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A Critical Appraisal of The Principle of Divorce in Nigeria Under the Matrimonial Causes Act 1970

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ABSTRACT
This study seeks to critically analyze the theory of divorce under the Nigerian Matrimonial Causes Act 1970. Accordingly, the concept of marriage is narrowly considered, however in such a manner that the essentials of a valid marriage is discussed as a foundation to analyze the principles of divorce vis-à-vis the various grounds for dissolution of marriage with particular focus on the divorce laws under the MCA 1970 in order to ascertain whether the Act is purely a fault or No- fault principle oriented and the attendant consequence of the application of the No Fault principles innovation of the said Act. A comparative analysis of the laws on divorce in other countries was done in order to establish the continued relevance, effectiveness and propriety or otherwise of the Nigerian laws on divorce.
Keywords: Law; Matrimonial causes; Divorce; Statute; Marriage

INTRODUCTION

The institution of marriage has faced serious challenges in several countries and even the current same sex marriage campaign has further thrown more *dust into the air*. Be that as it may, the age long practice of divorce still constitutes its own challenges to marriage. Specifically, religious leaders in various societies have consistently expressed concerns on the current high rate of divorce globally and its adverse effects on the institution of marriage.[1]

WHAT IS MARRIAGE?

Marriage denotes an agreement to marry and the act of being married. It also refers to the ceremony that brings two individuals together as well as the state of being married.[2] Marriage is a global institution with vast adoption of norms in society proffered by social and religious backgrounds. Marriage carries with it principles that are well accepted in the world community. In Nigeria, the two types of marriage that are legally recognized are: The Statutory Marriage (Monogamous) under the Marriage Act 2004 and the Matrimonial Causes Act 2004 and the Customary Law Marriage under Native Law and Custom.

In Hyde v Hyde[3] a monogamous marriage was defined as voluntary union for life of one man and one woman, to the exclusion of all others until divorce or death. This description is equally suitable to describe the Nigerian Monogamous Marriage as well as that of many other countries. In fact, this practice and system of marriage finds its origin under the common law. Accordingly, the Criminal Code Code Cap 38 Laws of the Federation of Nigeria, 2004 Act defines a statutory marriage as 'the marriage which is recognized by the law of the place where it is contracted as the voluntary union for life of one man and

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[1] See S C Ifemeje Contemporary Issues in Nigerian Family law (2008, Nolix Publications) 95-108.
[2] Black's Law Dictionary (8th ed, 2004, West publishing Co) 992 and The New International Webster's Comprehensive Dictionary (2010) 781.
[3] (1886) L.R.I.P & D 130, 133.

one woman to the exclusion of all others. On the other hand, Customary Law Marriage can be defined as the marriage contracted according to the various customs and traditions in Nigeria. The major difference between the Monogamous Marriage and the Customary Law marriage is that under the latter, polygamy is recognized. In other words, a man is allowed to marry more than one wife under the customary law marriage system.[4]

It is clear that from the nature of the two kinds of marriages that a contract subsists between the persons involved. However, this study concentrates on what happens to the said contract particularly in a monogamous marriage and how same is terminated by the parties.

Nevertheless, it is pertinent to mention certain key elements of the monogamous marriage which includes that the union must be the result of the free consent of the parties and only one man and one woman are involved to the exclusion of all others. The union of the two persons is for life and as such at the formation of the marriage, the two persons must have intended to remain married for life. This robust element of the monogamous marriage- a union for life- as rosy as it does seem, may nevertheless be disrupted by divorce or death of one of the spouses, but as this study focuses on divorce, it is apt to consider the legal concept of divorce.

WHAT IS DIVORCE?

Divorce is the legal dissolution of a marriage by a court or other competent body. According to Covenant Divorce Recovery Leaders Handbook,[5] divorce is the termination of a marriage or marital union, the canceling and/or reorganizing of the legal duties and responsibilities of marriage, thus dissolving the bonds of matrimony between a married couple under the rule of law of the particular country and/or state. Given that divorce is the formal dissolution of the marriage according to the relevant law, divorce with respect to statutory marriages in Nigeria is the dissolution of marriage according to the Matrimonial. Divorce should not be confused with annulment, which declares the marriage null and void or with legal separation or *de jure* separation.[6]

The only countries that do not allow divorce are the Philippines and the Vatican City, an ecclesiastical state, which has no procedure for divorce. Countries that relatively recently legalized divorce are Italy in (1970), Portugal (1975), Brazil (1977), Spain (1981), Argentina (1987), Paraguay (1991), Chile (2004)[7] and Malta (2011).[8]

A BRIEF HISTORY OF DIVORCE LAWS IN NIGERIA

Nigerian laws are largely inherited from England which includes the divorce laws that are operative in Nigeria. The major source of the divorce laws of Nigeria prior to 1970 was the English Matrimonial Causes Act of 1965 which was extensively based on the matrimonial offence theory. In England, the said Matrimonial offence theory, as it were, originated from the old ecclesiastical courts which had the exclusive competence with regard to dissolution of marriages and the granting of the decree of divorce '*a mensa et thoro'*.[9]

