

Review

Divorce in Nigerian statutory and customary marriages: a comparative critique of grounds, procedures and reliefs attaching thereto

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Divorce is a common incidence in both statutory and customary marriages. It presupposes a dissolution and/or termination of a hitherto validly celebrated marriage. However, its operation and applicability to the various legal systems; statutory and customary, differs greatly in details with regards to grounds, procedures and consequential reliefs possible. Hence to determine the grounds and recommend procedures as well as predict effects of marriage dissolution, it is relevant to first resolve the question of which form of marriage is under consideration. Yet the determination of which form of marriage is under consideration has assumed a fresh complexity in the contemporary legal regime where for instance almost every marriage celebrated superimposes customary marriage on the statutory marriage or vice versa. In this work, an attempt is made to understudy the grounds, procedures and available consequential reliefs relating to each marriage form as arising from differential legal systems; statutory and customary law systems. This is done with a view to criticizing identifiable deficiencies in the light of human right provisions and international best practices; as well as recommending approaches considered compliant to human dignity, natural justice, equity and good conscience. Methods used in achieving the reflection include statutory and case reviews, jurisprudential considerations and hermeneutics.

Key words: Divorce, customary law, statutory law, reliefs and human rights.

INTRODUCTION

Incidence of divorce in the world statistics has continued to grow wild. In both statutory and customary marriages, the issue cannot be taken for granted as it is fast constituting into one of the greatest malady of the family and therefore the society though legal. However, it is beneficial to engage the procedure, grounds and reliefs of the divorce system provided for in customary and statutory laws with a view of determining their comparative conformity with international best practices and their status in human right laws. This, is the objective of this work.

The United States has the highest divorce rate in the world (United Nations, 1992). In 1980, the number of divorce per 1,000 population peaked at 5.2 (Statistical Abstract of the United States, 1995). Since that year, the divorce rate has dropped, reaching 4.6 in 1994 (National

Center for Health Statistics, 1995). Individuals who get divorced usually explain their divorce on the basis of individual and relationship factors, but a variety of social factors contribute to divorce as well. Under the Matrimonial Causes Act, a person domiciled in Nigeria may institute proceedings in respect of the following reliefs:

1. Dissolution of marriage.
2. Nullity of marriage (void or voidable).
3. Judicial separation.
4. Restitution of conjugal rights.
5. Jactitation of marriage.

The parties to a marriage are proper parties to a petition for a matrimonial relief. But in certain cases like adultery,



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a third party may be joined to the proceedings as a “Co-Respondent (Matrimonial Causes Act, Section 32).” The Co-Respondent must be the one with whom the Respondent committed the adultery. The Court may award damages for adultery against the Co-Respondent (Matrimonial Causes Act, Section 31). The court shall however not award damages if the Petitioner has condoned the adultery; or where adultery is not a ground for a decree of dissolution of the marriage (Matrimonial Causes Act, Section 31), or where the adultery has been committed more than 3 years before the date of the petition (Matrimonial Causes Act, Section 31).

DEFINITION OF TERMS

Stationary marriage

This is otherwise known as marriage under the Act. It is governed by the Matrimonial Causes Act and the Matrimonial Causes Rules. By its nature, it is monogamous and not otherwise. According to Efevwerhan (2007):

“This is marriage solemnized in accordance with the marriage Act, 1949, as amended by the marriage (Registers General License) Act, 1970. This is preceded by the publication of the notice of marriages, a certificate of notice issued by the Registrar, and then the solemnization of the marriage in the register’s office.”

Customary marriage

Customary marriage simply refers to marriage contracted under the various native laws and customs of the various tribes in Nigeria and the procedure varies from one locality to another. It is generally classified as being polygamous yet it is recognized under the law (Matrimonial Causes Act, Section 35). Nevertheless, it is important to underscore that there is no simply universally accepted customary law marriage as there are variations across the tribes and races of men. Notwithstanding these differences there are recognizable peculiarities running through the different cultures.

Notice that contrary to popular belief and assumptions, statutory marriage is not superior to marriage under the customary law. One is at liberty to contract any. The only requirement is that one can only contract both with one person at a time. This entails that it is only the person you married under the native law and customs that you can validly marry also under the Act. Hence where a person contracted a customary marriage and while that marriage is still subsisting, he goes to marry another person under the Act, the marriage under the Act will be invalid, and it would amount to bigamy, which carries five (5) years imprisonment on conviction (Matrimonial Causes Act, Section 46).

