A CRITICAL ANALYSIS OF DIVORCE AND CHRISTIAN INDISSOLUBILITY OF MARRIAGE IN CANON AND CIVIL LAW IN NIGERIA.

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Abstract

Civil divorce and Christian indissolubility are two important concepts in marriage that contrast sharply with each other. While the law on divorce has been lauded for granting an aggrieved party to a marriage the right to sue for dissolution of same under certain conditions, Christian indissolubility maintains that a validly contracted marriage is not to be dissolved against any pretext whatsoever. Nevertheless, divorce has come under attack in recent times due to the alarming rate of its increase in the society. The point of criticism stems from the fact of its negative effects on the family system in the society, and the diminishing societal values resulting from broken homes and single parenting. On the other hand, the doctrine of Indissolubility, which posits that marriage is a permanent bond has also received a lot of criticisms on the ground that it discourages its adherents, mostly Christians, from exercising their right to divorce. The critiques of indissolubility accuse it of creating hardship on the Christian couples who are confronted with the dilemma of the right option to make in taking a pivotal decision in their marriage. The concept of Indissolubility instead, disapproves of divorce. It however, makes provision for grievous cases under which a marriage could be declared null and void. On the point of similarity, it was discovered that a decree of divorce granted by the civil court, and nullity granted by the Ecclesiastical law could only be granted upon request by any of the aggrieved parties to marriage. The aim of this paper is to examine the similarities and differences between civil divorce and Christian indissolubility as

well as their legal implications, and at the same time respond to the questions regarding the nature and the justifiable grounds for Christian indissolubility. It was also evident from the research, that both systems make use of Court system in their proceedings. This study used a Juridical-comparative method to analyse the two divergent legislations, civil divorce under the Nigerian Legislation and the Christian indissolubility under the Ecclesiastical law. Also analytical and doctrinal research methods were employed. This research work revealed that civil law provides extensive grounds for divorce under the statutory marriage.

Introduction

The family is often regarded as a domestic society in the sense that a collection of families make up the society. It is common knowledge that the type of family protected by law and the Church is a nuclear family, i.e Father, Mother and Children. Little wonder why it is defined as a group consisting of two parents and their children living together as a unit.[1] It therefore follows that a family arises from a marriage bond entered into with the consent of the parties involved. Right from creation, Marriage is believed to have been ordained by God, when He created Adam and Eve and made them for each other, Eve was made to make Adam perfect and whole. Therefore, marriage had its foundation in the Garden of Eden between a man and a woman. The point is clear that God never intended their union to last for a determined period it was designed for life. This union for life has remained the status quo both in Civil and in Christian marriage.

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[1] Pearsall, J. *The New Oxford Dictionary of English,* Oxford, New York 1998 p.662

In the ancient times, divorce was a rare thought among married couples as they stuck to each other in fidelity. However, it is no longer news that divorce has become very rampart. While many researchers blame it on the much-acclaimed civilization and modernization, its effects on the parties are more worrisome than the causes. Although no one goes into marriage expecting it to fail, nevertheless, that does not rule out the fact that so many go into marriage with the mentality that divorce is always a second option should the marriage go bad, otherwise known as "divorce tendency".

This line of thought becomes problematic, leading to lack of commitment in marriage. It is usually said that those who have the divorce mentality end up in a divorce, thus, little or no effort is made to save their marriage. On the other hand, those who believe that marriage is workable even when it appears to be failing, overcome the divorce tendency. The issue of divorce raises such questions as to the fate of the children of the marriage (if any), their upbringing by a single parent and their mental development having been brought up in a broken home and probably by a single parent, the chances of contracting a new marriage. Another question that arises is, how many divorces could one obtain before he/she could have a perfect marriage? What guarantees a divorcee who wishes to re-marry that the next marriage will not fail? Etc. The Catholic community by its teaching, preaching and pastoral activities tries to go an extra mile to preserve the dignity and permanence of marriage, while expressing understanding for, and care of those who experience the pain of divorce. Through its teaching that marriage is one of the privileged sacramental events in the lives of people, the Church underlines the depth of meaning that human love incarnates and the significance of committed love between a man

and a woman.[2] The church cares so much for the Christian couple both before and after marriage. That explains the reason for the adequate marriage preparations and programs organized by the Church, all in a bid to uphold the perpetuity of marriage.

This research will examine the concept of civil divorce, and the church's stand on the indissolubility of the marriage bond. It will also x-ray the full meaning of marriage and its essential elements, using this to substantiate the ground for the unjustifiable concept of divorce in a Christian marriage. Faced with high rates of civil divorce, the Church seeks to give a creative and practical response. To this effect, it has established tribunals, to the extent that the evolution of matrimonial jurisprudence and the hard work of tribunal personnel have made it feasible for people to obtain annulments in a very difficult marriage situation when previously it would have been unlikely.

1.1 THE CONCEPT OF DIVORCE

Divorce is an incidental of marriage. It is a legal dissolution of a marriage by a court or other competent body.[3] It is a process of terminating a marriage or marital union, which usually entails the cancelling 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 that country. According to Micheal Lawler, western culture is now a culture of divorce.[4][5]

[2] Himes, K.R. Coriden, J.A *The Indissolubility of Marriage: Reasons to Reconsider*, Theological Studies 65 2004, P. 453

[3] Ibid. p.540

See also Garner, B.A. *Black's Law Dictionary* 7th Edition, West Group, USA 1999.

[4] H.C. Black, Black's Law Dictionary, (6th Edition) St. Paul, Minn, West Publishing Company, United States of America, 1990) p,480.

[5] Lawler, M.G *Divorce and Remarriage: Catholic options*, Leuven-Paris, 2007 p.107

He regrets that divorce has become, not only socially acceptable but also a legal right, and the social stigma attached to it prior to the mid-twentieth century has virtually disappeared.[6] In spite of the church's strictness, many Catholics divorce in the civil courts and go as far as contracting another civil marriage while their first spouse is still alive. He warns that the later remains invalid in the eyes of the church. Consequently, many of these remarried couples are banned from full participation in the sacramental life of the church.

