**AN ANALYSIS OF THE IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND FOR DIVORCE IN KENYA**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

By

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**Declaration**

I, LUCY WARINGA MBATIA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .......................................................................

Date: ..........................................................................

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ..........................................................................

Kariuki Francis

# ABSTRACT

Marriage is the very bedrock of the family and consequently of the society without which no civilization can endure. Once parties contract a marriage, the law steps in and binds the parties to various liabilities and obligations thereunder. Under the Marriage Act, 2014 both spouses have been guaranteed a right to have their union dissolved by a decree of divorce on more than one ground. The Republic of Kenya is traditionally a fault-based divorce regime owing to the nature of the grounds stipulated in the Marriage Act 2014. However, the Legislature has been aware of the social advancements and the need to avail the remedy of divorce in increased circumstances through the implementation of the irretrievable breakdown of marriage as a ground for dissolution of marriages in Kenya. This ground traditionally falls under the no-fault divorce regime and as such there is need to examine how it fits into our fault-based divorce regime. The answer to this is far much more complicated than the usual subdivision into either fault or no-fault owing to the fact that several considerations have been attached to this ground in the aforementioned Act.

This study will therefore attempt to examine the irretrievable breakdown as a ground for dissolution of marriage in Kenya as provided for in the Marriage Act 2014.

Research on this study will be done through exploration of data, articles, journals, judicial precedent and legislation relevant to the matter in question.

**Key Words**

matrimonial offence, fault, no fault theories of divorce, irretrievable breakdown of marriage, marriage, divorce,

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1. **LIST OF STATUTES**

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*Family Law Act* (Australia).

1. **LIST OF ABBREVIATIONS**

EALR – East Africa Law Reports

FLA – Family Law Act

eKLR – Kenya Law Reports

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**CHAPTER ONE: INTRODUCTION**

**1.1 Background**

As the institution of marriage increasingly evolves, there has been a growing awareness of the fact that although most, if not all spouses intend for marriage to be a lifelong union, there could arise unavoidable circumstances that result in the eventual disintegration of the marriage. These include but are not limited to: infidelity, unrealistic expectations, the lack of affection and intimacy, lack of equality in the marriage, cruelty and adultery.[[1]](#footnote-1) As a result, the legal framework in majority jurisdictions provides for the choice of divorce.[[2]](#footnote-2) In trying to understand and justify divorce, one needs to understand marriage. John Locke posits that marriage and the State share in the reality that they are both based on consent.[[3]](#footnote-3) This consent therefore means that the parties are not only free to enter into a marriage with whomever they want but to also seek for its dissolution once the marriage disintegrates.[[4]](#footnote-4)

The laws surrounding marriage and divorce around the world are of grave importance due to the sanctity that is the institution of marriage. In the case of *Mordaunt v Mordaunt*, Sir J.P Wild asserted that

*“marriage as an institution is protected because it bestows status on the parties to it and upon the children that issue from it. Despite the fact that it is entered into by individuals, it has a public personality. It is the premise whereupon the structure of civilized society is built; and as such, is subject in all nations to general laws which direct and control its incidents and obligations independently of the volition of individuals who enter upon it.”[[5]](#footnote-5)*

In Kenya, divorce is discouraged and paramount consideration is put in advancing the promotion of the stability of marriage and family life. The family's place in society is pivotal thus the reason for its protection through the enactment of the Marriage Act 2014. The Constitution of Kenya 2010 serves as a backdrop against which the Marriage Act 2014 was enacted. In ensuring the protection of the family, it recognizes that the family is the natural and fundamental union of society and the crucial foundation for social order.[[6]](#footnote-6) Moreover, it guarantees every person the right to marry a person of their preference, provided that they are of the opposite gender and there is consent from both parties.[[7]](#footnote-7) Before divorce can be sought, reconciliation is suggested with divorce being placed as a last resolve.

Due to the various types of marriages that exist in Kenya, different reasons are advanced as to why divorce is frowned upon. For Christians, the Bible provides for a monogamous marriage which is to be a lifelong union.[[8]](#footnote-8)Jesus Christ, among others such as Apostle Paul, not only reiterated the importance of marriage but also its permanence stating that divorce did not exist in the beginning but was only allowed by Moses because of the people's hard hearts.[[9]](#footnote-9) As a result, Christianity advocates for the permanence of marriage and advances that divorces are neither necessary nor unavoidable. Catholicism prohibits divorce and only allows the existence of an annulment but under very rare circumstances.[[10]](#footnote-10) Under Customary law, the elders are called upon to attempt reconciliation before the union can be disbanded. However, some communities such as the Kuria go to the extent of disregarding the very existence of divorce.[[11]](#footnote-11) The aforementioned reasons go a long way to show the importance that is placed on marriage and the reasons for there being only a limited number of grounds from which divorce can be sought in Kenya.”

However, in recognition of the fact that not all marriages are bound to be successful, a provision is made for the enactment of legislation by Parliament that shall recognize marriages terminated under any traditional, or system of religious, personal or family law and any system of personal and family law under any tradition, or adhered to by persons professing a certain religion so long as they are consistent with the Constitution.[[12]](#footnote-12)

The current legal standing is that both spouses are guaranteed equal rights at the onset of marriage, during the marriage and at the end of the marriage.[[13]](#footnote-13) For children, a guarantee is made of the right to parental protection and care, which encompasses equal responsibility of the father and the mother to cater for the child’s needs, whether or not they are married to each other.[[14]](#footnote-14)

Keen to note is that the grounds provided from which divorce can be sought are limited to those provided in the Marriage Act 2014 from which fault has to be proven before divorce can be granted. However, with the enactment of the aforementioned Act came the irretrievable breakdown of marriage ground which accommodates any other grounds that the court may deem appropriate in granting a divorce.