DIVORCE IN STATUTORY MARRIAGE

In discussing divorce in statutory marriages in Nigeria, one would be able to look into such issues as:

1. Rules into time for presentation of divorce petition; and
2. Grounds for Divorce.

Rules as to time

Under section 30 of the MCA, an application for dissolution of a marriage under two (2) years is not allowed, unless the petitioner can show:

- (i) Exceptional hardship which he will suffer and
 - (ii) Exceptional depravity on the part of the other party.
- Notice that what constitutes exceptionally hardship is a matter for the judge to decide.

Therefore, leave of Court will only be granted if refusal to grant that leave will impose exceptional hardship on the petitioner as in *Majekondunmi v Majekodunmi (1966) A.N.L.R. 324*. Secondly, the court will consider the interest of any children of the marriage and the possibility of reconciliation between the parties before the expiration of two (2) years against the date of the marriage. See *Akere v Akere (1962) NMLR 298*.

However, leave to bring application to dissolve a marriage under two (2) years will not be necessary where:

- (a) The respondent has wilfully refused to consummate the marriage.
- (b) The respondent has committed intolerable adultery.
- (c) The respondent has committed rape, sodomy or bestiality.
- (d) Where the petition arose from cross petition.

From the fault theory to breakdown principle

In England what was obtainable was the matrimonial offence theory of divorce or otherwise called the fault theory. For the fact that laws on matrimonial causes obtainable in England were also made applicable to Nigeria, the fault theory was therefore extended to the Nigeria jurisdiction. Hence, before the year 1970, the Nigerian law on divorce was based on the “offence theory”. By this theory, marriage may only be dissolved when a spouse has committed a matrimonial offence like adultery, cruelty or desertion (Nwogugu, 2006).

There appeared a paradigm shift in 1920 when some parts of the commonwealth like New Zealand, Australia and others began to experiment with the breakdown theory of marriage (Divorce and Matrimonial Causes Act, 1920).

By 1964 a group headed by Archbishop of Canterbury was established to review the laws of England on divorce. The group after deliberation recommended among other things “a wholesale change of the English law of divorce by abandoning the fault theory and adopting the breakdown theory of marriage as the basis of divorce law (Nwogugu, op.cit).” Next the Lord Chancellor of Great Britain referred the report of the Archbishops group to the “Law Commission” for advice. The law commission in its report titled “Reform of the Grounds of Divorce: the Field of Choice” made a montage of the “breakdown theory” and the “matrimonial offence principle”. This report greatly influenced the English Divorce Reform Act of 1969. As it were, this Act applied equally to Nigeria.

However in 1970, the Matrimonial Causes Act was promulgated to take the place of the English Act. The Matrimonial Causes Act introduced the breakdown principle into the Nigerian law of divorce while at the same time retaining the element of the matrimonial offence principle. The provisions of the Act in respect of divorce were modeled on the English Divorce Reform Act of 1969, though with random differences.

An outline of the ground as provided by MCA, 1970

Section 15 (1) MCA provides that either party to a marriage may petition for divorce “upon the ground that the marriage has broken down irretrievably” (Archbishop of Canterbury Report, 1964). In this way only a single ground of divorce was established, i.e. irretrievable breakdown of marriage as against the several grounds hitherto applicable under our law.

Critics have tried to argue that section 15 (1) has not changed the old “grounds” of divorce. The basis of this argument appear to be the fact that the marginal note to the section reads “grounds for dissolution of marriage” (Adesanya, 1973). However, the clear words of the statute which states “ground” for dissolution of marriage and the several decisions of our courts sustain the point that S.15(1) has established only one ground of divorce to wit: “that the marriage has broken down irretrievably.”

The almighty question is, ‘When has a marriage broken down irretrievably?’ Section 15(2) of MCA provides for eight instances when a marriage can be said to have broken down irretrievably. Notice that the enumeration of the facts is exclusive in the sense that a court cannot conclude that a marriage has broken down and grant a decree of divorce unless one of the facts at least has been established.

From the evaluation of sundry scholars, the breakdown theory satisfies the requirements of a good divorce law to wit:

(i) To buttress rather than to undermine, the stability of marriage; and

(ii) When regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness and humiliation (Reform of the Ground of Divorce, Para. 15).

What is more, the break down theory positively excludes all the weak points associated with the fault theory of divorce, which weak points include:

(i) That the commission of a matrimonial offence follows the breakdown of marriage and not the case of it.
(ii) That in an adversarial system, the matrimonial offence must be proved in what turns out to be hostile litigation which leads to unnecessary bitterness.

Indeed, the introduction of the breakdown principle is a welcome development in the Nigerian Divorce Law.