In the old practice, a decree of divorce indeed relieved parties of the duty to cohabit, but what it did not do was to give room for any of the parties to remarry.[10] While the offence theory remained in operation, the Matrimonial Causes Act of 1857 introduced secular divorce which extended the powers of the court and empowered them to grant decrees of dissolution of marriage, nullity and separation.[11] However, one striking effect of the Act was that while it pronounced divorce, it nevertheless still made same to be

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[4] See T O Elias The Nature of African Customary Law (1952, Manchester University Press) 146-154-5

[5] Covenant Divorce Recovery Leaders Handbook, Wade Powers, 2008

[6] A legal process by which a married couple may formalize a de facto separation while remaining legally married

[7] BBC News 'Chile introduces rights to divorce' (18 November 2004) BBC News, available at http://news.bbc.co.uk/2/hi/americas/4021427.stm (Last accessed 1st November 2013).

[8] B Dutroit, R Arn, Bpondylia and C Tamnelli Divorce in Comparative Law (2000, Librairie Droz) 56.

[9] E I Nwogugu Family Law in Nigeria (3rd ed, 2014, HEBN Publishers) 170

[10] S M Cretney Principles of Family Law (1984, Sweet and Maxwell) 99

[11] See Section 6, English Matrimonial Causes Act , 1857.

obtained on a fault based premise, so that parties could obtain divorce upon proof of commission of a matrimonial offence and as such a marriage may be dissolved upon commission of the matrimonial offence of adultery, cruelty or desertion.

The above indicates that the fault based principle of divorce was still adopted in that Act and this was so even up to 1963. Apparently the law, as it were, still denied divorce except to those who could provide sufficient evidence to convince a court, of a partner's adultery or other matrimonial offence. It does seem that prior to the reforms- which is hereunder discussed- a party to a marriage contract would have been circumspect on the nature of what he or she is about to enter. Such arrangement that binds two forever without any leverage for departure must indeed be perceived as a harsh bond. But perhaps this may only be a cynical view, for we are yet to see in this study whether the bail out from fault based principles of divorce has done society any good.

Be that as it may, in 1964, the Archbishop of Canterbury appointed a group known as 'Putting Asunder' with a specific instruction to review the law of England on divorce.

SUMMARIZED OUTCOME OF THE REPORT/INQUIRY-

The review of the law of England on divorce showed that the then existing offence principles was unsatisfactory[12] and the group found inter alia that;

1. The offence committed by one spouse may not necessarily cause the breakdown of the marriage, but merely a symptom.
2. In most divorce cases, both spouses are not at fault and as such the declaration by a court, establishing a party's innocence and the other guilty would work out injustice.
3. The declaration that a party is guilty may not be a healthy practice after all, as same will occasion bitterness and cause distress to the parties and the children as well.
4. The offence principle may encourage fabrication of evidence.
5. The offence principle would mean that the innocent spouse could in theory maintain a marriage that is already an empty shell if he or she decides not to petition.

The group consequently recommended that the English law of divorce be changed and the fault theory be abandoned and that the breakdown of marriage be adopted as the basis of divorce law.[13] Nevertheless the report from the above referred group was subsequently transmitted to the law commission which after a critical consideration of the report rejected the proposal that divorce be predicated upon a breakdown. In the commissions opinion, to adopt the breakdown theory would be to lengthen trials and increase expenditure. The commission also stressed on the pertinence of dissolving a marriage decently and with dignity and in a way that will encourage harmonious relationships between the parties and their children in the future.[14]

The findings of the two bodies of inquiry laid a foundation for the enactment of the English Reform Act of 1969, which Nigeria being a British colony has consequently benefitted from. In the English Reform Act of 1969, all grounds of divorce were abolished and a single ground '***that the marriage has irretrievably broken down'*** was adopted. However, the proof that the marriage has irretrievably broken down does not operate in vacuum. A petitioner must nonetheless establish same by proof of one or more of five facts set out in the Act.[15] The Nigerian legislation[16] equally adopted and thus changed its matrimonial offence concept having been influenced by the 1969 English legislation above mentioned. It is important to note as earlier mentioned, that although the English Reform Act stipulates only one ground

[12] S A Adesanya The Laws of Matrimonial Causes (1973, University Press) 36-37. See also S C Ifemeje Contemporary Issues in Nigerian Family Law (2008, Nolix Publications).

[13] E I Nwogugu Family Law in Nigeria (3rd ed, 2014, HEBN Publishers) 155

[14] S C Ifemeje Contemporary Issues in Nigeria Family Law (2008, Nolix Publications) 45.

[15] See MCA 1970 Cap, M17 Laws of the Federation of Nigeria, 2004; see also S C Ifemeje Contemporary Issues in Nigeria Family Law (2008, Nolix Publications)

[16] MCA 1970

that the marriage had irretrievably broken down, it does require that prove of same be effected through certain facts set out clearly in the same Act.

