousness are two different grounds for divorce that fall is placed in the same section.

⁸⁴ Law Reform and Development Commission. (November, 2003). LRDC 13 - *Report on Divorce* (ISBN 0-86976-654-6), p. 8.

⁸⁵ 70 of 1979 see section 4 (2) (b).

⁸⁶ Cronjé *et el* (2004: p. 121).

⁸⁷ 1991 (4) SA 702 (C).

⁸⁸ Cronjé *et el* (2004: p. 120).

⁸⁹ *Ibid*, p. 122.

(a) Mental illness

The proposed divorce bill lays down guidelines in terms of which the spouse that is applying for divorce must prove to the court that the other spouse has a serious mental illness which makes it impossible for “continuation of a normal marriage relationship” with no reasonable possibility of cure is a ground for divorce.⁹⁰

(b) Continues unconsciousness

To obtain a degree of divorce the spouse that is applying for divorce must prove to the court that the other spouse has been continuously unconsciousness for at least one year prior to the divorce application with no reasonable prospect of regaining consciousness.

3.5 Constitutional basis for the Namibian draft divorce bill

The constitutional basis for the Namibian draft divorce bill was raised in the judgement of *Snyman v Snyman*⁹¹. According to the Law Reform and Development Commission the following are the points that were raised in the judgement of *Snyman v Snyman*⁹²;

- Enforcement of Fundamental Rights and Freedoms: Article 25 of the Namibian constitution gives persons the power to approach court and seek relief.
- Freedom of association: According to Article 21 of the Namibian constitution freedom of association is one of the fundamental freedoms of all persons in Namibia. This association includes the right to enter into marriage and to terminate a marriage.
- Public Policy: In terms of public policy persons should not be forced to remain in a marriage that they want to terminate.
- Common law and the Namibian constitutions: “There are fundamental differences between the principles upon which Namibia as a secular state [Article 1 (1) of the Namibian Constitution] is founded, and the common law grounds for divorce.”

⁹⁰ Law Reform and Development Commission. (November, 2003). LRDC 13 - Report on Divorce (ISBN 0-86976-654-6), p. 10.

⁹¹ (Case No. (P) 166/2003).

⁹² *Ibid.*

- The law as it stands includes the provisions of the Constitution.⁹³

3.6 Conclusion

Ueitele, AJ stated in *De Klerk v De Klerk*⁹⁴ that;

One of the presumptions that inform the process of interpretation of statutes is the presumption that, “statute law is not unjust, inequitable and unreasonable. Laurens Du Plessis in his book *Re-Interpretation of Statutes* opines that presumption “goes to the root of **what most citizens believe a legal order should any rate seek to achieve** while it eludes as far as humanly possible individual hardships”.⁹⁵

This brings us to the question. If the presumption “goes to the root of what most citizens believe a legal order should any rate seek to achieve”, than what does the section 4 of the new proposed divorce act seek to achieve?

With regard to causes (grounds) of divorce the Earl of Birkenhead formulates as follows “to limit the causes of divorce is to ignore the fact that the spiritual and moral aspects of marriage are incomparably more important than the physical side”.⁹⁶ A lot of countries have many grounds for divorce. Upon getting divorce they do what Örüçü and Nelken would call “ground shopping”.⁹⁷ Despite the availability of multiple grounds for divorce empirical research shows that spouses in England and Wales tend to choose the shortest way to divorce.⁹⁸ In most cases the shortest way to get divorce is by divorce ground of irretrievable breakdown of marriage.

The proposed ground for divorce “irretrievable breakdown of marriage” can be misleading and confusing. The proposed divorce law reform bill states only two grounds for divorce namely, irretrievable breakdown of marriage and mental illness or the continuous unconsciousness of spouse to the marriage. The law professes that irretrievable breakdown of marriage does not include any fault grounds for

⁹³ Law Reform and Development Commission. LRDC 13 - Report on Divorce (ISBN 0-86976-654-6). (November, 2003), p. 2.

⁹⁴ Case No. I 841/2009 at paragraph 59 of the judgement

⁹⁵ At page 154

⁹⁶ Birkenhead, Earl of (F. E. Smith) 1927. *Law, life and Letters*, Volume 1. London: Hodder and Stoughton, pp. 154-5.