LOOKING AT THE FACTS AS THEY ARE

As to what amounts to irretrievable breakdown of a marriage, S. 15 (2), provides that the court may hold that a marriage has broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts:

(a) That the Respondent has willfully and persistently refused to consummate the marriage.
(b) That since the marriage, the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent.
(c) That since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
(d) That the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the Petition.
(e) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent does not object to a decree being granted.
(f) That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the Petition.
(g) 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 this Act.
(h) That the other party to the marriage has been absent from the Petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

The Standard of Proof in any of the above matters is that established to the reasonable satisfaction of the court (Matrimonial Causes Act, Section 82). The test of

reasonability here is that of objectivity. And to further ease the burden of proof of the condition under S. 15(2)(c), the Act itemizes the facts that may be adduced in satisfaction of the allegation without limiting same to the stated facts (Matrimonial Causes Act, Section 16). Similarly, the Act also provides for facts, that may be adduced in satisfaction of the allegation under S. 15(2)(h) (Matrimonial Causes Act, Section 16). The period for which the Respondent has been continually absent from the Petitioner so as to presume the death of the former is 7 years prior to the presentation of the petition. These provisions accords with the provision of the Evidence Act on the presumption of death (Matrimonial Causes Act, Section 144).

Section 16(1) of MCA provides for seven instances of unreasonableness:

- a. That since the marriage, the respondent has committed rape, sodomy or bestiality.
- b. That since the marriage, the respondent has for a period of not less than 2 (two) years been a habitual drunkard or drug addict.
- c. That since the marriage, the respondent has within a period not exceeding 5 (five) years suffered frequent convictions and in respect of which the respondent has been sentenced to imprisonment for not less than 3 (three) years in the aggregate; and has habitually left the petitioner without reasonable means of support.
- d. That since the marriage, the respondent has been in prison for a period of not less than 3 (three) years in respect of conviction for an offence punishable by death or life imprisonment or for a period of 5(five) or more, and is still in prison at the date of the petition.
- e. That since the marriage and within a period of 1 (one) year preceding the date of the petition, the respondent has been convicted of attempted murder or offence involving grievous harm on the petitioner.
- f. That the respondent has habitually and willfully failed, throughout a period of 2 (two) years immediately preceding the date of the petition, to pay maintenance allowance ordered to be paid by a Court or as agreed to be paid under an agreement between the parties to the marriage providing for their separation.
- g. That the respondent is at the date of the petition, of unsound mind and unlikely to recover; and since the marriage and within the period of 6 (six) years immediately preceding the date of the petition has been confined for period of, or for periods aggregating, not less than 5 (five) years in an institution where persons may be confined for unsoundness of mind.

Of the statutorily seven instances according to which the marriage can be declared to have broken down irretrievably, this work will proceed to a deeper examination of Section 15(2)(c) which provides that "Since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected

to live with the him or her." The operative word here is *behavior*. The question is 'what is the working meaning of behavior in this section?' In the English case of *Katz v Katz (1972) INLR 955*, it means something more than a mere state of affairs, or a state of mind. Take, for instance, *repugnance to sexual intercourse* or a *feeling* that a wife is not being demonstrative in the act of coitus can constitute into such a behaviour. Behaviour in this context is an action or a conduct by one which affects the other. Thus in *Phasant v Phasant (1972) 1 All ER 587*, the court refused to grant the decree where the sole charge against a wife in a petition was her inability to give the husband the spontaneous affection which his nature demanded and for which he desired. In a plethora of cases, the courts have granted the decree based on both positive (e.g. violent languages) and negative (silence, inactivity or laziness) behavioural patterns. Surprisingly, the Courts have gone further to grant the decree based on a behaviour caused by illness, injury or disease. See *Thurlow v Thurlow [1975] 2 All ER 979*. However, in all such cases the courts have been minded to consider the fact of the relative obligation to share burdens imposed on partners as a result of ill health. It is important to note that in arriving at the decision or conclusion regarding whether or not the respondent's behaviour is such that the petitioner cannot reasonably be expected to put up with, the court must consider:

1. The capacity of the petitioner to cope with the condition; and
2. The effect of the illness on the petitioner.

But it has been held that once the behaviour in question is one occasioned by accident or illness, the petitioner usually has difficulties in proving that the behaviour satisfies the conditions under sec. 15(2) of MCA. What is more? To qualify under section 15(2)(c), the conduct in question must:

- (a) Have reference(s) to the marriage; and
- (b) It must be shown that the petitioner cannot reasonably be expected to put up with such conduct.

Under this head, the test is objective viz: whether it is reasonable to expect this petitioner to put up with the behaviour of the respondent. This was the position in *O'neil v O'neil (1975) 1 WNL R, 118*.