It has been mentioned here that Nigeria adopted the English Reform Act and consequently changed its laws on divorce as reflected in the MCA 1970.[17] But whether that legislation of 1970 truly abolished the matrimonial offence concept which the English Reform Act intended to achieve is what is to be considered hereunder.

Thus, has the fault based principles of divorce been annihilated in the Nigerian law of divorce? Is there really only one ground of divorce and has the current position on divorce done any good?

What is the position of the law in other forums and how effective is same?

First, a no fault divorce refers to a divorce based on irreconcilable differences or an irretrievable breakdown of the marriage. In its strict sense, a petitioner need not disclose to the court the cause of the divorce or prove fault. In other words, there is no need to claim that a spouse engaged in bad behavior because the courts will not consider either spouse's misconduct when deciding whether to grant the divorce.

This practice is obtainable in most states of America. For instance, Arkansas and Louisiana now have statutes that allow for a pure no fault divorce. Nevertheless even in states that are still fault based, one can circumvent proving faults if it can be shown that the couple had been separated for the requisite period of time.[18] Conversely, in a fault based divorce, it is compulsory for the spouse to prove that the other spouse has done wrong which establishes the basis for a divorce. Different countries have different sets of fault grounds.[19]

IS THE NIGERIAN LAW ON DIVORCE FAULT BASED?

In view of the Matrimonial Causes Act which remains the substantive law on divorce in Nigeria, there is only one ground for the dissolution of marriage and it is that the 'marriage has irretrievably broken down.' This concept was analyzed and equally finds support in the case of Harriman v Harriman.[20]

Sec 15(1) of the MCA states as follows;

'*a petition under this Act by a party to a marriage for a decree of dissolution may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably*. '

The implication of the above section 15 which is clear and unambiguous is that a petition for the dissolution of marriage in can only be sustained if the marriage has broken down permanently and irreversibly

On its own, the above section does not call for proof of fault by any of the parties to a marriage contract, as a reason for divorce. It will be correct therefore to say that it is immaterial if a party has committed a matrimonial offence. All that appears to be pertinent is that a party or both parties' desires to dissolve the marriage at will. This position will present the law on divorce in Nigeria as one predicated on a no fault principle.

Accordingly, a petition for divorce which fails to request primarily for dissolution on the ground that the marriage in question has broken down irretrievably will fail. It must therefore be shown to the court that the said marriage is now dead and life can no longer be given to it.

The need for clarity of laws cannot be over emphasized and perhaps his Lordship in the case of Ekrebe v Ekrebe[21] did see clearly the intentions of the draft man when he held that irretrievable breakdown was the ONLY ground for divorce under the Act. In his lordship's view, since the petition before the court did not contain the phrase ' the marriage has broken down irretrievably' in addition to prove of one of the facts stated in Section 15(2) of the MCA, then the Appellant could not succeed to obtain a divorce decree.

As shall be shown hereunder, the marginal note to Section 15 of the MCA states additional facts that must be proved before a decree can be granted. This appears to contradict the actual provisions of the said

[17] Cap M17 Laws of the Federation of Nigeria, 2004

[18] See R Warner, T Ihara and F Hertz Living Together, A Legal Guide for Unmarried Couples (2006, NOLO).

[19] E Doskow Nolo's Essential Guide to Divorce (2014, NOLO).

[20] 1989 5 (NWLR) Pt 119, 6 at 15.

[21] (1999), 3 (NWLR) 514.

Section 15(1) in such a manner that it becomes uncertain what the precise grounds for divorce is under the MCA.

Nevertheless, it can be shown that the attitude of the courts on this issue, seems to suggest that although a party can state the factual situations enumerated in the marginal notes of Section 15, it is however crucial to basically support the facts with the overriding ground that the marriage has broken down irretrievably . In the above cited case of Ekrebe v Ekrebe[22] it is evident that the omission of the phrase 'that the marriage has broken down irretrievably' was fatal to a petition for divorce. Further, it is submitted that it may not be out of place to state that while Section 15 of the MCA provides the ground for the dissolution of marriage- which is not fault based- the following paragraphs in Section 15(2) merely refers to facts for the activation of that sole ground.

According to Savage J[23]

'*…the sole ground for the dissolution of marriage is that the marriage has broken down irretrievably. Anyone or more of the facts under the MCA would be in my opinion really 'guidelines' which will enable the court to determine whether or not the ground exists*.'

By implication, when any of the facts in Section 15(2) is proved, then the court will consider the marriage failed not on the grounds of the fact as proved but on the ground that the marriage has broken down irretrievably. It was equally shown in Ubuso v Ubuso[24] that the concern of the courts in any proceeding under Section 15 is whether the marriage has broken down irretrievably and not necessarily whether Section 15(2) is appropriately applied.