**1.2 Statement of the Problem**

President Uhuru Kenyatta signed into law the Marriage Bill No 13 of 2013 on April 29, 2014, which consolidated the distinctive laws overseeing religious, civil and customary unions and divorces in Kenya.[[15]](#footnote-15) The legislation reiterates a fixed, limited list of grounds for dissolution of civil, Christian and Hindu marriages and acknowledges the use of any grounds acceptable under the pertinent customary and Islamic practices. This consolidation of laws introduced a new ground; the irretrievable breakdown of marriage as one of the grounds from which dissolution of a Christian, Civil, Customary and Hindu marriage can be sought. Traditionally, the aforementioned ground has fallen within the no-fault regime of divorce. However, the Marriage Act 2014 attaches further considerations to the ground by stipulating that a marriage has irretrievably broken down when either of the parties is cruel, commits adultery, willingly neglects the other party, is imprisoned or any other ground that the court may deem appropriate. This then necessitates an analysis of this ground in our Kenyan context. As such this study seeks to analyse the irretrievable breakdown ground for dissolution of marriages in Kenya that was introduced with the enactment of the Marriage Act, 2014.

**1.3 Research Aim and Objectives**

This study aims to carry out an analysis of the irretrievable breakdown of marriage as a ground for divorce in Kenya provided for in Section 65, 66 and 69 and 70of the Marriage Act 2014.

The specific objectives of the research are to:

1. Delve into the rationale behind the passing of the pertinent sections of the Marriage Act 2014.
2. Identify the considerations attached to the irretrievable breakdown ground of marriage as a ground for dissolution of marriages in Kenya.
3. Compare Australia’s irretrievable breakdown of marriage as a ground for divorce to that of Kenya.

**1.4 Hypothesis**

This study’s hypothesis will be:

The introduction of the irretrievable breakdown ground of marriage as a ground for dissolution of marriages in Kenya in the Marriage Act 2014 has served to provide a ground for termination of marriages that disintegrate outside the traditional fault-based grounds.

**1.5 Research Questions**

1. What are the grounds for dissolution of marriages in Kenya?
2. What are the considerations attached to the irretrievable breakdown of marriage as a ground for divorce in Kenya?
3. How is Australia’s irretrievable breakdown of marriage ground different from Kenya’s?

**1.6 Justification for Research**

As the attitude towards divorce changes, this necessitates a change in our current divorce laws to make them increasingly adaptable and accommodating. Roger Cotterrell in his book *Law’s Community*[[16]](#footnote-16)concludes that law needs a political authority as a condition for implementation as well as the moral authority as a condition for its social acknowledgment.[[17]](#footnote-17) This assertion only confirms the old adage that ‘law mirrors the society’.[[18]](#footnote-18) A look into Kenya’s divorce laws will reveal that the laws were made in contemplation of requirement of fault from either party in a marriage. To this extent, before the Marriage Act 2014 was implemented, the grounds provided for divorce were confined to those that were provided in the repealed Marriage Act with a further requirement of fault from either party. However, with the implementation of the Marriage Act 2014, such laws on divorce in Kenya have been implemented to now include the irretrievable breakdown of marriage as a ground for divorce. This means that the introduction and inclusion of this ground in the Marriage Act 2014 mirrors the increasingly evolving society to cater for marriages that disintegrate outside of the traditional grounds for divorce in Kenya.

**1.7 Theoretical Framework**

**1.7.1 Social Contract Theory**

John Locke propounds that marriage, being a social contract, brings about a contractual relationship. He posits that the obligations of marriage are to join together in communion of interest, to reproduce children for the advancement of the species, and to care for them until they are self-sufficient.[[19]](#footnote-19) Locke legitimizes this assertion by advancing that man is not made to live in confinement, and that in order to prosper, he must be put under strong societal obligations.[[20]](#footnote-20)

Moreover, he expresses that our institution of marriage is what separates us as human beings from the mammoths of the field. For the mammoths of the field, the union between male and female endures as long as the act of copulation; human beings are both increasingly dependent at birth and progressively proficient in maturity. This legitimizes the need for government over a society, according to Locke. Despite the fact that spouses have similar interests and concerns, there will be unavoidable conflicts based on their different desires. A government offers stability and equilibrium; its rules are not subject to our daily changes in feeling or desire.[[21]](#footnote-21) Therefore, for the progression of society in general, it is essential to have a government that is constant in a world of endless variables. This government then assumes the role of implementing laws which must be adhered to by those living in that society.[[22]](#footnote-22) This can be compared to the laws legislated in relation to marriage and divorce in our Kenyan context including the implementation of the irretrievable breakdown ground in a divorce regime that previously failed to recognize that ground and only provided a limited number of grounds from which divorce could be sought.

**1.7.2 Breakdown Theory of Marriage**

The irretrievable breakdown of marriage ground stems from the breakdown theory of marriage which propounds that a marriage no longer exists when its essence is destroyed and the law should therefore not compel the parties to continue with the marriage.[[23]](#footnote-23) Sometimes, neither of the spouses is at fault thus negating the presence of matrimonial offence, but the law ought to assist them in the dissolution of the marriage. This regime is to some degree therefore a pragmatic approach of realizing the social reality in marriage; that sometimes parties to a marriage might not be guilty of an offense but the law ought to assist them in the dissolution of the marriage despite the lack of matrimonial offense being at play.[[24]](#footnote-24)

In contemporary society, the breakdown of marriage theory is perceived by the laws of many countries and a pattern towards this theory becomes discernible through the enlarging of the number of grounds based on the fault theory and by giving the widest possible interpretation to the traditional fault grounds.[[25]](#footnote-25)

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**1.8 Literature Review**

In his paper, Douglas Allen summarizes the historical origins of no-fault and the effects of the no-fault divorce on divorce rates and concludes that no-fault has certainly led to an increase in divorce rates over the past three decades. He however fails to recognize that once a marriage has disintegrated, spouses will still seek divorce even in fault-based divorce regimes thus requiring the apportionment of fault only serves to prolong divorce proceedings.[[26]](#footnote-26)

In her book *Dissolution: No-fault Divorce, Marriage, and the Future of Women*[[27]](#footnote-27), Riane Tennenhaus points out that throughout history, the structure and form of the family have continually changed and evolved, which are all reflections of evolving social and economic realities that require new forms of social organization such as the irretrievable breakdown ground of divorce which is a stray from Kenya’s traditional grounds of divorce. She adds that this ground is in many respects an improvement over the older laws of divorce in countries that have adopted it.[[28]](#footnote-28) However, by attaching fault factors to what is traditionally a no-fault ground, the Law fails to recognize the ever evolving causes of the breakdown of marriages.