In all cases, it is for the court to determine whether a behaviour or conduct qualifies. The court in doing that has to construe the entirety of "the character, personality disposition and behaviour of the petitioner. Therefore, a violent petitioner may be reasonably expected to live with a violent respondent. See *Ash v Ash (1972) ZULR, 347*." To help the court make a proper construction for a just decision, the petition must not only mention the specific act or behaviour in question but must give brief particulars of the fact (Matrimonial Causes Act, Order 5).

Having so discussed, this paper proceeds to outline the various grounds of unreasonableness as provided under *section 16(1) of MCA*.

CRITICAL REFLECTION

It has been argued however that section 16(1) MCA is not exhaustive of the various behaviours or conduct that is likely to qualify under section 15(2)(c). Indeed, such behaviours as offensive as snoring while sleeping, offensive dirtiness, other sexual depravities as masturbation leading to lack of interest in sexual intercourse, persistent use of condoms during coitus, constant and noticeable alienation to identify with the petitioner in the public, total failure of domestic manageriality, etc. to the extent these can affect the relationship in the marriage, to the extent the petitioner cannot be reasonably expected to put up with any or a combination of these factors can qualify under S. 15(2)(c).

DISSOLUTION OF CUSTOMARY LAW MARRIAGE

Up till now, the customary law rules regarding the dissolution of marriage is not as developed as the statutory alternative. Yet there are common features of such dissolution across the different cultural areas. A customary law marriage as a matter of fact may be dissolved in either of the following two ways.

- (a) Non-judicial divorce.
- (b) Judicial divorce.

Non-judicial divorce

This arises in those situations where the customary law marriages are dissolved without recourse being had to the customary court. Whatever be the development in the Corpus of Nigeria Legal System, Nwogugu (Op. cit.) argues that "non-judicial divorce is still an important institution of customary law matrimonial causes."

There are two possible ways of achieving non-judicial divorce: by mutual agreement or by a unilateral action of the spouses. Dissolution by *mutual agreement* arises where after the spouses has fallen out and where attempt to reconcile them by their families have failed; a mutual agreement to bring the marriage to an end may be reached. In such a case, the repayment of the bride price is also agreed upon or determined by the customary court where such agreement fails. Secondly, dissolution of customary marriage can also be achieved by a *unilateral action* of any of the parties. Thus, with the intention to end the marriage, the husband may drive the wife out and demand the refund of bride price or the wife

who is maltreated might run back to her parents with the intention to end the marriage. Whichever way it happens, dissolution under customary law is achieved by the refund of bride price. In some areas, however, only the husband has the right to a unilateral dissolution of marriage. Examples abound under:

- (a) Section 8 of the BIU Native Authority (Declaration of BIU Native Marriage Law and Custom) order 1964; and
- (b) The Maliki School of Islamic Law which dissolves marriage either by means of Khul or by means of Talaq.

Notice that one major defect of non-judicial divorce is the absence of record of the time at which and circumstances in which the divorce was obtained (Nwogugu, Op. cit.).

Judicial divorce

Judicial separation of customary marriages is only a second order approach. This means that it is only resorted to when the family arbitration has failed to reconcile the parties. Today, judicial divorce is gaining prominence because it provides recorded evidence of divorce. It belongs to the jurisdiction of the *Customary courts* and sometimes *Magistrate Courts* to hear and determine divorce cases under the customary law. See the case of *Okpakap v Okor & Anor Suit No. LD/634 1969 (unreported/High Court, Lagos 22 May, 1970)*. The problem of judicial dissolution of customary marriages is that where the courts refuse to grant the decree, parties may resort to non-judicial divorce to dissolve the marriage.

GROUND FOR DIVORCE

While it is true that in general, customary law has no standardized and strict grounds for dissolution of marriage, the custom of each locality include the accepted grounds on which marriage may be ended. We shall look at the General and Statutory grounds.

Generally, there are no particular grounds of divorce in customary law. Emphasis is usually on the fact that a marriage has failed, the fault of a party is considered usually for purpose of when repayment of the bride price is to be made. A plethora of factors can be identified as moral causes for dissolving marriages. These include: adultery (particularly by the wife), loose character, impotency of the husband or sterility of the wife, laziness, ill treatment and cruelty, leprosy or other harmful diseases which may affect procrastination of children, witchcraft, addiction to crime and desertion (Nwogugu, Op. cit.). The list is however not exhaustive.