In the same vein, in Arowoselu v Arowoselu[25] it was stated that proof of a fact under Section 15(2) must clearly and convincingly indicate that the marriage has broken down irretrievably. In fact, it has been pointed out[26] that the marginal note to a section cannot override the actual provisions of a section.[27]

However, conversely according to Lord Reid at the second reading of the Divorce Bill in the House of Lords, the provisions of clause 1 is merely inconsequential as setting out to prove that a marriage has irretrievably broken down. He argued that clause 2 of the Bill essentially furnishes the grounds of divorce and when proved the phrase 'irretrievably broken down' is hardly pronounced.[28] One must not forget that the Bill referred to above metamorphosed into Law in England which influenced the Nigeria laws on matrimonial causes.[29] According to Kasunmu[30] the provision of grounds for divorce under the MCA is 'deceptive' and 'unrealistic.'[31]

This view finds support in another work where it has been stated that the law on divorce in Nigeria is still the same in substance.[32] Uzodike and Kasunmu argues that the law is still fault oriented and so the repudiation of the matrimonial fault principle by the Act amounts to nothing, since the reliance on the grounds enumerated at Section 15(2) necessitates prove of a fault.[33] Furthermore Kasunmu finds further support in William v William[34] where the learned judge had submitted that;

'*… it is not sufficient for him or her to say my marriage has irretrievably broken down, and I can no longer live with my partner*.'

This suggests that a party cannot obtain a divorce decree by merely stating that the marriage has broken down irretrievably without more. To do so, will of course suggest a clear no fault principle approach to

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[22] Ibid.
[23] See Agbai-Ajagbe v Ajagbe (1979) 1HCCR 83.
[24] (1976) NMLR 158 at 159.
[25] (1980) FNLR 172.
[26] S C Ifemeje Contemporary Issues in Nigerian Family Law (2008, Nolix Publications) 39.
[27] A.G v Prince Ernest (1957) AC 436.
[28] House of Lords debates, Vol. 303, No. 84 of 30th June 1970.
[29] MCA 1970.
[30] A B Kasunmu 'Matrimonial Causes Decree 1970: A critical analysis' (1971) 2/2 Nigerian Journal of Contemporary 141 at 211.
[31] Ibid.
[32] E NU Uzodike 'A Decade of Matrimonial Causes Act 1970' (1983) Current Law Review 57
[33] See Section 15(2) (a), (b), (c) and Section 16 MCA
[34] Unreported LD/12/69 of 1st June 1970

dissolution of marriages. Nevertheless the learned judge in William v William[35] and the learned author, Kasunmu, do not agree that the law is entirely no fault based. More so, the discretionary and absolute bars to divorce under the MCA has been criticized and considered baseless in a supposed no fault principle based legislation.[36]

While the parent legislation[37] which influenced the MCA 1970 has for all purposes expunged the discretionary and absolute bars to divorce, the Nigerian legislation- a beneficiary of the English Act still retains the bars said to have been lifted from the Australian Act of 1959 which was fault oriented.[38] While Kasunmu argues that the Nigerian Act has not substantially changed and that some grounds of divorce which a petitioner can rely on is still fault oriented, Ifemeje departs from his view where she submits that;

‘’*… it is glaringly clear, with all due respect to Kasunmu, that the 1970 MCA has actually brought about a fundamental change in our divorce law.’*[39]

To buttress her point on the changes in the Nigerian divorce laws, she cited the case of Oni v Oni[40] where the court held that a decree of dissolution of marriage is now based on a no fault system since the requisite ground for divorce is now irretrievable breakdown of the marriage with lesser concentration on whose fault has occasioned the break down.

Ifemeje further cited Tokun v Tokun[41] where it was restated that divorce today is not based principally on fault but on irretrievable breakdown of the marriage. Again, in Shokunbi v Shokunbi[42] and Erhahon v Erhahon[43] a more recent case decided in 1997, the court was emphatic that the Matrimonial Causes Act 1970 will dissolve an apparently failed marriage on the ground that the marriage has broken down irretrievably.

From the discussions above, what is clear is that the law on divorce seems not to be precise on whether it is fault or no fault based. It has been shown that although the matrimonial offence principle has been repudiated, the MCA still remains deceptive because some grounds of divorce could still be said to be fault oriented.[44] It is also the case that the courts have often stated that its business is not centered on guilt or innocence of either party but on whether or not the marriage is still viable.[45]

Ifemeje was able to show that in deciding whether or not to grant a decree, the Judge looks emphatically on the state of the marriage, whether it still has viability to subsist or has indeed failed. It is the learned author’s laudable opinion that the grounds for divorce can be considered as the symptoms of breakdown of marriage.[46]

According to Nwogugu[47] the divorce law in Nigeria is not sharply predicated on the fault principle but rather could be said to be an admixture of offence doctrine and no fault principle. It is therefore submitted that the literal rule of interpretation be applied on this subject to discover if the law is clear where it states that irretrievable breakdown of marriage is the ground for divorce. Further perusal of the law will show that the word ‘ground’ was not repeated even in Section 15(2), rather it referred to the items listed therein as ‘facts’. There is therefore only one ground of divorce which clearly is not predicated on the offence or fault doctrine. As such, Section 15(2) therefore should not spur up any confusion or occasion a miscarriage of legislative intentions. Facts must not be mistaken for grounds.