1.2 Historical Perspective of Divorce

The earliest and most celebrated divorce case in history remains that of Henry VIII versus Pope Clement VII. The battle began in 1527, when Henry tried to force the Pope into annulling his marriage to Catherine of Aragon, who had failed to provide him with a male heir. Upon not being bestowed this, he effectively began the reformation, establishing his own Church of England while rejecting Catholicism. Determined to make the younger and prettier Anne Boleyn his wife, Henry finally broke with Rome in 1533 and declared himself the head of a new church, the Church of England. Three years after the controversial marriage, Anne was convicted of treason, adultery and incest, and beheaded. It is generally assumed that she caused the floodgates of divorce to be opened in England, never to be closed again. Henry's marriage to Anne led to precisely one divorce in 1552.[7] The term was not used again until 1670.

[6] Ibid.

[7] Foreman, A. *The Heart-breaking History of Divorce*, Smithsonian Magazine 2014, http://www.smithsonianmag.com/history/heartbreaking-history-of-divorce, visited on April 6, 2019

Divorce is historically believed to have been a cause within the ancient Ecclesiastical (Church of England) court jurisdiction until when the Society for Promoting the Amendment of the Law in the 1850s published proposals suggesting that divorce should be dealt with in a separate Court and should be a cheaper process. [8] These proposals were accepted, and by the Matrimonial Causes Act 1857, the Court for Divorce and Matrimonial Causes came into existence and the Ecclesiastical jurisdiction over divorce was abolished. The 1857 reforms only changed procedure and adultery remained as the only ground available for divorce. If a wife was the party claiming a divorce, she had to prove cruelty or desertion, in addition to the act of adultery by her husband.

Abuse of the new procedure by wealthy Victorian families, combined with clashes between the Government of the time and the Church of England, meant that further reform was slow in coming. A Royal Commission in 1912 suggested that cruelty or 3 years' desertion should be introduced as separate grounds for divorce and that the rights between wives and husbands should be equalised. The Church was opposed to anything that widened the possibility of divorce and the recommendations of the Royal Commission were defeated in 1914. A further Royal Commission in 1923 attempted the same reforms but only succeeded in equalising the rights between wives and husbands. As a matter of practice, married couples often contrived to stage an act of adultery by the husband to achieve a divorce 'by consent'. In 1935 a committee within the Church finally agreed to the proposals originally suggested by the Royal Commission in 1912. Further reform suggestions were delayed until post-Second World War and in 1951 a bill was presented in Parliament to

[8] Nwogugu, E.I. *Family Law in Nigeria*, revised edition, Ibadan- Nigeria 1990 p. 155

permit divorce by consent after separation for 7 years. A Royal Commission argued against this proposal in 1955, however Lord Walker in the arguments of that 1955 Royal Commission dissented and suggested divorce should be permitted where a marriage had irretrievably broken down. After a further 10 years, this approach was endorsed by the Archbishop of Canterbury and was brought into law by the Divorce Reform Act 1969.[9]

The current position is set out in the Matrimonial Causes Act 1973 and the sole ground for divorce is that the marriage has irretrievably broken down. This breakdown can be proved by the fact of adultery by one of the parties, unreasonable (abusive) behaviour, two years' separation if both parties consent, two years' desertion or five years' separation if only one party consents. Originally, under the 1973 Act, the parties had to wait until 3 years into the marriage before a divorce could be applied for but this period was reduced to one year by the Matrimonial and Family Proceedings Act 1984.[10] In Nigeria, prior to 1970, the law on divorce was based on the matrimonial offence theory. This arose from the fact that the law on matrimonial causes in force in England from time to time was made applicable to Nigeria; changes in English Law in this respect became part of Nigerian Law.[11] This could be explained by the fact that Nigeria was under the British colony and by that reason was subject to the Queen and all England Law. It could be said that Nigeria benefited immensely from the reforms which took place in England and other parts of Commonwealth.

[9] Ibid.
[10] Ibid
[11] Ibid.

In 1970, the Matrimonial Causes Act was promulgated by the then Military Government to take the place of the English rules, which up till then, applied in Nigeria. Nwaogugu reports that the Act was a great watershed in the Nigerian law on matrimonial causes in the sense that it marked the first indigenous legislation in the field of matrimony.[12] He noted that the most important change effected by the Act was to introduce the breakdown principles into the Nigerian law of divorce while at the same time retaining elements of the matrimonial offence principle. The provisions of the Act in respect of divorce were modelled on the English Divorce Reform of 1969 though with some significant differences. Notably, section 15(1) of the Act provides that either party to a marriage may petition for divorce "upon the ground that the marriage has broken down irretrievably".[13] Consequently, the section established a single ground for divorce –irretrievable breakdown in place of several which existed under the old law. Section 15(2) of the same Act then stipulates eight facts of proof of this, which will enable the court to come to the conclusion that a breakdown of marriage has occurred. At least, three of these: adultery, cruelty and desertion, each in a modified form, are included in the list. The others include periods of separation, which exemplify the breakdown approach. In the present Matrimonial Causes Act applicable under the Nigerian legislation, marriage can only be dissolved under the following

[12]Ibid.

[13]Laws of Federal Republic of Nigeria, *Matrimonial Causes Act*, 1970. Hereafter referred to as MCA

This originated from the report of the Archbishop group, under which the primary and fundamental principle which the court would be called upon to determine was formulated as follows: "Does the evidence before the court reveal such failure in the matrimonial relationship, or such circumstances adverse to that relationship, that no reasonable probability remains of the spouse again living together as husband and wife for mutual comfort?"

headings: wilful and persistent refusal to consummate marriage, adultery and intolerability, conduct which petitioner cannot reasonably be expected to bear, desertion, separation, three years' separation, failure to comply with a decree of restitution of conjugal rights, and presumption of death.