Statutorily, we find under section 7 of the *Marriage, Divorce and Custody of Children Adoptive By-Law Order 1958* which applies to parts of Ogun, Oyo, Ondo, Delta

and Edo States, that the following can ground the dissolution of marriage under Customary law: Betrothal under marriageable age; refusal to consummate the marriage; harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man; impotency of the husband or sterility of the wife, etc. See Local Government Law See WRLR, 1958 Local Government Law, Cap 78 Laws of Oyo State.

AT WHAT POINT IS CUSTOMARY LAW MARRIAGE DISSOLVED?

Customary law marriage is considered dissolved in the case of non-individual divorce when the bride price is returned or refunded to the husband. Before this is done, the marriage is considered to have continued as decided in *Registrar of Marriages v Igbinomwanhia, suit No. B/16M/72 unreported, High Court, Benin 5 August 1972*. An unfortunate consequence of this custom is that any child born to the woman before the bride price is returned is considered the child of the husband. See *Edet v Essien (1972) II NLR. 47*. In fact, even where marriage is dissolved by order of the customary court, it is held that "it is the refund of the bride price or dowry that puts to an end all incidents of customary law marriage and not an order of any court dissolving such marriage. Any order dissolving any customary law marriage without a consequent order for the refund or acceptance of the bride price or dowry is meaningless. See *Eze v Omeke, (1977) I ANSLR, 136*." The problem with this reasoning is that the customary courts appear to have been robbed off of their jurisdiction by the mere extra-judicial act of refund of bride price. But the better reasoning is that the jurisdiction of the court remains intact but such an order made dissolving a customary marriage becomes effective by the refund of the bride price.

There are cases where the refund of the bride price loses the force of being the material determinant of dissolution of marriage. Such cases include:

1. Where the husband renounces his right to claim a refund – here the marriage is automatically dissolved by such renunciation.
2. Where a husband especially among the Igbo divorces his wife, the refund shall not take effect until the wife remarries.
3. Where the husband refuses to accept the refund of bride price. In such a case the wife may petition the court that the marriage be dissolved and bride prize paid into the court.
4. Under the Maliki law in Northern Nigeria for instance, a customary Court may dissolve a marriage without ordering a refund of bride price where the husband is guilty of willful refusal to maintain the wife, physical ill treatment of her or deliberate sexual desertion.
5. Also in Biu area, a husband who institutes divorce

proceedings or repudiates his wife orally is deprived of the right to the refund of bride price.

In such situation where bride price is to be refunded, the quantum of what is recoverable by the husband differs from locality to locality. In some, it is limited to bride price but in others incidental expenses are included. Sometimes, the amount of bride price repayable is directly proportional to the duration of the marriage. However, statutory limitations have been imposed in some parts of Nigeria regarding what is recoverable (Marriage, Divorce and Custody of children Adoptive By-laws order, 1958)".

On the question of who pays, the primary responsibility of refund of bride price is that of the father of the bride or any other person who under the particular customary law is entitled to receive it.

Both in juridical and non juridical divorce, there is no strict rule as to the timing of the refund. The general principle is that if the husband is responsible for the termination he will be refunded only upon re-marriage of the wife but if the wife is responsible, the husband is entitled to immediate refund.

Concerning the right to re-marry, customary law confers on each spouse a right to re-marry after the dissolution of their marriage except in few cases seen in Islamic law and others.

CONCLUSION

This work concludes by outlining some differences between statutory and customary law dissolution of marriages as follows:

- (i) On the death of a customary law husband, the wife has the options to return to her parents, re-marry and have the bride price returned or remain in the husband's home and marry to her husband's brother or a son from another woman. She can also remain in the husband's place without re-marrying to anybody. However, if it were in the statutory marriage, the option of re-marrying to a brother of the husband or son of the husband is foreclosed by affinity.
- (ii) What dissolves statutory marriage is order of court but under the customary law of marriage it is essentially the refund of the bride price.
- (iii) Under the statutory marriage, once there is divorce such ancillary relief as maintenance, custody of children, distribution of property, etc could be made. These are not applicable under the customary law marriage where the wife is merely a property to the husband.
- (iv) Under the statutory law marriage, there is only one ground of divorce: that marriage has broken down irretrievably but under the customary law marriage, the grounds are several and differ from one locality and another.

(v) Under the customary law marriage, there can be a non-judicial dissolution of marriage, while in the statutory law marriage; the concept of non-judicial divorce is unknown to law.

(vi) Under the statutory law marriage, the fact that petitioner has committed adultery or have condoned, connived or colluded with the respondent makes his petition incompetent but this does not apply under the customary law marriage.

These and many others are the differences between the law on divorce under the statutory and customary law marriages.

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