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[35] ibid.
[36] Ibid footnote 30
[37] The English Matrimonial Causes Act 1857 and currently English Matrimonial Causes Act 1973.
[38] A B Kasunmu ‘Matrimonial Causes Decree 1970: A critical analysis’ (1971) 2/2 Nigerian Journal of Contemporary 141
[39] S C Ifemeje Contemporary Issues in Nigerian Family Law (2008, Nolix Publications).
[40] CCHCJ/17176 at 1936
[41] Unreported Suit no. 1/127/80
[42] CCHJC/7/76 p. 113
[43] (1997) 6 NWLR (pt 570) 687
[44] See sec 15(2) MCA 1970
[45] Shokunbi v Shokunbi CCHCJ/7/76 p. 1913
[46] S C Ifemeje, footnote 39
[47] E.I Nwogugu footnote 9

It is suggested that the attention given to Section 15(2) be relaxed since in practice Judges do not particularly regard its purport as per the sections offence and fault principle content. More so, as Ifemeje[48] pointed out, the marginal note to a section cannot override the actual provision of a section. This finds support in the age long case of A.G v Prince Ernest.[49]

A CONSIDERATION OF THE IRRETRIEVABLE BREAKDOWN PRINCIPLE IN THE LIGHT OF THE FACTS STIPULATED IN SECTION 15(2)

1. WILLFUL AND PERSISTENT REFUSAL TO CONSUMMATE

A spouse may petition for dissolution relying on the fact that the other party has willfully and persistently refused to consummate the marriage.[50] It is required of the petitioner to show that the persistence and willful refusal to consummate continued up to the commencement of the hearing of the petition. It does appear that irretrievable breakdown is here based on the fact of refusal to do an act. The refusal is qualified in the sense that the refusal must not just be the will of the defaulting party but the party must have persistently turned down efforts by the innocent party to consummate. In Mason v Mason[51] the court held that a refusal within the context of Section 15 (2)(a) of the MCA implies that there was a proposal to the refusing party and that the word 'willful' means want of reasonable cause.

How a refusal to consummate marriage would occasion a breakdown of marriage is difficult to ascertain. The above fact begs the question as to how much effort must be put in by a willing party to achieve consummation. It would appear that a marriage suffering the above plight, may still have some hope of resuscitation hence the inference that the marriage has broken down on the fact of willful and persistent refusal to consummate may not be appropriate, since the reason for the said refusal may be dispelled with time. It must be noted that when the phrase irretrievable breakdown of marriage' is employed, same must imply that there is no chance or possibility for resuscitating the marriage.

2. ADULTERY AND INTOLERABILITY-

In view of Section 15(2)(b), a court will hold that a marriage has broken down irretrievably where, since the marriage, the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. Two elements must be established in order to succeed when relying on this fact. First is the commission of the act of adultery, and the fact that the petitioner finds it intolerable to live with the respondent. More so, the factors must have occurred after the celebration of the marriage. A proof of this fact, it is clear, will amount to finding and placing faults. A petitioner necessarily will have to prove the act of adultery and consequently establish the fault and offence of the respondent. The requirement for prove therefore makes Section 15(2) (b) apparently based on fault. To this extent, the Act cannot be precisely a no fault principle oriented piece of legislation.

3. THAT SINCE THE MARRIAGE THE RESPONDENT HAS BEHAVED IN SUCH A WAY THAT THE PETITIONER CANNOT REASONABLY BE EXPECTED TO LIVE WITH THE RESPONDENT;

A party relying on this fact must cite the behavior which he or she now finds intolerable. Although not exhaustive but a list of conduct that may be found offensive is evident in the cases of Akinbuwa v Akinbuwa[52] and Johnson v Johnson.[53] It is observed that since the conduct of the respondent must be explained in court as to subject same to a test of reasonableness, the law therefore is based on the fault principle and clearly defeats the aim of a no fault oriented legislation.

4. DESERTION

Under Section 15(2) (d) of the Act, a marriage will be deemed to have broken down irretrievably where the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition. Desertion is when a spouse separates from the other with

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[48] S C Ifemeje footnote 46
[49] (1957) AC 436
[50] See sec 15(2) (a) and 30 (2)
[51] (1979) 1 F.M.L.R; 149
[52] (1998) 7 NWLR (Pt 559) at 66 CA.
[53] (1972) 11CCHJ.

intentions to bring cohabitation to an end and the said separation is without reasonable cause and without the consent of the other spouse.[54]

Desertion can be constituted where four key elements are present. First, there has to de facto separation of the parties, *animus deserendi*, lack of just cause for the withdrawal from cohabitation and the absence of the consent of the deserted party. De facto separation connotes that all marital obligation is severed, the most obvious being a physical departure by one party from the matrimonial home. It is interesting to note that desertion can still occur where parties are under the same roof, but the deserting party repudiates all marital obligations. This is wholly the case with the wife of a dissolved marriage that may not have an alternative place to go to. It is worthy to note that the court will decline to grant dissolution of the marriage by reason of Section 15(2)(d) unless it is satisfied that it was the respondent who deserted the petitioner.[55] It is submitted that prove of desertion is a fault oriented fact for dissolution of marriage.