In his paper ‘*The Limits of Limits on Divorce’*[[29]](#footnote-29) Robert Gordon states that at some point highly demanding laws become less effective than those that are less restrictive such as providing set grounds upon which divorce can be sought.[[30]](#footnote-30) Moreover, he also notes that conditioning divorce on fault is more likely to encourage destructive behavior to children and leaves parents less financially secure due to the costs of long tedious litigation. He shuts down the argument that tougher divorce laws can help both the parents and children by stopping the divorce.[[31]](#footnote-31) In stipulating a limited number of grounds from which divorce can be sought the Law fails to recognize that doing so does not stop divorce.

In his paper, *‘The Law of Divorce and the Problem of Marriage Stability’*[[32]](#footnote-32) Max Rheinstein argues that divorce should not be based solely on traditional fault grounds such as adultery, cruelty or desertion. He proposes that divorce should be viewed as a regrettable, but necessary, legal definition of marital failure, where very often the factors leading to the marriage breakdown were not all one-sided and based solely on the fault of one guilty party, but they were also caused by the incompatibility and irreconcilable differences of both spouses.[[33]](#footnote-33) However, the Law fails in its duty to protect the spouses divorce by necessitating parties prove of fault which in many instances leaves parties bitter and angry.

In his book *‘The Grounds for Divorce: The Australian Experience’[[34]](#footnote-34)* H.A Finlay presents a question on whether fault should be a factor in divorce proceedings. He advances that in passing the irretrievable breakdown of marriage as a ground for divorce, the Law sought to rid divorce proceedings of the previously existing disfigurements of perjury, humiliation and bitterness and to simply base the dissolution of marriage on the proof of the marriage having irretrievably broken down with a separation period of twelve months thus negating the need for matrimonial offence. In Kenya, the irretrievable breakdown of marriage was introduced in our Marriage Act 2014 but it attaches several considerations for a marriage to be considered to have broken down which are fault based. The Law fails to take into consideration that there are marriages which disintegrate in the absence of fault by attaching fault considerations to a no-fault ground.

**1.9 Research Design**

**1.9.1 Research Methodology**

This study will constitute mainly of qualitative data analysis and review of literature that exists on the irretrievable breakdown of marriage as a ground for divorce. It will be a purely desktop research thus no field activities will be conducted due to time and resource limitations. This study will predominantly use primary sources including the Constitution of Kenya 2010, Statute, Case law and books with the inclusion of secondary sources such as reports, internet sources, and journal articles from both renowned institutions and authors. There will also be analysis of both Kenyan and Australian case law in order to identify the differences in the application of the irretrievable breakdown of marriage as a ground for divorce by courts in both countries.

Research on this study will be purely comparative, critical and analytical without any religious or emotional arguments. It will be purely factual thus relying and borrowing heavily from existing literature on this accessed through the internet and the school's library. This comparative approach will aid in bringing forth Australia’s application of the irretrievable breakdown of marriage as the sole ground for divorce.

This research will also undertake to review literature covering both policy and academic texts, drawing from studies and reports on the irretrievable breakdown of marriage as ground for divorce. It will focus on documents whose dates of publication falls within the last two decades.

A comparative analysis will also be undertaken as a means of comparison between the application of the irretrievable breakdown of marriage in Kenya and Australia. At both the federal and State levels, the substantive law of Australia is generally borrowed from the common law system of English law, which is also the case in Kenya, a British colony, thus making Australia a good fit for a comparative analysis.

**1.9.2 Assumptions**

The study will be carried out based on the assumption that the introduction of the irretrievable breakdown as a ground for divorce facilitates the dissolution of marriages that disintegrate outside the traditional grounds.

**1.9.3 Limitations**

As part of the partial fulfillment of the degree of Bachelor in Law, time constraints will act as a hindrance towards the completion of the research and the occurrence of technological difficulties including the disruption of wireless connectivity of the internet resulting in a halt in the research process. I therefore intend to mitigate the aforementioned by allocating at least two hours a day towards the completion of my research and use the computer laboratory when I experience technological difficulties.

Moreover, acquisition of research materials on this topic proved to be difficult owing to the fact that there is little research done on this particular topic in the Kenyan context.

**1.9.4 Chapter Breakdown**

**Chapter One: Introduction**

This chapter provides the background of the study, the statement of the problem, the literature review, the objectives and questions, the hypothesis, the theoretical framework and the design methodology of the study.

**Chapter Two: Historical Development of Marriage Laws in Kenya**

This chapter will outline the historical development of marriage laws in Kenya and highlight the evolution of divorce laws in our jurisdiction, by applying a chronological order.

**Chapter Three: Irretrievable Breakdown of Marriage**

This chapter will look into the working definition of the irretrievable breakdown ground for dissolution of marriages with an aim of examining its application in Kenya.

**Chapter Four: Comparative Analysis**

This chapter will deal with a comparative analysis and take a look at Australia’s irretrievable breakdown ground. This country is relevant to the study for comparison owing to the fact that its divorce regime is a no-fault divorce regime that only necessitates proof of separation for twelve months before the marriage can be legally terminated.

**Chapter Five: Findings, Recommendations and Conclusion.**

As the final chapter of the dissertation, it will focus on the findings of the study, the conclusion and the recommendations of the researcher.

**1.3.5 Timeline**

This dissertation will commence on April 2019 and take seven months to be completed. Submission of the final copies to the school will be done on 4th December 2019.

1. **CHAPTER TWO: HISTORICAL DEVELOPMENT OF THE IRRETRIEVABLE BREAKDOWN OF MARRIAGE AND KENYA’S CONTEXT**

**2.0 Introduction**

To appreciate the author’s research, it is key to begin by establishing a definition of the term irretrievable breakdown of marriage before proceeding to outline the evolution of the aforementioned ground as a ground for dissolution of marriages. The second part of this chapter seeks to outline the historical development of laws on marriage in the Kenyan context with the aim of highlighting the evolution of divorce laws in Kenya to the point of the introduction of the irretrievable breakdown of marriage as a ground for divorce in the Marriage Act, 2014. This chapter also seeks to look into Kenya’s legal regime in relation to divorce laws with the aim of understanding the irretrievable breakdown of marriage as a ground for divorce as provided for in the Marriage Act 2014 and its application in Kenyan courts. In order to do so, it is important to categorically look at the existing legislative framework by first establishing what grounds the Marriage Act 2014 provides for the dissolution of marriages then proceed to narrow down on the irretrievable breakdown of marriage and its application in Kenya through case study.