⁹⁷ Örüçü, E., and Nelken, D. (Eds). 2007. *Comparative Law: A Handbook*. Oxford: Hart Publishing, p. 253.

⁹⁸ *Ibid*, p. 253.

divorce. But then it provides factors as evidence of irretrievable breakdown, three of which are fault based. When a divorce is based on irretrievable breakdown the court, in majority of cases does not look in to the facts of the case.⁹⁹

⁹⁹ Law Reform and Development Commission. LRDC 13 - Report on Divorce (ISBN 0-86976-654-6). (November, 2003); See also Cretneyn *et el* (1997); Eekelaar (2006); and Weitzman (1985).

Chapter 4

The possible effects of divorce law reform

Introduction

This chapter is cardinal as for the first time Namibia has actually presented a proposed bill for reforming its divorce. After in-depth reading of the bill and materials relating to divorce it is possible to argue that the type of divorce ground a country chooses determines its divorce rates.

4.1 The link between divorce rates and divorce law reform

To answer the question as to whether there is a link between divorce rates and divorce law reform is not simplistic. Academic writers have different views with regard to this issue.

Jacob maintains that divorce law reforms had no effect on divorce rates in the United States.¹⁰⁰ Allen,¹⁰¹ Friedberg¹⁰² and Wolfer¹⁰³ are all in agreement that there is a link between divorce rates and law reform.¹⁰⁴ Wolfers analysed various divorce legal reforms that occurred in the United States from the 1960s and 1970s. He concluded that the various divorce legal reforms that occurred during the aforesaid period had an effect on divorce rates.¹⁰⁵ Unlike Wolfers, Friedberg looks at divorce law reform that occurred from the 1970's. The author concludes that the divorce law reforms caused the rise of the divorce rates during 1970s and 1980s.¹⁰⁶

¹⁰⁰ Jacob, H. 1988. *The Silent Revolution: The Transformation of Divorce Law in the United States*. Chicago: University of Chicago Press, p. 162.

¹⁰¹ Allen, D. W. 1992. Marriage and Divorce: Comment. *American Economic Review*, 82(3), 679–685.

¹⁰² Friedberg, L. 1998. Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data. *American Economic Review*, 88(3), pp. 608–627.

¹⁰³ Wolfers, J. 2006. Did unilateral divorce laws raise divorce rates? A reconciliation and new results. *American Economic Review*, 96(5), pp. 1802–1820.

¹⁰⁴ The position of the divorce rates after the divorce law reform.

¹⁰⁵ Wolfers (2006: pp. 1802–1820).

¹⁰⁶ *Ibid.*

In England between 1960 and 1970 the divorce rate increased twice as much than it was. The divorce rate doubled again in the 1970's and is still increasing.¹⁰⁷ Interestingly the Divorce Reform Act of 1969 only came into effect from 1971 and replaced the fault-based divorce law with divorce based on irretrievable breakdown.¹⁰⁸ In 1966 there were 3.2 divorces per 1 000 marriages and in 2004 there were 14.0 divorces per 1 000 marriages. Eekelaar points out that in 1956 the "majority of the Royal Commission of 1956 predicted that weakening the divorce law would destroy the concept of life-long marriage."¹⁰⁹ Eekelaar points out that "studies show that there is only a weak relationship between the rate of divorce and the nature of divorce law."¹¹⁰ As much as we would like to deviate from Eekelaars assertions we have to agree that the writers' assertions are correct with regard to England.

Note that the divorce law in England and Northern Ireland is similar. Since the implementation of the present divorce law, the rate of divorce in Northern Ireland is escalating. In 1996, according to the Social Trends 28¹¹¹ the annual rate of divorce in Northern Ireland was 3.4 per 1 000 while the divorce rate in England and Wales was 13.5 per 1 000.¹¹² Glennon maintains that "divorce is an important social issue which requires an efficient and cost-effective governing legal framework."¹¹³ Looking divorce rates of Northern Ireland, England and Wales, it is highly unlikely that we will disagree with Glennon's connotation.

It is convenient at this stage to question whether the divorce law reforms are the cause of the increasing divorce rates or are only a response to the increasing divorce rates.

