The CURRENT limitations on the provision of legal aid for divorce cases combined with
the slow pace of law reform on divorce could be trapping spouses in unhappy and even
dangerous marriages.

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Namibia’s current divorce law, based primarily on common law rules inherited from South Africa at
independence, provides for divorce only on the basis of fault. This means that one spouse must
prove that the other spouse did something wrong. The main grounds of divorce are adultery or
malicious desertion, which includes actual physical desertion as well as constructive desertion,
where one spouse makes life so dangerous or unbearable that the other spouse cannot
reasonably remain in the marriage. (There are also special grounds of divorce that apply when
one spouse is a habitual criminal or incurably insane, which understandably find little practical
use.)

The existing divorce process is complicated, meaning that it is not feasible to obtain a divorce
without employing a legal practitioner. Currently divorce cases are heard only by the High Court in
Windhoek, and at least one spouse must appear in person – which adds expense, especially for
those living outside Windhoek. Namibia has a low divorce rate (only 1.3% of the population age
15 and over identified their marital status as ‘divorced’ in the 2011 census), which could be partly
a result of the difficulty of obtaining divorces.

Judge President Damaseb recently described Namibia’s divorce law as “archaic” and in urgent
need of reform. Most democratic countries today, including South Africa, allow divorce on the
ground of the irretrievable breakdown of the marriage, which is more in line with practical reality.

In 2004, Namibia’s Law Reform and Development Commission published a draft Divorce Bill,
which has not yet made past the desk of the Minister of Justice to Cabinet. If passed, this bill
would introduce irretrievable breakdown as the only generally-applicable ground for divorce. In
cases where both spouses want the divorce, the proposed law would allow a joint application. Or
one spouse could apply for divorce, with the other spouse agreeing that the marriage is over.
In either of these cases, the couple would not be required to provide any information about why
the marriage has failed. This approach would help remove unnecessary conflict and focus
attention on important issues such as property division and arrangements regarding children.

A recent telephone survey of a few law firms by the Legal Assistance Centre indicated that the
average cost of an unopposed divorce is between N$5000 and N$10 000, with opposed cases
typically costing N$30 000 – and occasionally reaching amounts as high as N$100 000.
Earlier this year, the Ministry of Justice blocked legal aid assistance for ‘minor issue divorce cases’. In a telephonic interview, the Director of Legal Aid informed the Legal Assistance Centre that they assist only with dire cases, such as those involving spousal or child abuse, and will not consider funding for divorce cases based on ‘petty excuses’.

The reported reasons for this cut-back are financial constraints and a limited in-house staff complement.

Complex and confusing divorce processes place persons who cannot afford legal representation at a distinct disadvantage. Couples who lack the financial resources necessary to open a divorce case may be forced to remain married, even while perhaps living separately. This can result in financial vulnerability, uncertainty regarding child custody and access and even bigamy, where a spouse “remarries” without being formally divorced. And, because it is common for Namibian women to be financially dependent on their husbands, they are the most likely to suffer from this state of affairs. Without state-funded legal assistance, a fair divorce outcome – or the option of obtaining a divorce at all – may become completely inaccessible to many women.

In June 2013, the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, produced a report examining the relevance of legal aid and urging governments to develop and sustain effective legal aid systems as an essential component of a fair and efficient justice system founded on the rule of law.

The report expresses specific concerns about women, noting that the Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights stated in General Comment No 28 (2000) that women should have ‘equal access to legal aid, in particular in family matters’.

It is hard to quarrel with a policy, which prioritises legal aid for criminal defence – since facing deprivation of liberty is serious indeed. But the vast majority of accused criminals in Namibia are men, which gives this aspect of legal aid a distinct gender bias. And a system that may result in forcing married couples to stay together after the marriage has broken down is another form of deprivation of liberty, which can create conflict, or even violence, in the home; as the Judge President pointed out, “a more fertile ground for violence in the family is hardly imaginable”.

We hereby plead for prompt political attention to the long-languishing divorce law reforms and for a reconsideration of the current policy to limit legal aid in divorce cases.

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