**2.1 Defining irretrievable breakdown of marriage**

The author seeks to consolidate legislative provisions, dictionary definitions and definitions from legal precedent on irretrievable breakdown of marriage in coming up with a working definition. The irretrievable breakdown of marriage refers to a situation where either or both spouses are no longer able or willing to live with each other thereby breaking the husband-wife relationship with no hope of resuming their spousal duties.[[35]](#footnote-35)

As per legislation, a marriage has irretrievably broken down where:

1. *a spouse commits adultery;*
2. *a spouse is cruel to the other spouse or child of the marriage;*
3. *a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;*
4. *the spouses have been separated for at least two years, whether voluntary or by decree of the court;*
5. *desertion for at least three years immediately preceding the date of presentation of the petition;*
6. *a spouse has been sentenced to a term of imprisonment for life or seven years onwards;*
7. *incurable where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or*
8. *any other ground as the court may deem appropriate.*[[36]](#footnote-36)

Black’s Law dictionary defines it as a broad ground for divorce that is predicated on the development of incompatibility between marriage partners and that is used in many states as the sole ground of no-fault divorce.[[37]](#footnote-37) In *Joy v Joy****[[38]](#footnote-38),*** it was held that:

*“a marriage is irretrievably broken when, for whatever reason or cause and no matter whose fault it is, the marriage relationship is for all intents and purposes ended; when the parties are unable, or refuse, to cohabit; or when it is beyond hope of reconciliation or repair. The principal question to be determined is whether the marriage is at an end and beyond reconciliation.”[[39]](#footnote-39)*

**2.2 Evolution of the Irretrievable Breakdown of Marriage as a Ground for Divorce**

In so far as Commonwealth countries are concerned, the origin of the irretrievable breakdown of marriage as a ground for divorce may be traced to the legislative and judicial developments of New Zealand in The (New Zealand) Divorce and Matrimonial Causes Amendments Act, 1920.[[40]](#footnote-40) The Act was the first to include a provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given discretion (without guidelines) whether to grant the divorce or not. [[41]](#footnote-41) The case of *Lodder v Lodder*[[42]](#footnote-42)pioneered the exercise of the discretion conferred by the aforementioned statute. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

*“The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous.”*

In England, the case of *Masarati v Masarati*[[43]](#footnote-43)commenced the application of the breakdown theory of marriage where the Court of Appeal observed that the marriage had broken down.[[44]](#footnote-44) Moreover, The law commission of England in its report said:

*“the objectives of good divorce law are two: one to buttress rather than to undermine the stability of marriage and two, when regrettably a marriage has broken down, to enable the empty shell to be destroyed with maximum fairness, and minimum bitterness, humiliation and distress”.*[[45]](#footnote-45)

On the recommendation of the Law Commission, Irretrievable Breakdown of Marriage was made the sole ground for divorce under section 1 of the Divorce Law Reforms Act, 1973.[[46]](#footnote-46)

**2.3 The Development of Marriage Laws in Kenya**

**2.3.1 Pre-colonial era**

Prior to Kenya's declaration as a British protectorate, the institutions of family and marriage were regulated by the customs, traditions and customary laws of the ethnic communities. These customs, traditions and laws differed from one ethnic community to the other owing to the different circumstances and challenges faced by the different communities. African Customary Law provided for institutions and procedures that regulated the subsistence and conclusion of marriages, including dispute resolution mechanisms and dissolution of customary marriages.[[47]](#footnote-47)

**2.3.2 Colonial era**

British colonization, whose goal was the expansion of the British Empire, has long been credited for the advancement of Kenya's modern legal system and the application of common law.[[48]](#footnote-48) As is, Kenya is among the many countries whose legal development as a common law legal system was spearheaded by its transplantation in the context of colonial repression.[[49]](#footnote-49) This legal development was not only aided by the colonization of the Republic of Kenya, but also the struggle for its independence and its eventual independence which stimulated Kenya's institutional advancement and the application of statute law.[[50]](#footnote-50)

Kenya had its first British contact in the late 19th century when the British were in contention for the hegemony of Eastern Africa with the Germans and was officially declared a crown protectorate in 1920 putting it under the control of the British.[[51]](#footnote-51) The first common law courts in Kenya were established in 1897 and used Indian codes and policies during the years of colonial control, a pattern that had been established by the incidents of the courts in Zanzibar.[[52]](#footnote-52)

The provenance of family law in Kenya can be drawn back to the 1897 East African Order in Council, which not only introduced the application of determined Indian and British acts of Parliament to what was now referred to as the East African Protectorate, but also applied England's common law that was in operation at that time.[[53]](#footnote-53)The Order realized the introduction of the first statute law that served to govern the personal law of inhabitants within the protectorate. In so far as the locals were concerned, the Order had restricted application by providing that any cases against locals would be taken to the Native Courts. A Commissioner was accorded the power to establish and abrogate those Native Courts, manage their procedure and give directions with regard to the use and application of any native customs and laws.[[54]](#footnote-54) The result of this power was that the Commissioner made the Native Court Regulations of 1897, which stipulated that in issues affecting the individual status of the indigenous people, then the law of their tribe or caste could be used to the extent that it was ascertainable and not repugnant to morality. However, matters affecting the personal status of the indigenous Africans who had converted to Christianity could be handled in ordinary courts. Islamic law would then apply to the indigenous people who conformed to Islam in issues concerned with individual status.[[55]](#footnote-55)

There being two other communities in Kenya at the time, the Indians who had been brought in as laborers and British Colonizers, it was necessary to determine whether they were to apply the Indian Act or British Laws. It is worth noting that Indian Law was essentially British Law that had been enactedin India with their being very few differences between the two. They were clearly designed for application to the British Settler but a question arose as to whether they applied to the Hindu. In Kenya, the assumption was that they would apply.[[56]](#footnote-56)