After discussing the increases in England, Western Germany, France and United States, Philips concludes that divorce law reforms had no or very little influence on

¹⁰⁷ Phillips, R. 1991. *Untying the knot – A short history of divorce*. Cambridge: Cambridge University Press, p. 243.

¹⁰⁸ Eekelaar (2006: p. 19).

¹⁰⁹ *Ibid*, pp. 24 and 18.

¹¹⁰ *Ibid*, p. 24.

¹¹¹ (Office of National Statistics, 1998) Table 2.19

¹¹² Glennon, L. 2001. Family Law: A process of Reform, in Bainham, A. (ed). *The International Survey of Family Law – 2001 Edition*. Great Britain: Jordan Publishing Limited, p. 352.

¹¹³ *Ibid*.

the escalation of divorce rates.¹¹⁴ Philips maintains that the divorce rates started escalating before the divorce reforms were implemented.¹¹⁵ Philips assertions may be correct with regard to some countries such as England, however for countries such as France and United States we have to strongly disagree with Philips assertions. Let's look at France for example.

The French national institute of statistics (INSEE) recorded an increase in divorce rates of France. Which Philips also observed. However Philips failed to mention that in 1975 when no-fault divorce was enacted the divorce rates in France rapidly increased. Again in 2004 when divorce reform took place the divorce rates were more rapidly increasing. Evaluating this it is possible to argue that divorce reforms does have an effect on the divorce rates.

As we have seen there is no-consensus among the writers as to whether there is a direct link between the divorce rates and divorce law reform. However, strict logic dictates that no-fault ground divorce laws would make obtaining divorce very easy and quickly and would in turn increase divorce rates.

When a statute is promulgated it "inevitably conveys a certain message" about what is acceptable and what is unacceptable."¹¹⁶ The statute influences people's actions. As pointed out by Young "there would be no point in legislating at all if the law did not influence behaviour..."¹¹⁷

Deech argues:¹¹⁸

... to bring statute law into line with 'reality' has resulted in an increase in the divorce rate. The increased divorce rate results in greater familiarity with divorce as a solution to marital problems, more willingness to use it and to make legislative provision for its aftermath. The resultant pressure on the divorce system leads to a relaxation of practice and procedure..., then to a call for a change in the law in order to bring it into line with 'reality', and then to yet another increase in divorce.

¹¹⁴ Phillips (1991: p. 243).

¹¹⁵ *Ibid*, p. 243.

¹¹⁶ Cretneyn *et el* (1997: p. 305).

¹¹⁷ *Ibid*, p. 305, fn. 26a.

¹¹⁸ Diduck *et el* (2006: p. 522).

Various countries such as Western Germany, France and United States have proven Deech's argument to be true. In countries such as France and United States it has been observed that the divorce rates did increase after the implementation of no-fault ground divorce. At this point one wonders what whether or not Namibia's divorce rates will increase as those countries? Is Namibia not planning to do the same as the other countries?

Richard takes issue with Deech argument that relates to "divorce reform and the rate of marriage breakdown".¹¹⁹ According to Richard "[t]here is a widespread view that the number of those who divorce is determined by the ease or difficulty of the legal process. In the widest sense this is, of course, true - if divorce is not possible, it cannot happen."¹²⁰

Richard goes on and gives an example of Ireland. The writer formulates that in Ireland it shows¹²¹

... that the absence of a divorce process does not ensure that all couples remain living together or, or indeed, married. The process of marital breakdown should be distinguished from the various legal processes that those whose marriages have ended use (or do not use) to regularise their situation...

Richard is missing Deech's point. Deech is not professing that divorce law to be eliminated. What the writer is simply doing is pointing out that divorce rates increases every time a country changes their divorce laws by simply relaxing the grounds for divorce. An excellent example would be the countries that changed their divorce grounds from fault based divorce to irretrievable breakdown of marriage.

4.2 Effects of increasing divorce rates

An increase in divorce rates automatically means an increase in economic problems. It has been found that divorced women and their children experience a tremendous

¹¹⁹ Diduck *et el* (2006: p. 522).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

drop in income and standards of living after divorce.¹²² Older divorce women and women with younger children experience the greatest hardships, while men actually improve their level of economic well-being.¹²³

Keep in mind that women are usually the primary caretakers of the children and most fathers' are in arrears with their maintenance payments. The economic hardship suffered by women in-turn affects the literacy rate of the country, as many children from divorce families do not get a chance of an adequate education and end up working for low wage from an early age. This in-turn increases the poverty level of the country.

