

Abstract

The Matrimonial Causes Act, 2004 (MCA) seems to assert that dissolution of marriages is based on a Non-Fault Theory. The basis is that parties are not to prove any fact leading to the breakdown of the marriage where it is assumed to have broken down irretrievably. Regardless the MCA stipulates certain facts which must be proved in order to sustain an application for divorce; a position that runs contrary to claims of a non-fault based system. Adopting an analytical method, the findings in this work are that the fault based system is not jettisoned in the matrimonial laws of Nigeria. This paper takes the position that clarity on the system of divorce under the MCA will pave way for adopting a particular system for a better legal jurisprudence on marriage. The principal recommendation of this paper is that our courts should conform to global best practice on divorce by operating a no-fault system which circumvents the system imposed troubles on litigants in divorce proceedings.

Keywords: Marriage, Dissolution, Irretrievable Breakdown, Fault and Non-Fault Theories

1. Introduction

The term marriage is capable of three different meanings. The primary meaning of marriage points to the social Institution of marriage. Here it refers to the relationship of husband and wife, the relationship of parents and children in the family. In this sense, it is connected to the notion of family¹. Secondly, marriage may connote the act of marrying. Thus, it alludes to the ceremony which makes a man and woman husband and wife.² Finally, the term marriage could mean the state of being married. Hence, it refers to the rights and obligations of couples in a statutory marriage such as maintenance and property rights of parties.³ The ordinary dictionary meaning of marriage sees marriage as ‘the formal union of a man and woman, typically as recognized by law by which they become husband and wife.’⁴ In other words, it is a union between a man and a woman that is legally and socially sanctioned.⁵ In fact, it is a union that is governed by laws, rules, and customs, as well as ethos, that prescribe the rights and obligations of parties and confers status to the children of such marriages.⁶ From the legal perspective, marriage is ‘the voluntary union for life of one man and one woman to the exclusion of all others’.⁷ The above definition of marriage sees marriage as a monogamous union and this is the kind of marriage intended under the Matrimonial Causes Act⁸ and the Marriage Act.⁹ A review of the above definition of marriage portrays certain conditions. First, marriage is a union that unites a man and a woman, thus they become one person.¹⁰ Secondly, this union must be voluntary. The consent given must be a true consent devoid of any vitiating factor such as duress, fraud, mistake as to the identity of the other party or as to the nature of the ceremony performed or mental incapacity which renders one incapable of understanding the nature of the marriage contract.¹¹ Thirdly, the union must be for life. Thus, parties entering into a statutory marriage must have the intention that the marriage will last for the whole life of the parties,¹² unless the marriage is dissolved by a process of law.¹³ Statutory marriage otherwise known as monogamous marriage is regulated by the Marriage Act and the Matrimonial Causes Act. The Marriage Act is the law that lays out the conditions and formalities for the celebration of a valid monogamous or statutory marriage in Nigeria. This Act is a re-enactment of the Marriage ordinance of 1914.¹⁴ While the Matrimonial Causes Act is the law that regulates the annulment of marriages, dissolution of marriages and other matrimonial causes. For this reason, such marriages are regarded as statutory marriages or marriages under the Act.¹⁵

Parties to a statutory marriage in Nigeria intend that their union will be for life. Cohabitation is therefore a necessary element in a statutory marriage. However, there may be extreme issues in a marriage that may necessitate a separation in the form of a divorce. In this sense, the marriage is said to have broken down irretrievably. Dissolution of marriage or divorce is a formal, legal ending of a marriage or marital union by a court of law. It is trite that for a marriage to undergo divorce proceedings in court, such marriage must be a statutory marriage legally conducted and evidenced by a valid marriage certificate. Any party to such marriage may therefore present a petition to the court upon the ground that the marriage has broken down irretrievably. Incidentally the Act reflects only a single ground for divorce in Nigeria. The ground for divorce is where the marriage has broken down in a manner that same cannot be retrieved.¹⁶ However the position of the Act as to a single ground for divorce is undermined by certain stipulated facts under section 15(2).¹⁷ A close

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¹Ifeoma P Enemo, *Basic Family Law in Nigeria* (Ibadan: Spectrum Book Limited 2008) 24

²Ibid

³Ibid

⁴Catherine Soanes and Angus Stevenson (eds), *Concise English Oxford Dictionary* 11 edn. Revised Oxford University Press 2008)875

⁵Encyclopedia Britannica, ‘Marriage’ <<https://www.britannica.com/topic/marriage>> assessed 22 June 2023

⁶Ibid

⁷Hyde V Hyde (1866) LR 1 PD 130

⁸Cap M6 2004

⁹Cap M7 2004

¹⁰Ajuzie C Osondu, ‘Modern Nigerian Family Law and Practice’ (Lagos: Printable Publishing Company 2012) 70