1.3 Grounds for Divorce Under the Nigerian Legislation

1.3.1Wilful and Persistent Refusal to Consummate Marriage

Proof of the wilful and persistent refusal of a spouse to consummate the marriage will enable a court hearing a divorce petition to decide that the marriage has broken down irretrievably.[14] The application of the law depends on the interpretation of the phrase, "wilful and persistent refusal", this phrase was determined in the case below:

> 'Persistent' in this context, is a word, which implies continuity and seems to me to be somewhat analogous to the word 'repeatedly'. 'Wilful' means in the context the doing of something as a matter of conscious will. The end result of the combination of the two words seems to me that in order to make out a case under section 28(c), section 15(2) (a) of the MCA, it will be necessary to show that there was a refusal to consummate and that despite a number of requests, the respondent continued to refuse to engage in sexual intercourse with the other spouse.[15] Furthermore, Lord Jowitt explained the phrase as 'a settled and definite decision come to without just excuse and in determining whether there has been such a refusal the judge should have regard to the whole history of the marriage'.[16] However, it is important to note that what constitutes wilful and

[14] Section 15(2) (a) of the Matrimonial Causes Act, 1970.
[15] *Hardy v Hardy* [1964] 6 FLR 109, P. 110-111
[16] *Horton v Horton* [1947] 2 All ER P.871

> persistent refusal to consummate will depend on the facts of each case. In each case, it should be noted that mere neglect to comply with a request is not necessarily the same as a refusal. A refusal implies a conscious act of volition. Neglect on the other hand may be nothing more than a failure or omission to do what has been suggested in order to attain a conjugal love.

Similarly, it must be shown that the refusal was a conscious and free act of the respondent.[17] In the case of *Horton v Horton*[18] it was established that before there can be a refusal, there must be a number of requests, direct or implied, and an opportunity to comply with such request must exist. Therefore, refusal as a result of ill-health may not constitute a ground for dissolution, however, it may be necessary to ascertain the gravity of the ill-health at the time.

Similarly, in the case of *Jodla v Jodla*[19] it was held that a wife's requests to the husband to make the arrangements for a religious ceremony constituted an implied requests for sexual intercourse, which he had refused without just cause, as such refusing to consummate the marriage. To grant a dissolution under this heading, it is required that the marriage had not been consummated up to the commencement of the hearing of the petition. [20] However, it is not clear what happens where after the petition is heard, the couple in question subsequently consummate the marriage. What role would such result play in the determination of the petition? What Happens if after the said

[17] *Awobiyi v Awobiyi* [1965] 2 All NLR P.200
[18] [1947] 2 All ER p. 871
[19] [1960] 1 WLR 236
[20] Section 21 of the Matrimonial Causes Act, 1970

consummation, the couple still insists on getting a divorce? These are questions which need to be determined with respect to this subsection as it touches on the possibility of reconciliation with such subsequent consummation. On the whole, it must be shown that the petitioner is able to establish wilful and persistent refusal of the respondent to consume the marriage.

1.3.2 Adultery and intolerability

By virtue of section 15(2)(b) of the Act,[21] a court will come to the conclusion that 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. Unlike what obtained in the old Act, the petitioner has to prove not merely the commission of adultery by a spouse but also that the petitioner finds it intolerable to live with the respondent. Consequently, in order to satisfy the sub-section, two elements must be established: the commission of adultery and the petitioner finding it intolerable to live with the respondent. In addition, it has to be established that these factors occurred after the celebration of the marriage.

In this context, commission of adultery may be defined as voluntary sexual intercourse between a spouse and a third party of the opposite sex, not being the husband or wife during the subsistence marriage. It is worthy of note that the element of free will is fundamental to the concept of adultery. Consequently, it must be established that the respondent consented to the adultery, as such, adultery committed under the influence of alcohol or by an insane spouse would not constitute adultery for the purpose of this sub-section. However, the issue of committing adultery under

[21] Ibid.

the influence of drug or alcohol is somewhat tricky, and should be carefully investigated. For example: what if one decides to get drunk or take drugs in order to accomplish a long-desired adultery with a third party of the opposite sex? It is submitted that if he intended to be intoxicated in order to commit adultery, then he should also be guilty under this subsection as long as it was a deliberate act which is meant to aid the attainment of a desire. The onus would be on the petitioner to prove intention.

The evidence recognized by court varies from direct to circumstantial, as such, mere proof of familiarity between the respondent and the co-respondent is not sufficient, it must be proved that there was adultery between them. Other proofs could be birth of a child by a wife during the marriage when the husband had no access, venereal disease which has not been contacted from the other spouse, general cohabitation of the respondent and the co-respondent in the same house as husband and wife, confessions and admissions may also provide evidence for adultery.[22] However, the court requires that confessions be corroborated. Above all, the petitioner must prove that he/she finds it intolerable to live with the respondent.[23]

1.3.3 Conduct which the Petitioner Cannot Reasonably be Expected to Bear

Section 15 (2) (c) of the Act[24] enables a court to find that marriage has broken down irretrievably, where since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The conduct

[22] Nwogugu, E.I. *Family Law in Nigeria*…,Pp. 162-163
[23] Section 15(2)(c)of the Matrimonial Causes Act, 1970
See also *Cleary v Cleary* [1974] 1 WLR 73
[24] Matrimonial Causes Act, 1970.

of the respondent which is in question must have occurred since the celebration of the marriage. The petitioner must however establish that the respondent has behaved in a particular way and then on the basis of that fact so proved, the petitioner cannot reasonably be expected to live with the respondent. It is pertinent to observe that behaviour could be positive or negative: positive behaviour could be for example, violent language or violent activities, negative behaviour could be cases of silence, total inactivity or laziness. On both cases, it does seem that parties could obtain a decree of divorce.

The conduct in question must have some reference to the marriage. Consequently, the impact of the conduct in question on marriage will be a relevant consideration. In the case of *Thurlow v. Thurlow* [25]the parties were married in 1963. The wife suffered from epilepsy since infancy requiring hospital in-patient treatment from time to time. From 1970, the wife's physical and mental condition gradually deteriorated so that she became bed-ridden. At times, she was aggressive and she threw objects at her mother-in-law and caused damage to various household items. From time to time she escaped from the home and wandered about the streets causing alarm and stress to those who looked after her. By July 1972 any hope for a reversal in the wife's condition had gone and she required continuing institutional care. On a petition by the husband based on the facts of wife's behaviour, the court held that the husband could not reasonably be expected to live with her.