4.3 Divorce rates in Namibia: Is it as high as we think?

According to the United Nations Population Division the number of Divorced Men decreased from 11.38%¹²⁴ in 1991 to 5.2%¹²⁵ in 2007. The number of divorced women also decreased from 23.87%¹²⁶ in 1991 to 11.1%¹²⁷ in 2007. We can conclude that over the seven (7) years from 1991 to 2007 the divorce rates in Namibia actually decreased from 35.25% to 16.3%. Interestingly from 1960 to 2007 the divorce rates in Namibia has decreased with 20.22%. In 1960 there were 36.52% divorces: 28.08% were women and 8.44% were men.¹²⁸

Compared to the divorce statistics of other countries, such as United States and Europe the divorce rates of Namibia are very low. However, it is believed that the divorce rate is steadily increasing.¹²⁹

¹²² Everett (1991: p. 6).

¹²³ *Ibid.*

¹²⁴ FindTheBest.com, Inc.. 2011. *Namibia Marital Statistic: 1991 Men Divorced*. Available at <http://marriage-statistics.findthebest.com/detail/4441/Namibia>; last accessed on 22 August 2011

¹²⁵ FindTheBest.com, Inc.. 2011. *Namibia Marital Statistic: 2007 Men Divorced*. Available at <http://marriage-statistics.findthebest.com/detail/4453/Namibia>; last accessed on 22 August 2011

¹²⁶ FindTheBest.com, Inc.. 2011. *Namibia Marital Statistic: 1991 Women Divorced*. Available at <http://marriage-statistics.findthebest.com/detail/4435/Namibia>; last accessed on 22 August 2011.

¹²⁷ FindTheBest.com, Inc.. 2011. *Namibia Marital Statistic: 2007 Women Divorced*. Available at <http://marriage-statistics.findthebest.com/detail/4453/Namibia>; last accessed on 22 August 2011

¹²⁸ FindTheBest.com, Inc.. 2011. *Namibia, Marriage Statistics by Country*. Available at <http://marriage-statistics.findthebest.com/directory/d/Namibia>; last accessed on 22 August 2011

¹²⁹ Divorce rates of United States and Europe is discussed in the beginning of the chapter. I compared this divorce rates with those of Namibia.

4.4 Countries that failed in divorce reform process

4.4.1 FRANCE

Around 2004 France failed to introduce a new French divorce law of 2004 which would have eradicated fault based divorce and introduced only no-fault based divorce. The main changes contained in the 2004 divorce law were modifications of the particular grounds.¹³⁰

¹³⁰ Örucü *et al* (2007: p. 249).

Chapter 5

Lessons Namibia can learn from other countries

Introduction

There are two main types of divorce, which is fault and no-fault ground based divorce. The type of divorce used by spouses depends entirely on the governing divorce law of that country. Thus in order to reform our divorce law it is pertinent to discuss the lessons Namibia can learn from other countries. This chapter will first start by explaining the types of divorce, analysing the different grounds of divorce, discussing countries with those different grounds of divorce and finally concluding as to which ground of divorce is possibly more suited for Namibia.

5.1 Understanding types of divorce

There has been a long on-going debate about fault and no-fault ground based divorce in the world.¹³¹ Many countries prefer to have both fault and no-fault ground based divorce. This combination is usually instituted in the following two respects.

- a) The first one is a mixture of both fault and non-fault ground of divorce. This is instituted by allowing one spouse (in most cases the husband) to use a no-fault ground but makes fault mandatory when initiated by the other spouse.¹³²
- b) The second one is where the divorce claims on no-fault divorce, although the divorce ground still accommodates precise grounds that attaches fault to one of the spouses.¹³³ This is similar to the proposed divorce act of Namibia. It connects both no-fault and fault divorce by proving irretrievable breakdown of marriage.

¹³¹ De Cruz (2010: p. 23).

¹³² *Ibid*, p. 24.

¹³³ *Ibid*.