¹¹Marriage Act LFN 2004 s 3 (1) (d); Enemo (n 1) 25

¹²Osondu (n 10)70

¹³E.I. Nwogugu, ‘Family Law in Nigeria’ (Revised edn, Ibadan: Heinemann Educational Books (Nig.) PLC 2001) IXXXI

¹⁴Ordinance No.18 of 1914

¹⁵Nneoma Grace Ogbah, ‘The Institution of Marriage and Law in Nigeria’<<https://sabilaw.org/the-institution-of-marriage-and-the-law-in-Nigeria>> assessed 22 June 2023

¹⁶Section 15(1) of Matrimonial Causes Act.

¹⁷Under section 15(2) of the Act, the Petitioner for divorce must prove one or more of the facts; that the respondent has willfully and persistently refused to consummate the marriage; that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; that since the marriage the respondent has behaved in a manner that the petitioner cannot reasonably be expected to live with the respondent;

look at these facts shows that the dissolution of statutory marriages in Nigeria is based on fault and no-fault theories. In fact, the preponderance of evidence shows that the dissolution of statutory marriages in Nigeria leans more to the fault theory. A no-fault divorce is the dissolution of a marriage that does not require a showing of wrongdoing by either party.¹⁸ Laws providing for no-fault divorce allow a family court to grant a divorce in response to a petition by either party of the marriage without requiring the petitioner to provide evidence that the defendant has committed a breach of the marital contract. No-fault jurisdictions do not give options of casting blame on fault grounds. Thus, the only option for filing a divorce case under systems that operate on a no-fault basis is no-fault divorce. Reasons furnished by parties seeking a no-fault divorce include irreconcilable differences, an irretrievably broken marriage, or an irretrievable breakdown of the marriage. These somewhat amorphous terms imply that the marriage can no longer work. The spouse receiving the divorce petition cannot object to the other party's petition for a no-fault divorce as the court may view that objection itself as an irreconcilable difference. Conversely, fault divorces are founded on matrimonial offences commonly given as grounds for divorce. A fundamental difference between fault and no-fault divorce is that spouses filing a fault-based divorce are required to allege facts mostly on the strength of evidence and disprove fault by filing a defense.

2. Conceptual Evaluation of Marriage

Statutory marriage is a voluntary union of one man and one woman to the exclusion of all others for the rest of their lives.¹⁹ However, it is trite that parties to a statutory marriage may not be living together as one household even when they are living under one roof. In such a case, the marriage is said to have broken down irretrievably. Hence, though the marriage may be valid *ab initio*, a party can bring up a petition in court for the dissolution of such marriage. It is also trite that Nigerian divorce law is modeled after English law on divorce. Accordingly, the law on matrimonial causes which was in force in England was made to apply to Nigeria from time to time.²⁰ This law was based on the Matrimonial offence theory.²¹ Thus, before 1970, the Nigerian Law on the dissolution of marriages was based on the matrimonial offence theory.²² The kernel of this theory is that marriage may only be dissolved on the commission of a matrimonial offence such as adultery, cruelty or desertion.²³ In 1920, a movement away from the matrimonial theory started to gain ground in some parts of the commonwealth.²⁴ In that year, the New-Zealand parliament started experimenting on the breakdown theory of marriage. The experiment was followed by Australia with the promulgation of the Matrimonial Causes Act 1959 which was particularly based on the breakdown principle.²⁵ This novel movement away from matrimonial offence theory to the breakdown theory started gaining grounds in England. Hence, in 1964, a group of experts was appointed by the Archbishop of Canterbury to review the English Law on Divorce.²⁶ The group's recommendation was an abandonment of the offence theory (fault) and the adoption of the breakdown principle. The report of the group was sent to the Law Commission and the Commission adopted a compromise position which is a combination of the non-fault and the fault theories, as reflected in the Divorce Reform Act of 1969.²⁷ According to Enemo²⁸ and Nwogugu,²⁹ these reforms which took place in England and some countries of the commonwealth had their influence in Nigeria as seen in the Matrimonial Causes Act, 1970³⁰ promulgated by the Nigerian Military Government. The Act is modeled after the English Divorce Reform of 1969, however with some apparent differences. Dissolution of marriage or divorce is therefore a process whereby a court of competent jurisdiction terminates a marriage.³¹ Thus a judicial pronouncement is made declaring the marriage to be dissolved. In this case, parties to the dissolved marriage are free to remarry.³² Divorce is therefore the legal termination of a marriage by a court or other component body.³³ By the process of dissolution, a marriage or marital union is terminated; the legal duties, responsibilities and certain rights are cancelled or reorganized, leading to the divorcement of matrimony between the parties who were formally joint in matrimony.³⁴