Furthermore, it is required that such behaviours be specifically mentioned as well as stating all the relevant particulars. Thus,

[25] *Thurlow v. Thurlow* [1975] 3 WLR Ibl

section 16(1)[26] enumerates the various situations of this subsection as follows:

i. Rape, sodomy or bestiality
ii. Habitual drunkenness or intoxication
iii. Frequent convictions and habitually leaving the spouse without support
iv. Imprisonment
v. Attempt to murder and assaults
vi. Habitual and wilful failure to support
vii. Insanity

1.3.4 Desertion

A marriage will be regarded as having 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. [27] Desertion in this context refers to the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse.[28] To constitute desertion, four elements must be present at the same time: *de facto* separation, *animus deserendi*, lack of just cause for the withdrawal from cohabitation and the absence of the consent of the deserted spouse.

i. *De facto* separation of the parties: this implies the bringing to an end of cohabitation by severing all marital obligations. Nwogugu[29] noted that the most obvious case of desertion occurs when one spouse physically departs

[26] Matrimonial Causes Act, 1970
[27]Section 15(2)(d) of the Matrimonial Causes Act, 1970
[28]Jackson, J. and C.F Turner, C.F. *Rayden's Practice and Law of Divorce,* 9th edition 1971, London P. 165
[29] Nwogugu, E.I *Family Law in Nigeria*…,P. 178

from the matrimonial home. Other instances of separation abound, for such as, a spouse who is desirous of leaving the matrimonial home does not always have an alternative place to go. Rather than leave, he/she may continue to live there, but he repudiates all marital obligations: in such a case, there will be desertion just as in the case of physical departure. As Lord. Merrivale, P, points out, 'desertion is not the withdrawal from a place but from a state of things'.[30] Consequently, there may be desertion where the parties continue to live under the same roof. The test is whether there is one household or more.

ii. ***Animus Deserendi:*** the law provides that for a desertion to occur there must be the *animus deserendi,* that is the intention to withdraw from cohabitation permanently. As such, there is no such intention where a spouse is temporarily absent from the other, for instance, on holidays or business. The same is true where the separation is due to mutual consent. Where a spouse voluntarily abandons the matrimonial home, there is a presumption that he intended to desert *animus deserendi.* The desertion therefore starts at the moment of his/her departure. But if in the course of separation, due to mutual consent one of the parties forms the intention to withdraw permanently from the other, desertion starts from the moment the intention was formed.

iii. **Lack of just cause:** there will be no desertion if the spouse who withdraws from habitation has a good reason to do so. It is clear that where one spouse is guilty of

[30] Ibid.

adultery or other matrimonial misconduct the other spouse will have a reasonable cause for living apart. In fact, if the innocent party fails to withdraw, he may forfeit his right to matrimonial relief on the ground that he condoned or connived at the misconduct.

In the case of *Sowande v Sowande*, the petitioner, a Nigerian married the respondent, an American, in London in 1936. Shortly after the outbreak of the World War II in 1939 the United States Government offered passages to its citizens who wished to return to the United States. The respondent, against the wishes of the petitioner took advantage of the offer and returned to the United States. She never returned to the matrimonial home. The court held that the war was not a just cause for the wife to leave the matrimonial home without the husband's consent.[31] The general principle is that any conduct which makes the continuance of matrimonial cohabitation virtually impossible will be a ground for a spouse to desert. However, one may conclude that just cause is based on case-to-case scenario, as what may be a just cause in one case may not serve as such in another case. This raises the question of objectivity.

iv. Absence of Consent: according to Nwogugu, a spouse who leaves the matrimonial home without the consent of the other spouse may be in desertion.[32] If there has been a separation by mutual agreement, desertion will supervene once one party withdraws his consent to the state of

[31] Ibid. p.180
[32] Ibid

affairs. In the case of *Ikpi v. Ikpi*[33], the parties were married in 1944 and lived at Ibadan. In November 1950, the husband was transferred to Zaria. There was an agreement between the parties that the wife should remain at Ibadan as she was expecting a baby and maternity facilities were not assured at Zaria. The wife was to join him in Zaria in February 1951 if maternity facilities in Zaria were guaranteed. Later the husband wrote assuring the wife of maternity facilities in Zaria. The wife refused to join him on the grounds that she would not get a teaching appointment in Zaria. It was held that as the husband had put an end to the agreed separation the wife was in desertion when she refused to join him in Zaria. In other words, the moment the wife refused to join him, there was absence of consent.

However, if a party consents to the separation, he cannot be held to complain of it. But the consent must be genuine and not obtained by duress, fraud or misrepresentation.[34] Thus, where a wife told her husband to go to his mistress, but made him promise to return to her when he was fed up with the mistress, it was held that there was no real consent.[35] Consent to separation may take the form of a separation agreement, which may be oral or in writing, but it must provide for the spouses living apart.[36] This raises the question on how to ascertain when there is a real consent, as oral evidence weighs little or nothing in court proceeding. It is submitted that such consent for

[33] [1957] WNLR P. 59
[34] Nwogugu,E.I. *Family Law in Nigeria*…,P. 181
[35] Bevan v Bevan [1955] 1 WLR 1142
[36] Nwogugu E.I, *Family Law in Nigeria*…,P. 18

separation should be written if it must be admissible in evidence since documentary evidence is the best evidence under the Nigerian legal system.[37]

v. **Period of Desertion:** The Matrimonial Causes Act provides that to constitute a ground for divorce, desertion must have lasted for a continuous period of one year immediately preceding the presentation of the petition. In determining whether desertion has been continuous, any one or more periods not exceeding six months during which the parties resumed living with each other in the same household are not regarded as a break in the continuity of the period. Apart from this, no period of cohabitation counts as part of the period of desertion.[38] It is doubtful however, on whether desertion for a period of one year should be a sufficient cause for the dissolution of marriage. In many cases, the period may be insufficient to enable the deserting spouse to take a final decision on whether or not to return to the matrimonial home.