5. LIVING APART UNDER SECTION 15(E) AND (F)

Under Section 15(e) living apart constitutes a state of affairs that establish when it is necessary to prove beyond the fact that the husband and wife are physically separated. It must be clear that the bond of marriage no longer exist.[56] In Ladipo v Ladipo[57] it was held that it is not sufficient to show that the parties had lived apart for the stipulated period of time, it must however be shown that at least one party intends that the union be brought to an end.

Furthermore, Section 15(f) which is similar to 15(c) save for the fact that the period of living apart is 3 years and no requirement of objection is needed. Whereas the issue of non-objection of the respondent is required to be met either by presenting a written statement to that effect , or physically entering appearance in court and indicating that there is no objection, Section 15(f) dispenses with objection which makes it a no fault provision.

Generally, parties to a marriage contract seeking dissolution based on the fact of Section 15 (e) and (f) must not provide reasons for living apart, and attribution of fault is consequently not of any importance.[58] Nevertheless, the existent bars to dissolution of marriage are extended to the living apart provisions, so that the petitioner's adultery, desertion or conduct can bar him from obtaining a divorce. Even the discretionary bars exercisable by the court can cause a declination to divorce.[59]

The above is a sad reality that punctures legislative acrimony of the no fault principles of divorce. Section 15 (e) and (f) seeks to dispense the fault element, but it does appear that the courts can still refuse to dissolve a marriage based on the discretionary bars where the petitioner has committed certain matrimonial offences like adultery, desertion etc.[60]

6. NON COMPLIANCE WITH DECREE OF RESTITUTION OF CONJUGAL RIGHTS

Under Section 15(2)(g) of the MCA, a spouse may establish the irretrievable breakdown of the marriage by showing that the other party to the marriage has for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under the Act. In view of Section 47, the court will not make an order for restitution unless it is satisfied that the party seeking the order desired conjugal rights to be rendered and is willing to render such to the other party. For dissolution, the petitioner would have to prove to the court that the respondent had ignored previous requests for cohabitation which had been written in conciliatory language.[61]

It is respectfully submitted that this provision is utterly without merit. Marriage remains a consensual agreement between two parties and should not be driven by legal force or coercion. It is doubtful if an aggrieved party would want to comply with an order to restitute conjugal rights if he or she remains dissatisfied with the marriage.

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[54] W Rayden Rayden's Practice and Law of divorce (9th ed, 1971, Butterworth)165.
[55] Odili v Odili (1973) ECSNLR, 82 at 86
[56] Balogun J. Bassey v Bassey (1978) H.C.L.R p.242
[57] (1980) FNLR p. 179
[58] See S.C Ifemeje footnote 44
[59] See sec 26 and 27 MCA
[60] See the observations of A.B Kasunmu opcit footnote 34
[61] See Section 49 (a) and (b) thereof.

7. PRESUMPTION OF DEATH

Where a party has been absent and remains so for a period of time that it is reasonably presumed that the party is dead, the court will dissolve the marriage. However, the burden is on the petitioner to satisfy the court that within seven years there is no reasonable cause to presume that the respondent is alive. This fact is therefore proof based and the seven years absence will not suffice if it is shown that the respondent was alive at any time within that period.[62]

APPRAISAL OF NO-FAULT PRINCIPLES OF DIVORCE AND REASONS FOR EXTERMINATION OF FAULT PRINCIPLES OF DIVORCE

The application of fault based principles of divorce in various forums, has for long been attacked and in fact abolished, as very little merit was seen in it. First, it was observed that fault principles of divorce encouraged collusion in divorce matters as parties desperately seeking divorce would often fabricate false evidence in order to meet the requirements for a legal divorce. It is also true, that some of the fault based grounds of divorce requires evidence and as such evidence is to be adduced in open court with its attendant discomfort and embarrassment.

The practice of laying blame and finding faults in the defaulting party in open court definitely has certain effect. Primarily, it affects the already warring parties of a marriage that become angrier and heart broken in view of the public court proceedings. Further, the children of the marriage will be psychologically affected as they may become privileged to hear about the misconduct of the defaulting parent which affects their relationship with the said parent. In addition, the children may often be called on as witnesses in court to testify against a party which invariably must be a tough experience for the child.

Again, a court's decision on custody and property settlement is usually influenced by the evidence in court as to which party is at fault. It has been shown that establishing fault in a divorce petition is a time consuming and money gulping exercise which not only affects the impoverished party- particularly wives- of the marriage but equally dissipates the marital assets.[63] All these led to the introduction of no fault principle divorce laws with hopes that problems associated with fault principles of divorce will be quashed and marital stability would be even more assured.