A case in point is that of the Indian Succession Act of 1865, an Indian act that was applied under the 1897 Order in Council. In India, an explicit expression had been made that the aforementioned Act was not relevant to Hindu succession matters in which case the Hindus would apply their customary laws of succession. Contrary to this, when the Act was applied in Kenya, such an exclusion was not applicable in respect to Hindus.[[57]](#footnote-57) Where issues of marriage and divorce arose, English Marriage Laws were applied. Between 1897 and 1898, an issuearose concerning the Hindus in Kenya when it was stated that the Indian Succession Act did not apply to the Hindus requiring them to be governed by their own customary law. Two Acts were passed to govern succession matters for the Hindus that had converted to Christianity, the Probate and Administration Act of India and the Hindu Wills Act. The supposition was that for conventional or orthodox Hindus, customary laws were applied in succession matters.[[58]](#footnote-58)

The East African Order in Council was implemented in 1902 whose principle purpose was to further explain instances that would require application of customary law. It was advanced that in cases where the natives were parties, whether criminal or civil, native law would guide the courts to the extent that it was relevant and not repugnant to morality and justice or in conflict with any law passed within the protectorate.[[59]](#footnote-59) Through this Order, the Commissioner was vested with the authority to pass laws. As a result, among the first laws to be made was the Marriage Ordinance of 1902 which sought to replace the reliance on the Indian Divorce Act of 1869, which had served as a foundation for divorce law in Kenya, having been applied by the East Africa Order in Council of 1897 with an aim of providing or affording relief to monogamous marriages. The relief was restricted to issues to do with restitution of conjugal rights, child custody and separation.[[60]](#footnote-60)

The Marriage Ordinance Act applied to all inhabitants within the protectorate as it was neither tethered to religion nor race making it a law of general application.[[61]](#footnote-61) Under this Ordinance, a provision was made for a strictly monogamous Christian marriage. This provision made it an offense for an individual married under customary law to enter into a marriage under the ordinance and vice versa. Moreover, it provided a platform for settlers to enter into marriage and the converted natives to contract a Christian marriage. Key to note is that, any native who contracted marriage under the Marriage Ordinance Act of 1902 had to cut ties with their customary way of life and embrace Christianity in totality.[[62]](#footnote-62)

Several cases such as that of *Cole v Cole*[[63]](#footnote-63) contextualize what occurred in the event that one contracted marriage outside the Marriage Ordinance. In this case, a Nigerian couple contracted a Christian marriage under the Nigerian Marriage Ordinance from which a mentally incapacitated son was born. After the death of the husband, an issue emerged as to who was entitled to the deceased's property. The deceased's brother contended that in accordance to Nigerian Customary Law, he was entitled as an heir to the deceased's property. However, the spouse to the deceased that the act of contracting a Christian marriage completely distanced them from the practices of their native law and put them under the umbrella of English Succession Law. She was therefore entitled to inherit the property both in her own right and as her son's guardian. The court endorsed her argument fundamentally expressing that contracting a marriage under the Marriage Ordinance excluded them from the practices of African customary law.

Moreover, in *R v Amkeyo*[[64]](#footnote-64) an issue arose in the course of trial as to whether a spouse, having contracted marriage under African customary law, had the protection of spousal privilege. In coming to his decision, Hamilton C.J. declared that a spouse under customary law was not considered a spouse in the eyes of the law thus the wife was compelled to testify against her husband. A statement by the judge in *R v Mwakio*[[65]](#footnote-65) referring to a wife as a concubine under customary marriage thus disregarding her as a legal wife further advances the importance placed in the separation of customary and Christian practices.

The Native Christian Marriage Ordinance was enacted in 1904 to apply to natives who converted into Christianity and contracted monogamous marriages. It served to supplement The Marriage Ordinance of 1902 thus liberating the natives from having to conform to formalities that had been set out in the aforementioned Ordinance. In addition, it served as a source of protection for widows in Christian unions by exempting them from wife inheritance as set out in customary laws. This Ordinance was then replaced by the African Christian Marriage and Divorce Act of 1937 that sought to handle matters pertaining to marriage and its dissolution for Africans that had converted to Christianity.[[66]](#footnote-66)

The Mohammedan Marriage & Divorce Registration Ordinance[[67]](#footnote-67) was enacted in 1906 allowing Muslims to not only register their unions but also seek for divorce as a remedy. The Act was however not substantive but fundamentally procedural.[[68]](#footnote-68) Its territorial extent was extended to all Mohammedan Natives inhabiting the mainland in 1926 after having been confined to areas governed by the Sultanate of Witu and the Sultan of Zanzibar.

The Separation & Maintenance Ordinance of 1928 brought about change by enacting judicial separation as a redress mechanism other than the already existing option to divorce. It was however confined to monogamous unions allowing spouses to seek financial maintenance while the marriage subsisted.[[69]](#footnote-69)Eventually, the Matrimonial Causes Act was ratified in 1941, replacing the Divorce Ordinance of 1904 with majority of its provisions stemming from the Marriage Act, 1902[[70]](#footnote-70) and the English Supreme Court of Judicature (Consolidation) Act, 1925.[[71]](#footnote-71)

In 1946, a breakthrough was realized for Hindu marriages with the ratification of Hindu Marriage Divorce and Succession Ordinance resulting in Hindus parting ways with Hindu Customary Law. The provisions of this Act required all Hindu marriages to be contracted as per Hindu customs. The Hindu Marriage and Divorce Act replace it and stipulated monogamy for all future marriages. Moreover, it extended to Hindus the remedies available under Matrimonial Act and under the Subordinate Courts (Separation & Maintenance) Act of 1928.[[72]](#footnote-72)

**2.3.3 Post Independence**

Kenya gained independence on 12th December 1964[[73]](#footnote-73) and with that came the need for a change of the laws that had been passed during the colonial era. This was due to the dissatisfaction and the plethora of issues that had come about as a result of the plurality of laws dealing with marriage and divorce.[[74]](#footnote-74) The treatment of polygamous marriages as inferior despite their recognition was one of these issues. This is seen in several court decisions including *R v Amkeyo*[[75]](#footnote-75)as hereinbefore discussed. Therefore, his excellency the Late Mzee Jomo Kenyatta formed a commission on the Law of Marriage and Divorce to come up with marriage law that attempted to consolidate marriage law thus coming up with an autochthonous Marriage Act.[[76]](#footnote-76) A number of recommendations were propounded with the main idea being that the proposal of a complete remake of the laws pertaining to marriage and divorce on the grounds that making changes on only some aspect would not serve to accomplish any significant changes thus necessitating a fresh approach.[[77]](#footnote-77)