1.3.5 Separation and Respondent's consent to Dissolution

A marriage will be regarded as broken down irretrievably where the parties have lived apart for a continuous period of at least two years immediately preceding the proceedings and the respondent does not object to a decree being granted.[39] This is usually examined under two headings: living apart for two years, and no –objection by the respondent.

[37] Federal Republic of Nigeria, *Evidence Act*, Laws of Federation of Nigeria Cap A2 2011, section 37

[38] Section 17(2) of the Matrimonial Causes Act, 1970

[39] Section 15(2)(e) of the Matrimonial Causes Act, 1970

(a) Living apart for two years: the Act[40] requires that the parties must have lived apart for a continuous period of two years immediately preceding the presentation of the petition. It is further established that mere physical separation does not constitute 'living apart' under the Law. Rather, it involves physical separation accompanied by the termination of consortium.[41] It follows that there must be a clear intention on the part of one or both spouses not to return to the other and the treatment of the marriage as having come to an end. It is obvious that absence on professional or business pursuits, ill-health, confinement in jail or outbreak of war will not amount to 'living apart' under the Matrimonial Causes Act. In the case of *Osho v Osho*,[42] the husband with the mutual consent of his wife went to Britain to study. The wife visited him there to spend her leave with him. It was held that there was no living apart of the spouses. In *Ezirim v Ezirim*,[43] it was alleged that though the petitioner and the respondent lived together in a flat, they had different bedrooms, have had nothing in common and so have lived apart since April 1973. The court of Appeal found from the evidence that the parties were living as man and wife though in quarrelsome state. There were attempts at reconciliation and the parties did not regard the marriage as already come to an end.

(b). Non-objection to a decree being granted: Even if it is established that the separation has lasted for the statutory period, section 15(2) (e)[44] requires in addition that the respondent does not object to a decree being granted. The emphasis here falls on the non-objection of the respondent to the dissolution of the

[40] Ibid.
[41] *Sharp v Sharp*[1961] 2 FLR P. 343
[42] CCHCJ/6/74 P. 829
[43] Nwogugu, E.I. *Family Law in Nigeria*…,P. 189
[44] Matrimonial Causes Act, 1970

marriage. The practice is that where the respondent takes a positive step to demonstrate non-objection, the requirement of the sub-section will be fulfilled. For example, in the case of Oyenuga v Oyenuga,[45] the court inferred from a letter written by the respondent informing the petitioner that the marriage between them had broken down and that he would like to file a petition for divorce, evidence that the respondent does not object to a decree being granted. The same conclusion may be reached where the respondent in an answer admits the truth of the fact stipulated in section 15(2) (e)[46].

On the other hand, some courts have decided that non-participation in the proceeding by the respondent after service of court processes may be regarded as evidence of non-objection.[47] The courts have submitted that this attitude is correct where the respondent fails to file an answer and to participate in the other aspects of the proceedings. The reason is that the answer provides the respondent an avenue to deny a fact alleged in the petition or allege a fact. If therefore, he/she fails to exercise the right of denial or alleging his/her facts, it is reasonable to infer that the respondent does not object to a decree being granted.

1.3.6 Three Years' separation

A court may reach the conclusion that the marriage has broken down irretrievably where the parties have lived apart for a continuous period of three years immediately preceding the presentation of the petition.[48] The basic concept of living apart applies in paragraph (f) of section 15(2) of the *MCA* as it does to

[45] [1977] 3 CCHCJ P. 395
[46] *MCA.*
[47] Nwogugu, E.I. *Family Law in Nigeria*…,P. 192
[48] Section 15(2) (f) of the Matrimonial Causes Act,1970

paragraph (e). There are, however, two basic differences between the two-sections. First, while two years separation is required in sub-section (e), the parties must have lived apart for three years for the purposes of sub-section (f). It is notable that the question of the respondent not objecting to a decree being granted which is applicable to sub-section (e) has no place in respect of sub-section (f).

The period of separation must be continuous and should have lasted for at least three years. Moreover, it must have occurred immediately before the presentation of the petition. [49] It has been argued that the period of three years is rather too short to grant a divorce, in view of the fact that an innocent spouse may be divorced against her/his will on this part. Jurists have submitted that the period should be extended to five years, as this will adequately show that the marriage has broken down irretrievably. However, even the five years period is still too short to really conclude that marriage has broken down irretrievably. This is because during this period, the spouses may still be struggling to study each other and learn how to cope with their differences.

1.3.7 Failure to Comply with a Decree of Restitution of Conjugal Rights

A marriage may be dissolved on the fact of irretrievable breakdown where the respondent has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights.[50] This provision will come into effect where the respondent, in defiance of a court order, has refused to resume cohabitation with the petitioner for the statutory period. It is

[49] *Nwabugwu v Nwabugwu* [1974] 4 UILRP. 280

[50] Section 15(2) (h) of the Matrimonial Causes Act, 1970

submitted that the period of one year or over must of necessity immediately precede the presentation of the petition.

The core of the case against the respondent would be that he has failed to resume cohabitation with the petitioner in compliance with a court order to that effect. This therefore implies that the refusal to cohabit must continue up to the presentation of the petition. If the respondent is cohabiting with the petitioner at the time the proceedings are commenced then it cannot be said that he has failed to comply with the court order. Moreover, the statutory period of at least one year must be continuous, as any intervening resumption of cohabitation would constitute compliance with the judicial decree. The situation contemplated here is such that there has been a previous court case between the same spouses in which one of them was mandated by a decree to restore conjugal rights to the other party. As such, this ground cannot be used in the absence of such a determined court case.