THE CASE OF AMERICA– HISTORY OF NO FAULT DIVORCE AND ITS CONTEMPORARY EFFECT

At this point, it is important to consider the import and impact of the 'no-fault divorce' system in America. During the 1960s and early 1970s, a momentous series of events transformed the public rapport of marriage dramatically: the institution no longer would be associated with lifelong happiness, except in jest.

What had brought about this change? Perhaps the introduction of no fault divorce as claimed by a notable researcher.[64] Prior to the California Family law Act of 1969 divorce necessarily requires an adversarial procedure in the courts of the 50 states of America. A plaintiff must allege specific faults by the other spouse and only upon evidence of statutory grounds for fault- such as adultery, desertion or cruelty- will the courts consider to dissolve a marriage.

California set the pace in the 1970s and as other states followed the lead, fault vanished from matrimonial proceedings of divorce. Contextually, divorce changed so that the plaintiff became a petitioner, and the other the respondent. Even the pejorative term 'divorce' yielded to the newly convenient construction- 'dissolution of marriage', devoid of any moral significance.[65]

Consequently, no fault was well welcomed and received large support from various segments of American society.[66] Various stakeholders such as lawyers, liberal theologians e.t.c, urged a loosening of

[62] See Nwankpele v Nwankpele (1972) 2 CCJCJ 101.
[63] See S.C Ifemeje footnote 58
[64] B Mitchell, 'The Great Oxymoron contest' (1983) 16/4 Word Ways 202-5
[65] R B Dixon and L J Wietzman, 'Evaluating the impact of no fault divorce in California' (1980) 29 Family Relations 297 at 299.
[66] Ibid.

the marital bond which was considered too tight to allow for exercise of basic rights and security. Nevertheless, the effect of the no fault system and its consequential effect on marriages soon became apparent and researchers quickly began showing the uncertainties as to the actual legacies of the new legislation. In the 1990s scholars increased the tempo of the call for a return to the formerly unquestionable presumption that marital permanency serves the best interest of men, women and children and of the society that they together constitute.[67]

At that time few traditionalists began re-inserting fault into the statutory procedures for divorce as an option to the otherwise dissoluble marriage contract but the no fault divorce system has had dominance for four decades and has permeated into society as an acceptable practice.[68]

Statistical abstract of the United States of America has shown that divorce rate did increase by 279 percent from 1970 to 1992.[69] While it generally felt that the no fault divorce was applied to save the trauma associated with accusations and display of a party's fault, it has been argued that the no fault divorce has brought more trauma by facilitating divorce and causing broken homes now alarmingly in the increase.[70]

THE CASE OF CROATIA: HISTORY OF NO FAULT DIVORCE AND ITS CONTEMPORARY EFFECT

Until the mid-twentieth century, the influence of the Church in Croatia made marriage indissoluble until death. The indissolubility of the Catholic marriage was regulated by the Austrian Civil Code (ACC) of 1853, which was the operative law in Croatia but inapplicable to a small part of non-Catholic population where the right to dissolve marriage under state regulation prevailed.[71]

Since 1946, provisions of the basic Marriage Act (1946) created room for citizens of Croatia to apply to court for dissolution of marriage in the sense that spouses can make request for divorce but had to disclose valid reasons for same. This arrangement was largely based on the principle of fault divorce and general disruption of marital relations. According to the Marriage and Family Act (1978-1999) in the last two decades of the twentieth century the principle of fault divorce was abandoned, leaving irretrievable breakdown of marriage and de facto separation for one year as the only legal basis for divorce.[72]

The law equally made it a permissible ground for divorce to allow divorce by common agreement (non contested divorce) without any additional explanation. Nevertheless, the law predicted reasons that may cause disruption of marital relations such as serious offences, abuse, adultery and infamous life. This shows that spousal misconduct, regardless of the formal abandonment of the principle of fault divorce, still stood as an excuse for divorce.

Looking at the statistical information on divorce provided by the Croatian Bureau of Statistics (CBS) and published in the year book of 2011, divorce rates in Croatia increased markedly since 1950 when the divorce rate referred to 83 divorces per 1000 marriages while in 2008 there were 215 divorces per 1,000 marriages. More currently, it has been reported through research that today every fifth marriage in Croatia ends in divorce.[73]

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[67] ibid.

[68] D A Vlosky and P A. Munroe 'The effective dates of no fault divorce laws in the 50 States' (2002) 51 Family Relations. See also H H Kay, 'An appraisal of California no fault divorce law' (1987) 75/1 California Law Review 7

[69] See S C Ifemeje footnote 54

[70] See footnote 63

[71] M Alincic, 'Judicial Separation and divorce in the twentieth century, dealing with the analysis of the legal institutes of judicial separation and divorce in their historical and contemporary form and meaning in Europe (Precisely Germany, France ,Italy, Sweden and Croatia) Zbornik Prarnog Fakulteta Uzagrebu (collected papers, Faculty of Law in Zagreb) (2002) 52(6),1160

[72] B Rester and J Berdica 'Divorce in Croatia: The principles of no fault divorce, parental responsibility, parental education and children's rights' (2013) 51/4 Family Court Review.