3. Ground for Dissolution of Marriage in Nigeria

By the provisions of the Matrimonial Causes Act, a party to a statutory marriage can bring up a petition in court for the dissolution of his or her marriage upon the ground that the marriage has broken down irretrievably.³⁵ Irretrievable breakdown is a legal term used to describe the fact that a marriage has collapsed beyond repair. In this sense, the parties to the marriage are no longer living like husband and wife and there is no prospect of reconciling them.³⁶ The marriage is dead and what is left of the empty legal shell must be given a

that the respondent has deserted the petitioner for a continuous period of at least one year preceding the presentation of the petition; that the parties to the marriage have lived apart for a continuous of at least 2 years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted; that the parties to the marriage have lived apart for a continuous period of at least 3 years immediately preceding the presentation of the petition; that the other party to the marriage 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.

¹⁸ 'No-fault divorce' Legal Information Institute, Cornell University Law School (2016).

¹⁹Hyde V Hyde (n 7)

²⁰Nwogugu (n 13) 155

²¹Ibid 155

²²Ibid

²³Ibid

²⁴Enemo (n 1) 154; See Divorce and Matrimonial Causes Act 1920 which was cemented in the Matrimonial Proceedings Act 1963; Nwogugu (n 13) 155

²⁵Enemo (n 1) 154

²⁶Nwogugu (n 13) 155

²⁷Ibid 155;Ememo (n.1)155

²⁸Ibid 155 - 156

²⁹Nwogugu (n 13) 155 - 156

³⁰Matrimonial Causes Act M7s LFN 2004 is a re-enactment of MCA 1970.

³¹ HG.org, 'Divorce Law' <<https://www.hg.org/divorce.html>>assessed 23 June 2023?

³²Ibid

³³Chibike Oraeto Amucheazi and Fochi Amabilis Nwodo, 'A Critical Appraisal of the Principle of Divorce in Nigeria under the Matrimonial Causes Act 1970' (2022) 9(3) International Journal of Innovative Legal and Political Studies<<https://seahipaj.org/journals-ci/sept-2022/IJILPS/full/IJLPS-S-2022pdf>>assessed 23 June 2023

³⁴Ibid

³⁵MCA LFN 2004 s 15(1)

³⁶IndrasishMajumber, 'Irretrievable breakdown of the marriage as a ground for Divorce' <<https://lawctopus.com/clatalogue/clat.pg/irretrievable-breakdownofmarriage-as-aground-for-divorce/>>assessed 23 June 2023

decent funeral.³⁷ As a legal term, it means that a marriage has become totally unworkable. Parties to such marriage are emotionally dead, thus the marriage cannot be salvaged.³⁸ However, the court hearing the petition for the dissolution of marriage shall hold that the marriage has broken down irretrievably if, and only if, the petitioner proved any of those facts as provided in the Matrimonial Causes Act.³⁹ The facts are discussed below;

Willful and Persistent Refusal to Consummate the Marriage

Consummation of marriage is to make a marriage complete by an act of sexual intercourse.⁴⁰ Consequently in this context, consummation is ‘the actualization of marriage. It is the first act of sexual intercourse after marriage between a husband and wife’⁴¹ The law is not interested in the act of sexual intercourse before the marriage. The sexual intercourse that has legal significance for the purposes of consummation is the one that occurred after the marriage.⁴² Refusal is willful when it is a conscious and voluntary act not to comply with a request for sexual intercourse to consummate the marriage.⁴³ Persistent refusal implies that there have been persistent requests and the other party has persistently refused to consummate.⁴⁴ Such refusal must continue until the date of the hearing of the petition.⁴⁵ In other words, willful and persistent refusal implies that there have been direct or indirect requests, which the respondent has always refused as a free agent, when there was opportunity to comply with the requests.⁴⁶ Hence the refusal is without justifications.