5.2 Analysis of fault ground based divorce

Under fault based divorce marriage can be seen as a contract. A contract which can only be breach by blameworthy means, i.e one of the spouses should be responsible for causing the marriage to come to an end. Breaching this contract of marriage by means of fault gives valid grounds for divorce. Örucü and Nelken points out that in fault based divorce the court will always enquire into a matrimonial offence.¹³⁴

Excluding fault based ground divorce will be excluding the grounds upon which one can make monetary claims, such as maintenance for the spouse and adequate division of property.

5.3 Analysis of no-fault ground based divorce

Unlike fault ground based divorce, no-fault ground based divorce does not require proof of fault or an allegation from either one of the spouses. One or both spouses can make an application to the court. The slightest admittance or affirmation marriage breakdown will suffice. The courts will just grant the divorce and will not examine the facts of the case. After in-depth reading of no-fault ground based divorce it is possible to argue that this ground of divorce makes divorce easier for spouses.

Spaht asserts that most divorces that occur in the United States are based on no-fault grounds.¹³⁵ Whether Spahts assertion is accurate or inaccurate is an entirely a different debate on its own as the writer gives no data to substantiate the statement. Riley points out that in the United States, no-fault divorce was popular in 1970's. However by the 1980's "it was apparent that no-fault provisions contributed to the poverty of growing numbers of women and children in the United States."¹³⁶

Do not be too quick to disapprove Spaht and Riley's findings as it was conducted in the United States around 1970's and 1980's. Five to ten years after the

¹³⁴ Örucü *et el* (2007: p. 251).

¹³⁵ Spaht, KS. 2003. *Revolution and Counter-Revolution: The Future of Marriage in the Law*. 49 Loyola LR 1, p. 13.

¹³⁶ Riley (1991: p. 7).

implementation of the new divorce act there is a huge possibility that we will face the same problem. The following reasons will help clarify the aforesaid view:

- (i) Namibia's divorce rates will rise as divorce will be easily obtainable.
- (ii) Namibia has a high unemployment rate. The unemployment rates in Namibia have been slowly rising. The Namibian Labour Force Survey observed that the unemployment rates increased in 2004 to 36.7% from 33.0% in 2000. Approximately two-thirds of the unemployed are in the most productive age group of 16-45 years. This can mean that in most cases only one of the married couple is working. Consequently one of them will be left with no income after the divorce is granted (this is usually the women). Which in-turn means that poverty is due to increase among women and children.
- (iii) Division of property and maintenance would not be accurately determined as the divorce is probably based on a no-fault ground of divorce.

Opponents of fault based ground for divorce would argue the procedure of fault based divorce causes distress and humiliation to the spouses. We can in turn argue that the same can be said for no-fault based ground divorce. The entire concept of divorce already caused a stir in the concept of life long lasting marriage, making it no-fault based would destroy the little existence that is left in the concept of life long lasting marriage en endanger housewives and children.¹³⁷

At this point, considering the possible issues arising from no-fault ground divorce, we need to question the entire concept of marriage. Divorce which is based on no-fault grounds undermines the entire concept of marriage. Marriage is widely accepted to be a contract of trust between two people which is deemed to be permanent. The entire concept of no-fault grounds for divorce gives an understandable unknown meaning to the definition of marriage.¹³⁸ Weitzman points out that divorce laws will affect the ideas the society has about marriage.¹³⁹

¹³⁷ Eekelaar (2006: p. 18).

¹³⁸ Cited in Lewis, J. 2001. *The End of Marriage? Individualism and Intimate Relations*. Edward Elgar Publishing Limited: Cheltenham, UK, p. 100.

¹³⁹ *Ibid.*

5.4 No-fault grounds for divorce in some countries

Sweden and California (USA) are excellent examples of countries that have implemented strictly no-fault grounds for divorce in their divorce law. When discussing Sweden and California's grounds for divorce we will see that: a) before Sweden implemented no-fault based divorce they had irretrievable breakdown which is the ground that the Namibian law reform and development commission is proposing Namibia should change to;¹⁴⁰ b) before California implemented no-fault based divorce their divorce was based on fault which is the current divorce ground for Namibia.