In trying to formulate new laws relating to marriage and divorce, the Muslims forwarded a plea requesting the non-interference with their personal law to include marriage and divorce, advancing that Islam is a complete way of life divinely ordained and relying on the freedom of religion guaranteed to them by the then Constitution of Kenya. However, the Commission was of the view that marriage, divorce and matters pertaining to the family's structure required the State's concern and their interconnection with religion did not justify the State's abdication of its responsibility.[[78]](#footnote-78)

Subsequently, there were three failed attempts to pass the bill drafted by the Commission with the last attempt taking place in 1979.[[79]](#footnote-79) This failure was mostly attributed to political reasons with claims that the proposed bill not only conferred a lot of undeserved rights to women but also veered away from African customs[[80]](#footnote-80) Of interest however is that the Commission recommended the move from a fault based divorce regime to a no-fault divorce regime.[[81]](#footnote-81)

The implementation of the current statute on marriage and divorce took place in March 2014, when the current President, His Excellency Uhuru Kenyatta assented the Marriage Act No. 4 of 2014, which consolidated all laws on marriage and divorce, providing for grounds upon which divorce could be sought and granted in Civil, Christian, Customary, Islamic and Hindu marriages in Kenya.[[82]](#footnote-82)

Among the many changes that were introduced by the legislation, the introduction of the irretrievable breakdown ground for dissolution of Christian, Civil, Customary and Hindu marriages is what is relevant to this research. In examining the rationale behind the passing of the aforementioned provision, there is need to point out that the reason provided in the National Assembly for the introduction of this ground was for the expansion of the grounds from which divorce could be sought.[[83]](#footnote-83)

**2.4 Current Legal Position of Divorce in Kenya**

The Republic of Kenya not only recognizes Christian marriages but also Customary, Civil, Hindu and Islamic marriages.[[84]](#footnote-84) It is primarily a fault-based divorce regime which means that the grounds provided for divorce have fault attached to them.[[85]](#footnote-85) Under the Marriage Act 2014, the grounds for divorce for a Christian, Civil and Customary marriages are similar and include:

1. *adultery by the other party one or more times;*
2. *the infliction of mental or physical cruelty by the other party on either the petitioner or the children;*
3. *desertion by the other party for at least three years directly predating the date of submission of the petition;*
4. *exceptional depravity by either party; and*
5. *the irretrievable breakdown of marriage.[[86]](#footnote-86)*

Under customary marriage, when the parties are seeking a divorce, the court tends to lean towards the reconciliation of the parties and therefore insists on reconciliation procedures.[[87]](#footnote-87) However, where reconciliation is not possible, the grounds provided for in Section 69 of the Marriage Act 2014 stand. In *Isaiah Bedi v Ether Munyasia[[88]](#footnote-88)* the husband's grounds for divorce were his wife's cruelty. He therefore brought forward evidence to prove that his wife had organized for members of the public to publicly beat him. Moreover, she was unfaithful and had borne a child with another man. The court in granting the divorce relied on the evidence brought by the husband since they were not mere allegations.[[89]](#footnote-89)

For Hindu marriages, the grounds for divorce include:

1. *the marriage has irretrievably broken down;*
2. *the other party has deserted the petitioner for at least three years before making of the petition;*
3. *the other party's conversion to another religion;*
4. *the spouse has committed sodomy, rape, adultery or bestiality since the celebration of the marriage;*
5. *the infliction of cruelty by the other party; and*
6. *exceptional depravity by either party.[[90]](#footnote-90)*

Finally, for Islamic marriages, the dissolution of the marriage shall be administered by Islamic law.[[91]](#footnote-91)

In the case of *W E L v J M H*[[92]](#footnote-92) the petitioner filed for divorce from his wife on the grounds that his wife had committed adultery. As per Section 66(2) of the Marriage Act 2014, among the grounds for divorce, adultery by the other spouse is provided for. The petitioner claimed that his wife had not only had affairs with other men on several occasions but that she was also cruel to him and would come home late in the night. In coming to its decision, the court recognised that the petitioner had failed to adduce evidence to prove that the respondent had committed adultery relying on the fact that he who alleges must prove. The petitioner had to be ready to prove fault by giving evidence in the form of names, occasions and even times since suspecting was not enough.[[93]](#footnote-93)

The above goes on to show that Kenya is primarily a fault-based divorce regime that necessitates the proof of fault by the spouse seeking divorce to establish their claim.

**2.5 Irretrievable Breakdown of Marriage as a Matter of Proof**

There are seven facts The Marriage Act 2104 provides that a marriage has irretrievably broken down when:

1. *a spouse commits adultery;*
2. *a spouse is cruel to the other spouse or child of the marriage;*
3. *a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;*
4. *the spouses have been separated for at least two years, whether voluntary or by decree of the court;*
5. *desertion for at least three years immediately preceding the date of presentation of the petition;*
6. *a spouse has been sentenced to a term of imprisonment for life or seven years onwards;*
7. *incurable where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or*
8. *any other ground as the court may deem appropriate.[[94]](#footnote-94)*

The above provisions make it clear that what is traditionally a no-fault divorce ground is in our jurisdiction characterised as a fault-based ground due to the considerations or facts attached to it that need to be proven for a marriage to be dissolved. In order to understand Kenya's application of this ground, there is a need to look into existing court decisions on this subject. court decisions.