[73] B Rester and J Berdica 'Divorce in Croatia: The principles of no fault divorce, parental responsibility, parental education and children's rights' (2013) 51/4 Family Court Review. See also J Baloban and others 'Vital values for a successful marriage in Croatia (EVS-2008)- Findings and Stimulus for Action' (2010) 80/2 Bogoslovska Smotra 597-622.

THE CASE OF NIGERIA

It has been shown in this study that the MCA 1970 appears to have consolidated the no fault principle and fault principle of divorce in view Section 15(2) and the ground for divorce vis-à-vis the facts enumerated under the paragraphs which nonetheless are conceived as grounds *suo motu* within its contexts. It is also evident that the English Divorce Reform Act of 1969 and the Australian Divorce Act of 1959 influenced the Nigerian Act. The surprising fact is that since 1975, the Australian Matrimonial Divorce Act adopted a no fault principle ground of divorce as a sole ground for same, whereas Nigeria till date still has a mixed system of fault and no fault principles of divorce.

It is further surprising that Nigeria has failed to take cognizance of the factors that have caused other countries to completely abolish the fault principles of divorce from their laws. Nevertheless, regard must be given to the effect of the current laws of divorce in Nigeria in other to ascertain whether or not it is appropriate and has done more good than ill. To achieve this is to survey how the laws have so far affected marriages in Nigeria in view of divorces and its effect on spouses and society generally. Sadly, it is difficult to ascertain the rate of divorce in Nigeria since 1970, as there are no concise statistical data collected over time to show same.

Even so, the extensive and commendable work of Ifemeje[74] on contemporary issues in Nigerian family Law, particularly with regards to divorce offers a guide on the rate of divorces in some states in Nigeria and the effect of the current legislation on matrimony in Nigeria. It was shown in the book referred to above[75] that statutory divorce rates, increased in the states were data was collected.[76] Furthermore, Ifemeje identified social factors that could cause divorce in Nigeria such as interference of in-laws, unequal educational attainments, and poverty including personality factors amongst others. It is therefore evident that the current MCA 1970 with its admixture of faults and no fault principles of divorce cannot be solely responsible for the breakdown of marriages in Nigeria. Rather, some jurists and scholars have commended the MCA 1970 for being no fault principle oriented. It is their view that the continued retention of fault principles in the Act is indeed inappropriate.

According to Nwogugu[77] the no fault principle under the Act is commendable for providing the much needed solution to limping marriages.[78] In his view, liberalizing divorce will strengthen rather than weaken marriages. This argument is plausible in the sense that the knowledge that marriage can no longer be water tight will awaken the consciousness of parties and cause them to be more responsible and instill virtue in their union. Again Justice Aguda also commended the MCA 1970 in his article where he commended the Act and referred to it as the most important social legislation within the recent past.[79]

Accordingly, Adefarasin C.J in Majekodumni v Majekodumni[80] observed that;

'It is not conducive to the public interest that a man and woman should be bound together in marriage, the duties of which had long ceased to be observed by either party and the purposes of which have immediately failed.'

CONCLUSION AND RECOMMENDATION

In the light of the above, it is recommended that the attention and concentration of the facts enumerated under Section 15(2) of the MCA be relaxed and regard be given to the substantive provision of section 15 which states only one ground for divorce. It is also submitted that the MCA 1970 be reviewed to have a more precise ground for divorce with regards to the grounds that may qualify for a grant of a divorce decree. It must be considered that the fault based grounds in the Act has not done much good as the effect

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[74] S C Ifemeje Contemporary Issues in Nigerian Family Law (2008, Nolix Publications).
[75] ibid
[76] Anambra State , Lagos State , Enugu State , Abia State and Rivers State.
[77] E I Nwogugu, footnote 47
[78] S C ifemeje footnote 73 116
[79] Justice A. Aguda 'An Examination of the Matrimonial Causes Decree 1970, select lectures and paper, Ibadan Association Publishers (1971) 122
[80] CCHCJ/6/74 P. 809

of its application has occasioned more hardship than good to the parties, their children and the marital assets of the marriage.

Even so, this work has shown that the application of the no fault principles of divorce in some forums has opened the flood gates of divorces rather than curbed same. It is evident that there has been calls for a return to marital permanency which is basically what the fault based principle of divorce attempts to achieve.

One therefore must put the fault principles and the no fault principles on a scale for a test of certainty and effectiveness. It does seem that the fault principles of divorce cause more hardship than good in view of the factors highlighted here above. In this vein one therefore recommend that Section 15 (2) of the MCA be expunged from the MCA 1970.