Sweden introduced divorce on demand. The Swedish divorce law has moved away from irretrievable breakdown of marriage and has implemented divorce on grounds of what they call "divorce in terms of an entitlement and a right."¹⁴¹ The Swedish reason for divorce reform was based on a directive which was laid down by the Swedish minister of justice around 1971. The Minister of Justice stated that "legislation should not under any circumstances force a person to continue to live under a marriage from which he wishes to free himself."¹⁴²

In 1970 California (USA) abolished fault based divorce and introduced strictly no-fault grounds for divorce. This meant that no grounds for divorce needed to be proved, unilateral divorce was made possible and financial awards were no longer determined by fault. By permitting unilateral divorce, Californian law made obtaining a divorce easy and faster. It has been seen that there is a shorter time between the filing of divorce and final decree of divorce.¹⁴³

5.5 Fault grounds for divorce in some countries

Namibia is one of the countries that use fault based divorce. Unlike Uganda that uses fault based divorce and places a higher burden of prove on women than

¹⁴⁰ Law Reform and Development Commission. LRDC 13 - Report on Divorce (ISBN 0-86976-654-6). (November, 2003).

¹⁴¹ De Cruz (2010: p. 249).

¹⁴² Örücü *et el* (2007: p. 249).

¹⁴³ Weitzman (1985: p. 37).

men,¹⁴⁴ the Namibian fault based divorce does not place such high burden on women.

In Uganda it is adequate for a husband to just prove adultery as a ground for divorce, but a wife has to prove desertion and cruelty in addition to adultery.¹⁴⁵ Logically this is discriminatory towards the wife as she has a higher burden of prove than the husband. The Uganda Law Reform Commission proposed that their grounds of divorce should be changed to no-fault divorce or irretrievable breakdown of marriage.¹⁴⁶

5.6 Countries that have both fault and no-fault grounds for divorce which is also known as irretrievable breakdown of marriage

This part of the paper will discuss divorce laws in South Africa, Germany, England, Northern Ireland, and France. All five of these countries have both fault and no-fault grounds for divorce which is also known as irretrievable breakdown of marriage.

Interestingly, divorce law in Northern Ireland is governed by the Matrimonial Causes (Northern Ireland) Order 1978 is modelled on the English Matrimonial Causes Act 1973. The Matrimonial Causes (Northern Ireland) Order 1978 provides both a fault and no-fault grounds for divorce.¹⁴⁷

South Africa abolished fault grounds for divorce three (3) years after Germany abolished it during the 1976 divorce law reform.¹⁴⁸ Currently Germany has only one ground for divorce, which is only irretrievable breakdown of marriage. When we read from article 1565 till article 1568 of the BGB, we will pick up that German divorce law is not entirely just divorce based on irretrievable breakdown, but also consists of divorce by mutual consent.

When we attentively read the governing divorce law of France in comparison to the South African divorce Act and the proposed divorce Bill of the Namibian law reform

¹⁴⁴ Ekirikubinza (2002: p. 436).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ The Matrimonial Causes (Northern Ireland) Order 1978

¹⁴⁸ Örucü *et al* (2007: p. 248).

and development commission we can see that divorce law in France is similar to the Namibia's proposed bill and the South African divorce act. Divorce in France is based on three main grounds. (a) where both spouses agree to get divorce, (b) where one or both spouses applies for a divorce, and (c) divorce on the ground of fault. An additional ground for divorce is irretrievable deterioration of married life i.e irretrievable breakdown of marriage.¹⁴⁹

5.7 Irretrievable breakdown, no-fault or fault based divorce: Which is more suited for Namibia?

Namibia is currently using the fault based divorce ground as oppose to the irretrievable breakdown divorce ground. In terms of this divorce ground a spouse who wants to get divorce must show that the other spouse is at fault or guilty of some kind of wrong against the other spouse.¹⁵⁰ Hubbard and Cassidy maintain that the current divorce not adequate to meet the needs of divorcing couples.¹⁵¹ However are Hubbard and Cassidy right by maintaining the aforesaid? The question inevitably arises... What will adequately meet the needs of divorcing couples? Is it implementing divorce laws that will make divorce easier, simpler and cheaper? We have to keep in mind that taking away fault based divorce completely does not mean that obtaining divorce becomes easier.¹⁵²

It is convenient at this stage to highlight that both Germany¹⁵³ and South Africa¹⁵⁴ are historically linked with Namibia and are based on the irretrievable breakdown of marriage.