1.3.8 Presumption of death

A marriage may be dissolved on the fact that the respondent has been absent from the petitioner for such a time, and in such circumstances as to provide reasonable grounds for presuming that the respondent is dead. This fact may be established by proof of the respondent's continuous absence for seven years immediately before the petition, and the fact that the petitioner has no reason to believe that the other party was alive at any time within the seven years period. However, proof of seven years absence will not suffice if it is shown that the respondent was alive at any time within that period.[51]

[51] Ibid. section 16(2) (a)

Nevertheless, the burden is on the petitioner to satisfy the court that nothing has happened within the seven years as to give him or her cause to believe as a reasonable person, that the respondent is still alive. The petition must state the latest date on which the petitioner has reason to believe the respondent to have been alive and the circumstances in which the petitioner has reason so to believe. It must also state the particulars of any enquiries made by the petitioner for locating the respondent. The decree made in respect to the petition under section 15(2) (h)[52] shall be in the form of a decree of dissolution of marriage by reason of presumption of death.[53] What happens where a party returns after he/she is presumed to have died is a different case altogether.

It is obvious that some of the grounds for divorce provided in the Matrimonial Causes Act above may be difficult to prove, in such a situation it would be unjust for a judge to proceed to grant a dissolution. In practice, cases abound where some judges granted a dissolution even where an alleged ground was not proved. It is submitted that reconciliation may be appropriate where the allegation is not established instead of granting a divorce.

2.0 Indissolubility as a Fundamental Element of Marriage under the Canon Law.

Can. 1055 defines marriage as a covenant by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of the offspring, raised by Christ the Lord to the dignity of a sacrament between the

[52] Ibid.
[53] Ibid. section 16 (2) (b)

baptised.[54] The above definition captures all the essential elements of marriage. First, marriage is meant to be a pact for life, which cannot be dissolved except in death. The Catholic's teaching on the permanence of marriage is founded on the scripture. We recall the episode in the Bible when Jesus' adversaries attempted to entrap him within the opposing sides of the divorce debate between two schools. His response was clear though a big disappointment to some of them: "Have you not read that at the beginning the creator made them male and female and declared, "For this reason a man shall leave his father and mother and cling to his wife, and the two shall become as one? Thus, they are no longer two but one flesh. Therefore let no one separate what God has joined".[55]

The early Christian writers also insisted on the permanence of marriage, but with many differences and nuances. They most often spoke in moral terms: "forbidden to take another partner," "partnership may not be sundered," "sinful to remarry," "remarriage not permitted," "commits adultery."[56] Thus, the combine effects of the teachings of Jesus in the scripture and that of the early Christian writers inform the development of the concept of "indissolubility" in the Church. According to Himes and Coriden, the first time the term "indissoluble" was employed in this context in official teaching was at the 16th century Council of Trent in the doctrines and canons on the sacrament of marriage.[57]

[54] John Paul II, *Code of Canon Law,* promulgated, in Acts of the Apostolic See, 75 (1983) hereinafter referred to as *CIC*/83.
[55] Mt. 19:4-6
[56] Mackin, T. *Divorce and Remarriage*, New York 1984 p. 112
[57] Session 24, November 11, 1563, doctrinal section and canons 5, 6, and 7; Tanner, Decrees 2.753-55

The council asserted that Adam pronounced marriage to be perpetual and indissoluble bond (*nexum*).[58] This could be inferred from Adams exclamations of happiness when he saw Eve "this is the bone of my bone and the flesh of my flesh…"

The council denied that a spouse could dissolve the bond of marriage "on the grounds of heresy, irksome cohabitation, or continued absence," or that it was dissolved by the adultery of one of the spouses. The council also affirmed that an unconsummated marriage is dissolved by solemn religious profession. After Trent, the term "indissoluble" was almost always linked to the "bond" (*vinculum* or *nexum*) of marriage. It is a juridical language, a legal terminology, not the language of moral obligation. As the teaching on indissolubility of the bond was articulated by Pope Pius XI in 1930 "this inviolable stability, although not in the same perfect measure in every case, belongs to ever true marriage," a perpetual and indissoluble bond which is not subject to any civil power.[59]

Similarly, the Vatican II council document *Gaudium et Spes*[60] affirmed the indissolubility of marriage, but it based it on the marital covenant, the intimate union of persons and activities, the mutual giving of the two persons as well as the good of their children. Here it is their "*union"* that is referred to as indissoluble. Later in the next paragraph, their "*married love"* was referred to as indissoluble and finally the next paragraph reminds us that marriage retains its indissolubility even if it is childless, in this

[58] Ibid.
See also Gen. 2:23-24

[59] Himes, K.R Coriden, J.A. *The Indissolubility of Marriage: Reasons to Reconsider*…,P. 458

[60] PAUL VI., Vatican II Ecumenical Council, Pastoral Constitution on the Church in the Modern World *Gaudium et Spes.* (Vatican City) 1965 nos. 48, 49 and 50

case indissolubility refers to "*procreation of offspring"*. It follows that the totality of marriage is an embodiment of indissolubility. It is a community of two persons meant for life.

Pope John Paul II gave the most extensive teaching on marriage in his apostolic exhortation "On the Family". He attributed it to conjugal communion, and to marriage, but not to the bond. He teaches that the indissolubility of marriage is rooted in the personal and self- giving of the couple" and required by the good of the children."[61] Recently, Pope Francis speaking on marriage stated as thus: "…Even in cases where, despite the intense desire of the spouses, there are no children, marriage still retains its character of being a whole manner and communion of life, and preserves its value and indissolubility.[62] The 1983 Code of Canon Law of the Latin Church[63], provides extensively for marriage and its fundamental elements. Whereas can 1055[64] defines marriage as we have it at the beginning of this section, Canon 1056 provides for the essential properties of marriage as thus: "the essential properties of marriage are unity and indissolubility; in Christian marriage they acquire a distinctive firmness by reason of the sacrament". The text of this canon indicates that unity and indissolubility are properties of marriage by natural law. They are therefore, common to every marriage. In accordance with

[61] John P. II. Apostolic Exhortation *Familiaris Consortio* no. 84. 22, November 1981, no. 20 in Acts of the Apostolic See 74 (1982) 102- 104, Vatican City, Libreria Editrice Vatican, Rome

[62] Francis. Post –synodal Apostolic Exhortation on love in the family *Amoris Laeticia* March 2016 in Acts of the Apostolic See. 108(2016) no. 178, Vatican City, Libreria Editrice Vatican, Rome Rome

[63] Promulgated by John Paul II in place of the 1917 code, which served as a precedence to the present code though with a slight difference and some significant changes. The Latin code applies only to the Latin Church, the Oriental Church is guided by the CCEO.