**2.6 The Courts’ Interpretation of Irretrievable Breakdown of Marriage in the Kenyan Jurisdiction**

**a) C W C v J P C**[[95]](#footnote-95)

In this case, the court was in agreement with the spouses that the marriage had irretrievably broken down owing to the fact that it was a loveless marriage and the parties had been living separately as presented by the Petitioner. It held that, “in any event, parties should not be forced to stay together if such relationship is full of bitterness, mistrust and hatred against each other.” The Judge proceeded to hold that in such circumstances, he was inclined to let each party move on with their lives without being held in a marriage which was akin to bondage or servitude.[[96]](#footnote-96)

**b) K A S v M M K**[[97]](#footnote-97)

The court relied on the fact that the husband had been separated from his wife for three years. However, the court went a step further to declare that their marriage was nothing but a shell of what it used to be because as the court noted, it was clear from the pleading that the parties hated each other and that their attraction was far gone, swept away by the winds of distrust demonstrated by the accusations they have levelled against each other. The Judge was of the opinion that there was before the court a marriage by name and paper alone, a shell of its former self that has lost hope of being salvaged and as such he was inclined to allow the spouses to part ways as the marriage had irretrievably broken down.[[98]](#footnote-98)

**c) J M M v J M N**[[99]](#footnote-99)

The court observed thatthere was evidence from both parties that they were unable to reconcile and that their marriage had irretrievably broken down. From the evidence on record the parties had been separated from late 2013 and the petition was filed in March 2015. The Judge proceeded to note that Section 66 (6) of the Marriage Act is clear on what constitutes a marriage that has irretrievably broken down. Before the petition was filed, the parties had been separated close to two years, they were not in the same house, thus were physically separated. Moreover, there was mistrust between them, their commitment to each was no longer there and it was apparent that they had no chance of resuming their spousal duties and there was a very slim chance of the marriage ever working again. The Judge was therefore of the view that the marriage between the petitioner and the respondent had irretrievably broken down. [[100]](#footnote-100)

1. **CHAPTER FOUR: A CASE STUDY OF AUSTRALIA’S IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND FOR DIVORCE**

**4.1 Introduction**

In some jurisdictions, irretrievable breakdown of marriage is a sole ground for no-fault divorce with either a few or no considerations attached to it thus there is a need to look into one such jurisdiction. This chapter seeks to look into Australia’s irretrievable breakdown of marriage as a ground for divorce owing to the fact that it is the sole ground for divorce in what was traditionally a fault-based divorce regime. This will be done through a look into the background of this ground and the legislative framework of divorce law in Australia, which is now a no fault divorce regime. This country is relevant to the study for comparison owing to the fact that its divorce regime is a no-fault divorce regime that only necessitates proof of separation for twelve months before the marriage can be legally terminated.

**4.2 Background of irretrievable breakdown of marriage as a ground for divorce in Australia**

In Australia, family law has its principal foundation in the Family Law Act (FLA) of 1975, the laws of equity and common law.[[101]](#footnote-101) With the enactment of the FLA came the overhaul of Australia’s regulations on divorce and other legal family matters which established no-fault divorce in Australia where proof of misconduct by one or the other party is not a requirement. As a result, irretrievable breakdown of marriage denoted by a 12-month separation has been the only ground for divorce in Australia since 1975. This separation need not include living in separate houses so long as spouses residing in the same house can swear an affidavit to prove that they had separated for 12 months.[[102]](#footnote-102)

The meaning of separation was discussed the case of *Fitzgerald v Fitzgerald****[[103]](#footnote-103)*** to mean the ‘active withdrawal from an existing cohabitation’ and the withdrawal from a state of things rather than from a place as developed out of the mainstream of the traditional English divorce law doctrine.[[104]](#footnote-104)The Australian case of *Tulk v Tulk[[105]](#footnote-105)* provides a checklist from which absence of which results in separation being concluded to have taken place and the ceasing to exist of the marital relationship and include residing under the same roof, marital intercourse, support, recognition in both public and private and protection.[[106]](#footnote-106) It can then be concluded that where the aforementioned elements are absent or present, then it is more or less conclusive that the matrimonial relationship has ceased to exist. The court in the case of *Pavey v Pavey****[[107]](#footnote-107)*** included ‘the support and nurturing of the children’ in the aforementioned checklist which was further supported by the judge in the case of *Russell v Russell[[108]](#footnote-108)* who emphasized that:

*“the recognition by the society of the rights and duties of spouses in relation to their children springing from their status as children of the marriage lies not on the periphery but at the core of the social institution of marriage”****.***

Fault therefore only remains as a residual element in cases relating to property settlement issues and child custody.[[109]](#footnote-109)

Prior to the FLA of 1975, divorce laws were regulated by the Matrimonial Causes Act of 1961 which was among the first uniform national law that was enacted by the Commonwealth. The aforementioned Act had until then had the power to make laws on divorce and matters such as maintenance and custody.[[110]](#footnote-110) The Matrimonial Causes Act 1961 provided for a fault-based divorce system with the requirement that the petitioning spouse prove at least one of the fourteen grounds that had been set out in the Act. Among those grounds was adultery, cruelty, desertion, insanity, habitual drunkenness and imprisonment.[[111]](#footnote-111)

Divorce had until then been characterized by humiliation, bitterness, perjury and hypocrisy**.** The no-fault divorce replaced the fault-based system with the aim of ridding the law of the aforementioned disfigurements by simply basing the dissolution of marriage on proof that the marriage has irretrievably broken down with the parties having lived separately for at least twelve months.[[112]](#footnote-112) This contributed to easing the cynical nature of divorce and encouraging alternative dispute resolution and mediation as opposed to conflict, perjury and unnecessary massacres of personality. It was also intended to ease the stress of divorce and render the maintenance of civil ties easier for erstwhile spouses. This, in effect, also made it simpler for kids to cope with their parents' divorce.[[113]](#footnote-113)

**4.3 Legislative Framework**

In order to avoid veering off topic, there is a need to analyse Legislation that is relevant to the irretrievable breakdown of marriage as a ground for divorce. Australia’s legal framework on divorce can thus be broken down as done below:

**4.3.1 Statute**

As earlier mentioned divorce laws in Australia are governed by the FLA of 1975 which replaced the Matrimonial Causes Act of 1961. Part VI of the Act in its provisions on divorce and nullity of marriages provides that:

1. *An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.*
2. *Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.*
3. *A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.[[114]](#footnote-114)*

The Act further proceeds to define separation owing to the fact that is the only consideration attached to Australia’s no fault divorce regime. It stipulates that parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties and notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.[[115]](#footnote-115)

**4.3.1.1 Children and No Fault Divorce**

A no fault divorce in Australia will not take effect until the relevant court has concluded that suitable arrangements have been made for the welfare, development and care, welfare of the couple’s spouses’ children.[[116]](#footnote-116) If during divorce proceedings, the court doubts that proper arrangements have been put in place for the children, then at that point the court may dismiss the proceedings until a family consultant has furnished the court with a report about the children’s arrangements. A child is viewed as a child of the marriage regardless of the fact that he or she is not an offspring of either spouse, insofar as the child was treated by the couple as a child of their family immediately before the husband and wife separated.[[117]](#footnote-117) Section 55A solidifies this by providing that:

1. *A divorce order in relation to a marriage does not take effect unless the court has, by order, declared that it is satisfied:*
   1. *that there are no children of the marriage who have not attained 18 years of age; or*
   2. *that the only children of the marriage who have not attained 18 years of age are the children specified in the order and that:*
2. *proper arrangements in all the circumstances have been made for the care, welfare and development of those children; or*
3. *there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.*[[118]](#footnote-118)

**4.3.2 Case Law**

**4.3.2.1 In the Marriage of Todd[[119]](#footnote-119)**

Mr. and Mrs. Todd contracted a marriage in 1960 and had two children. Mrs. Todd left the couple’s matrimonial home on 23 November 1974 with the two children, but on 21 April 1975, all three moved back in and continued to reside there until the parents decided to divorce in 1976. They made an application for divorce under the FLA which was initiated in the Family Law Division of the Supreme Court of New South Wales but later transferred to the Family Court of Australia. On the question of divorce, one key issue was what constituted “separation” and “separated and apart” for a continuous period of not less than 12 months. The court held that this marriage had irretrievably broken down since 23 November 1974 owing to the fact that there had been continuous separation for 12 months. The Court advanced that the application for divorce had thus been satisfied from the facts. The Court held that “separation” was broader than mere physical separation and concerned the marital relationship itself. According to the Court:

*“Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship has been severed.”*

In this case, the Court held although the spouses moved back in together in April 1975, they never restored the marital relationship.[[120]](#footnote-120)

**4.3.2.2 Pavey v Pavey[[121]](#footnote-121)**

In this case, it was advanced that spouses may mutually agree to separate and bring their marriage to an end. On the other hand, separation may also be agreed upon in the hope that the marriage will be improved either from an economic standpoint or using separation as an aid to reconciliation. This means that separation is physical and does not involve the breakdown of the marital relationship. Where this physical separation takes place with either the hope or intention of resuming the marriage after a duration of time then something must happen subsequently before the separation can be said to have taken place within the provisions of Section 48 of the FLA 1975. The subsequent event must have taken place more than twelve months before the application of the dissolution of the marriage is filed.

Therefore, separation can only be viewed as used in Todd’s case where it was stated that:

“*separation can only occur in the sense used in the Family Law Act 1975 where one or both of the spouses form an intention to server or not to resume the marital relationship and act upon that intention, or alternatively act as if the marital relationship has been severed.”*

Therefore, mutuality is not necessary to prove separation as observed in the passage. A conscious decision to separate can be inferred from one of the parties.[[122]](#footnote-122)

1. **CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSION**

**5.1 Introduction**

This chapter seeks to reflect on the findings of this study in relation to the previous chapters. It then proceeds to present recommendations directed towards making Kenya’s legislative framework on irretrievable breakdown of marriage as a ground for divorce more receptive to the ever evolving causes of the breakdown of marriage.

**5.2 Findings**

This study has found that irretrievable breakdown of marriage as a ground for dissolution of marriages in Kenya has fault considerations thus implying the encroachment of fault in what is traditionally a no-fault ground. There is however, the last consideration which stipulates that the court may grant divorce on the aforementioned ground through its own discretion of what it deems appropriate to fall under this ground. Through a comparative analysis, this study has also found that countries such as Australia have irretrievable breakdown of marriage as the sole ground for a no-fault divorce with no further considerations.

**5.3 Recommendations**

The research has gone over and above to prove that the considerations attached to the irretrievable breakdown of marriage in Kenya are mostly fault-based which implies that fault factors have encroached in what is traditionally a no-fault divorce ground. Below are some recommendations made towards this research:

1. Prudent and adequate measures have to be employed to ensure that this ground combats any negativity associated with divorce proceedings due to the requirement of apportionments of fault otherwise introducing this ground in our Marriage Act will have resulted in naught. Kenya could borrow from countries such as Australia whose irretrievable breakdown of marriage as a ground for divorce is purely no-fault thus negating the need to apportion fault. Including a no-fault ground in our Marriage Act 2014 and attaching fault-considerations to it beats the very essence of a no-fault divorce; the absence of apportionment of fault.
2. Section 66(6) of the Marriage Act 2014 must be redesigned to have its own definition rather than it being a combination of most grounds in the aforementioned Act. The current considerations attached to this ground are inadequate owing to the fact that they are a mirror image of all other fault grounds provided in the Marriage Act 2014. This confuses rather than clarifies what the irretrievable breakdown of marriage in Kenya entails**.**

**5.4 Conclusion**

The Marriage Act provides grounds upon which the dissolution of a marriage can be sought in Kenya. This study does not claim to be the solution to the negativity attached to divorce proceedings, rather it is an intellectual discourse whose deductive analysis reveals that the divorce conundrum cannot be answered until Kenya rethinks the fault considerations attached to the irretrievable breakdown of marriage as a ground for divorce. Whereas matrimonial offence is absent for this ground in jurisdictions such as Australia, matrimonial offence is still given priority in our jurisdiction while using this ground to petition for dissolution of a marriage. This then implies that this ground exists only as a remedy to the lacunas in the existing system of divorce. Moreover, the study proves that courts have also found grounds such as lovelessness in a marriage to fall under this ground which then removes the element of fault where such a judgement is passed. As a result, one can only conclude that there is now no-fault in what was once a purely fault-based divorce regime and fault even in no-fault due to the nature of the irretrievable breakdown of marriage as a ground for divorce in the Marriage Act 2014.

In conclusion, the introduction of this ground does not imply that the floodgates of divorce have been activated, rather it means that divorce can be granted where a marriage disintegrates beyond the traditional fault ground of divorce. Consequently, the Marriage Act has left it upon courts to determine which other ground may fall under the irretrievable breakdown of marriage and thus with time, there will be a clearer picture of what this discretion will mean for divorce proceedings. The introduction of the irretrievable breakdown of marriage as a ground for divorce therefore signals Kenya’s potential to shift to a purely no-fault divorce regime. This study therefore makes recommendations inclined towards the irretrievable breakdown of marriage as a ground for divorce in the Marriage Act 2014 taking a purely no-fault divorce approach rather than its pluralistic nature which only promotes negative attitudes towards divorce.

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