After publications of proposals for divorce reform in Northern Ireland, Glennon made an interesting remark that deserves to be quoted.

¹⁴⁹ De Cruz (2010: p. 25).

¹⁵⁰ Hubbard, D and Cassidy, E. 2002. Family law reform in Namibia: Work in progress, in Bainham, A. (ed). *The International Survey of Family Law – 2002 Edition*. Great Britain: Jordan Publishing Limited, p. 272

¹⁵¹ *Ibid*, pp. 272 – 273.

¹⁵² Martiny, D. Divorce and Maintenance between former spouses – Initial Results of the Commission on European Family Law, in Boele-Woelki (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe*, European Family Law Series No. 4, 2003, Intersentia, p. 534.

¹⁵³ Between 1884-1915 Namibia was a mandated territory of Germany.

¹⁵⁴ During 1915-1988 Namibia was controlled by South Africa.

When considering divorce reform, one of the key questions is the desirability of the retention of the fault facts to prove irretrievable breakdown of marriage.¹⁵⁵

With regard to the guilt aspect which is omitted in no-fault divorces Gorecki continues saying that:

...it is **not true that no one is ever guilty of failure of his marriage**; the radical determinism ... underlying the total disclaimer of guilt is ill conceived and harmful.

Those who are unilaterally guilty of disrupting their marriages, in particular if the amount of the guilt is great, should be punished, not rewarded, for what they did. Their punishment conveys a message to the general society: minimum of responsibility is anyone's family obligation, and so is an effort to avoid inflicting suffering on one's spouse and children, and wrecking their lives.¹⁵⁶

Here Gorecki meant that responsibility should be given to the guilty spouse. This should be done in forms of punishment by means of financial orders, or delictual actions.

Based on the lessons of other countries should Namibia reform it divorce law?

¹⁵⁵ *Ibid.*

¹⁵⁶ Eekelaar (2006: pp. 106-107).

Chapter 6

Conclusion of the study

6.1 Conclusion

History has proven that in other countries (such as the US) that have no-fault divorce has contributed to an escalation of in the number of single-parent homes. It has been observed that most of the children from single parent homes are more likely to drop out of school commit juvenile crime or be a teenage mother. Looking at the current rates of juvenile crimes, school drop outs, rate of poverty and teenage mothers in Namibia, the reader might conclude that this is already happening in Namibia so why blame it on no-fault based divorce? All this was also present in the other countries but soon after the implementation of no-fault divorce the rates of juvenile crimes, school drop outs, teenage pregnancy and poverty escalated. The paper found that there is a linked between divorce reform and the divorce rates.¹⁵⁷ Countries with no-fault divorce grounds and irretrievable breakdown of marriage tend to have a higher rate of divorce than countries with no fault divorce.

Critics of fault based divorce have blamed fault based divorce for being out dated and not in line with the reality of modern society. Looking at the current development of divorce we can agree that the acts are out-dated. The out datedness of the acts is not just seen on the dates of the acts, but also in the acts itself. e.g the acts refer to Namibia as South West Africa.

It is convenient at this point to quote a statement by Lord Mackay which was made in a Foreword to the government's consultation paper.

I believe that a good divorce law will support the institution of marriage by seeking to lay out for parties a process by which they receive help to prevent a marriage being dissolved ... It is important that the process leading to divorce should enable the

¹⁵⁷ For elaboration see chapter 4 of this paper which deals with the possible effects of divorce law reform.

parties to do as much as possible to prevent their marriage from finally ending if that sad event can be avoided.¹⁵⁸

In cases where a marriage ends due to a wrong done by either or both spouses it would be wrong not to allege fault as a ground for divorce.

Namibia is said to be a Christian country. It has been proven that more than 70% of Namibians are Christians. On this ground we refuse to make legalise some laws such as abortion and homosexuality. Why can we not use this ground to refuse the change of divorce grounds from fault based divorce to irretrievable breakdown of marriage.

¹⁵⁸ Lord Chancellor's Department, 1993; Quoted in Lewis, J. 2001. *The End of Marriage? Individualism and Intimate Relations*. Edward Elgar Publishing Limited: Cheltenham, UK, p. 117.

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