[64] *CIC*/83

Gauduim et spes,[65] these properties are required both for the good of the children and because of the nature of the partnership formed by the two spouses. The grace of the sacrament provides specific assistance for the spouses to remain indissolubly faithful. Furthermore, can. 1057 &2[66] solidifies the previous canon on indissolubility by describing the nature of the consent which should be manifested legitimately by the parties to marriage. It provides thus: "matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage". This canon establishes that marriage bond arises from a consent which must be freely and legitimately manifested by the parties after due evaluation of the marriage implications and obligations. Such consent if duly and freely manifested, by law provokes "an irrevocable covenant". Thus, the irrevocability of the marriage covenant is our major concern. It goes to demonstrate the indissolubility of the marriage covenant. Therefore, can 1134[67] concludes that from a valid marriage there arises between the spouses a bond (*vinculum*) which by its nature is permanent and exclusive. The canon does not speak only of Christian marriage, but it refers to all marriages, Christian and non-Christian. Natural marriage also has the essential property of indissolubility and is bound by such. There is no gainsaying that, the fact that the marriage is not sacramental is not enough to sanction a divorce.

2.1 Why does the Church Reject Divorce but Sanctions Nullity of Marriage?

The Church is usually confronted with questions like: "How do we reconcile the fact that the church which is against divorce,

[65] No. 48
[66] CIC/83
[67] CIC/83

grants nullity of marriage"? Although the Church does not consent to civil divorce, neither in Christian nor natural marriage, however, there are certain grounds under which it is permissible to declare a marriage as null or non-existent *ab inizio*. Some of these instances are drawn from the biblical teachings and that of the Patristic fathers. The canon law also provides for the dissolution of marriages in cases of non-consummation or in favour of faith (conversion to the Christian faith).

2.2 Non- Consummation of Marriage:

By virtue of Canon 1142[68], a non-consummated marriage between baptised persons or between a baptised party and an unbaptised party can be dissolved by the Roman Pontiff for a just reason, at the request of both parties or of either party, even if the other is unwilling. This is so because the church tries to safeguard the essential elements of marriage, to ensure that non is excluded in the union. The provision of Canon 1055, is to the effect that the end of marriage is the good of the couple and the procreation and education of children of the marriage. That been the case, refusal of conjugal love by any of the parties is a breach of this canon and as such a breach of the matrimonial consent. Such refusal automatically amounts to the exclusion of offspring, which is against Can. 1101&2[69] and could therefore warrant dissolution of such marriage.

Consummation of marriage brings the union to a perfect completion, as one cannot grant a consent to marry while withdrawing that of consummation. Matrimonial consent extends

[68] Ibid.

[69] CIC/83. That paragraph provides that if one or the both parties exclude marriage with a positive act of will, or any of its the essential elements or properties, such contracts marriage invalidly.

to the right to conjugal love, as such the spouses are bound to give themselves freely to each other for the sexual activities involved in the matrimonial covenant, that explains the need to have a good understanding of the marriage obligations before venturing into it. The procreation of children lies in this giving of self, denial of which could bring the marriage to an end, hence marriage was celebrated for this and not for any other reason. The law adds that consummation must be in a human act and not in any other way, thus excluding artificial method. In other words, since the use of artificial methods to consummate a marriage is not contemplated within the definition of consummation, any attempt to use it could equally lead to the dissolution of marriage.

2.3 In Favour of faith:

In the same vein, can 1143 &1[70] provides that "in virtue of Pauline Privilege, a marriage entered into by two unbaptised persons is dissolved in favour of the faith of the party who received baptism, by the very fact that a new marriage is contracted by that same party, provided the unbaptised party departs".& sub 2 gives an insight to the meaning of 'the departure of the unbaptised party': the unbaptised party is considered to depart if he or she is unwilling to live with the baptised party or to live peacefully without offence to the Creator, unless the baptised party has, after the reception of baptism, given the other just cause to depart.

This canon which has a theological origin, deals with the possibility of the dissolution of a marriage entered into by two unbaptized persons, one of whom is later converted to the Christian faith and baptized, while the other remains an

[70] Ibid.

unbeliever. The source of this canon is the first letter of St. Paul to Corinthians where he addressed the Christians in Corinth regarding the Christian marriage. He says:

> Concerning the rest, I am speaking, not the Lord. If any brother has an unbelieving wife, and she consents to live with him, he should not divorce her. And if any woman has an unbelieving husband and he consents to live with her, she should not divorce her husband. For the unbelieving husband has been sanctified [71]through the believing wife, and the unbelieving wife has been sanctified through the believing husband. Otherwise, your children would be unclean, whereas instead they are holy. But if the unbeliever departs, let him depart. For a brother or a sister cannot be made subject to servitude in this way. For God has called us to peace.[72]

The condition for the above privilege is that the marriage must have been celebrated between two unbaptized persons, of which only one was subsequently baptized while the other remained unbaptised. Secondly, that the unbaptized party refused to live with the other party or, while wishing to live with the other party, to be unwilling to do so without offence to the Creator.[73] It is therefore not applicable after both parties have been baptised. The major importance of this privilege is to enable the faithful spouse to contract a new marriage, and the first marriage is dissolved *ipso*

[72] I *Cor*. 7:12-15

[73] Caparros, E. [et al] *Code of Canon Law Annotated*: Preapared under the Responsibility of Instituto Martin De Azpicueta, 2nd Edition, 2004, Wilson & Lafleur Lte'e, Notre-Dame Est, Canada Pp.889-890

facto [74]when the new marriage is celebrated. In essence, it is geared towards the salvation of the soul of the baptised faithful. The scriptural background of this type of dissolution is the preaching of God's kingdom to the unbelievers in Corinth. When Paul preached to the people, a good number of them repented and believed in the Good news of Christ, while others remained adamant. Those who believed received baptism, which enkindled the fire of Christ's love in them and they were moved to live their Christian life to the full. It was against this backdrop that they sought a solution from Paul: on what to do when found in a marriage with an unbeliever who refuses to be baptised and fails to live in peace with the baptised party and Paul came up with the above tenet, or teaching.

Another aspect of the favour of faith is called the Petrine Privilege. This is a precept made by the Roman Pontiff. Its essence is to enable a polygamous man or woman who wishes to be married in the church to do so. Since the Church does not recognize polygamous marriage, this privilege is to the effect that he or she is allowed to choose the first wife/husband or one out of the other wives/husbands whom he or she prefers to marry in the church. Accordingly, the other wives are settled to go and stay on their own and take care of their children if any, or enter into another marriage if she wishes. Thus, marriage with the other wife/husband is thereby dissolved. This privilege is only applicable in a polygamous or polyandry type of marriage. The background of this privilege was the spread of Christianity to places like Africa, Asia, etc. where the culture permits polygamy: and the conversion of some Islamic brethren whose religion permits polygamy.

[74] A latin word used to express an automatic end of an initial existing fact.

Apart from the above instances, the code of canon law provides that a valid marriage between baptized Christians, ratified and consummated cannot be dissolved by any human power and by no cause, except death. Can 1061&1[75] provides as thus: "a valid marriage between baptised persons is said to be merely ratified if it is not consummated; ratified and consummated if the spouses have in a human matter engaged together in a conjugal act in itself apt for the generation of offspring: to this act marriage is by its nature ordered and by it the spouses become one flesh". This is the greatest firmness and indissolubility.

3.0 Divorce as Inadmissible in Christian Marriage

Many schools of thought have questioned the teaching of the church on indissolubility vis-a vis its position on divorce. They argue that the church rejects divorce on one hand and practices same on the other hand. This assertion is false and lacks basis. The Catholic Church does not grant divorce, it can only dissolve a marriage based on the instances cited above. Consequently, the church does not contemplate changing its teaching on indissolubility by the reason of its foundation on the scriptures. The early church's tradition, based on the teaching of Christ and the apostles, affirms the indissolubility of marriage, even in cases of adultery. As such, it is obvious that indissolubility is based on the teaching of Jesus and has been honoured from the beginning of the church.

Besides, the properties of unity and indissolubility are considered essential to the extent that their exclusion from consent renders the marriage null and void. For the same reason, civil divorce does not dissolve the marriage bond, despite the law's provisions

[75] CIC/83

on this subject; consequently, divorced persons may not enter into a new valid marriage *coram Ecclesia*[76] while the first spouse is still alive[77]. Maintaining the teaching on indissolubility is fidelity to an ancient tradition based on the scriptures, which admits no change or modifications unless a careful examination suggests that change is congruent with the tradition. Jesus' teaching on divorce is coherent; He made it clear that divorce is inadmissible in the Christendom, maintaining that whoever divorces his wife and vice versa commits adultery. This is so irrespective of the law of Moses.[78] It is based on this that divorce remains unjustifiable in the Church no matter the reason proffered for obtaining one. It is argued that one divorce may lead to another and yet another, therefore the church rather advocates for forgiveness and perseverance in marriage, as there is no perfect marriage anywhere.

Conclusion

This work examined the concept of divorce, its origin and *modus operandi*[79] under the Nigerian law. It further considered the concept of indissolubility and its applicability under the Church's law, stating the church's stand on divorce and indissolubility. From the foregoing, the research has been able to substantiate that whereas the Nigerian civil society is in favour of divorce and is ready to grant it to anyone who meets the requirements of the Matrimonial Cause Act, the church on the other hand rather emphasizes on the indissolubility of marriage on the grounds that marriage is a contract in perpetuity. Neverthless, marriages that

[76] A latin word meaning in the presence of God's people gathered together in a Church.
[77] Caparros E. [et al] *Code of Canon Law Annotated*…, P.807
[78] Mk. 10:1-12; Lk.16:18; Mt. 5:32; 19:1-12; I Cor.7:10-11
[79] A latin word meaning, method of its application under the legal system.

could be dissolved in accordance with the scripture and the law of the church are well stipulated under certain conditions. These two opposing sides have been a subject of debate by many scholars who argue that the church should demonstrate dynamism by changing the doctrine of indissolubility and embrace divorce which it once granted before the subsequent modification. It is pertinent to note that according to the teachings of the church, divorce is not justifiable as it was not contemplated in the scriptures. The early church understood that Jesus had taught a new attitude towards divorce namely: that a husband and wife are obliged to remain faithful for life and the community of faith had the duty to proclaim this teaching. The concern was to remind the couple of their obligation to fidelity and that divorce is to be rejected.

The church opposes divorce and remarriage because it believes that even if a couple separates and no longer share a life together, the marital bond persists.[80] Unfortunately, most of those who decide to file a divorce do not consider its negative effects on the children of the marriage, if any. It is obvious that divorce brings about a split home. Although the civil court may grant custody of the children to any of the parents whom they judge fit, however, research has shown that this does not always augur well with children and their upbringing. In some cases, going into a new marriage makes the children of the former marriage aliens in their new home, regrettably, they may be made unwelcome by the new spouse. Such development may lead to a conflict situation and most often affects the psychological development of the children. Besides, if the first marriage suffers a divorce, what guarantees

[80] Catholic Church, Catechism of the Catholic Church, Vatican City: Libreria Editrice Vaticana, 1994, nos. 1638 and 1640
See also CIC/83Can. 1134

the spouses that the subsequent marriage would not also end up in a divorce? Moreover, the fact that some divorced couples seek to return to their first marriage after; divorce buttresses the fact of the indissolubility of the marriage bond. The truth is; there is no ideal marriage as long as human beings are concerned. The best approach to marriage is to understand the different personalities of each spouse and learn how to journey with him or her as marriage is a special vocation in the church, which only God stands as the final judge who could only separate the spouses with death.