Adultery and Intolerability

The court shall hold that a marriage has broken down irretrievably, if the petitioner is able to prove that since the marriage, the respondent has committed adultery and the petitioner finds it intolerable to live with him or her.⁴⁷ In the case of *Dennis v Dennis*,⁴⁸ adultery is defined as the act of sexual intercourse between two persons of whom one or both are married, but they are not married to one another. It is sexual intercourse between a married person and another individual of the opposite sex who is not his or her spouse. However, such sexual intercourse must be voluntarily and consensual.⁴⁹ It is difficult to prove adultery by direct evidence and so recourse is made to circumstantial evidence.⁵⁰ The provisions of section 82(1) of the Matrimonial Causes Act require that adultery must be proved to the reasonable satisfaction of the court. Some of the ways in which adultery may be proved through circumstantial evidence include;

- a. Evidence of disposition and opportunity.⁵¹ The petitioner must prove that the relationship between the respondent and correspondent was not only intimate but there was opportunity to commit adultery.
- b. When a married woman visits a brothel with a man, there is conclusive evidence of adultery. But in the case of a man, there is a presumption of adultery.⁵²
- c. Where a child is born to a woman and the child cannot possibly be that of the husband, there is a presumption of adultery.⁵³
- d. Confession and admission of adultery.⁵⁴
- e. Cohabitation between the respondent and correspondent.
- f. Venereal disease from third party upon proof.
- g. Conviction for sexual related offences between a married person and someone who is not his or her spouse.

It must be noted that, proof of adultery *simpliciter* is not enough; the petitioner must prove that he or she finds it unbearable to live with the respondent.⁵⁵ Thus, the criterion of intolerability is subjective as what matters is the feeling of the petitioner.⁵⁶

The Intolerable behavior of the Respondent

The court shall hold that the marriage has broken down irretrievably, if the petitioner is able to prove that since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.⁵⁷ Accordingly, where a spouse puts up a conduct that the other spouse cannot be expected to bear, then such a spouse can petition for divorce.⁵⁸ Instances of such conduct include; rape, sodomy, bestiality, frequent conviction, neglect of the petitioner and insanity.⁵⁹ Thus, section 16(1) of the Matrimonial Causes Act amplifies and sets out instances of unreasonable behavior as provided under section 15(2)(c). Unlike adultery and intolerability where the test is subjective, the test of behavior in section 15(2) (c) of the Matrimonial Causes Act is objective.⁶⁰ This

³⁷Enemo (n) 155

³⁸ Neeta Beri, ‘Analyzing ‘Irretrievable Breakdown of Marriage’ as a Separate Ground for Divorce under Hindu Law’ (2020) 6(6) *International Journal of Legal Developments and Applied Issues* 240, 240

³⁹ MCA LFN 2004 s 15(2)

⁴⁰Soanes and Stevenson (eds) (n 4) 307

⁴¹Legal Information Institute ‘Consummation’ <<https://www.law.cornell.edu/wex/consumation>>assessed 23 June 2023.

⁴²Enemo (n1) 163

⁴³*Owubiyi v Owubiyi* (1965) 2 All NLR 200; Itse Sagay, ‘Nigeria Family Law: Principle, Cases, Statutes and Commentaries’(Lagos: Malt house Press Ltd 1999) 149

⁴⁴Enemo (n 1) 161

⁴⁵Sagay (n 67) 149

⁴⁶Osondu (n 10) 166

⁴⁷MCA LFN 2004 515 (2) (b)

⁴⁸(1955) 2 All ER 51

⁴⁹MZ Agams, ‘Adultery as grounds for Divorce in Nigeria’ <<https://mzagams.wordpress.com/2022/12/12/adultery-as-grounds-for-divorce-in-nigeria/>>assessed 23 June 2023

⁵⁰ Ibid

⁵¹Sagay (n 67) 15.7

⁵²Enemo (n 1) 168

⁵³Ibid.

⁵⁴Nwogugu (n 13) 162

⁵⁵MCA LFN 2004 515(2)(b). MZ Agams (n 73)

⁵⁶*Goodrich v Goodrich* (1971) 2 All ER 1340; Sagay (n 67) 160

⁵⁷MCA LFN 2004 515(2) (c)

⁵⁸Osondu (n 10) 169

⁵⁹MCA LFN 2004 s 16 (1)

⁶⁰Sagay (n 67) 249

is distilled from the provisions of section 15(2) (c) which provides that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him or her.

Desertion

Desertion is a fact to prove the irretrievable breakdown of marriage under the Act.⁶¹ Desertion has been defined as ‘the withdrawal of support and cessation from cohabitation without the consent of the other spouse and with the avowed intention of abandoning allegiance, fidelity or responsibility and remarrying separated in perpetuity’.⁶² In other words, it is the voluntary cessation of consortium by a married person without justification.⁶³ Desertion is consummated once a spouse ceases to cohabit with the other spouse without his or her consent and with the requisite intention of remaining separated forever.⁶⁴ In desertion, four essential elements could be distilled namely; physical separation, the settled intention to remain separated forever, absence of consent from the other spouse, and withdrawal from cohabitation without justification.⁶⁵ Nevertheless, the law has given recognition to two types of desertion. They are simple or willful desertion and constructive desertion.⁶⁶ In willful desertion, the person who leaves the matrimonial home is in desertion, while in constructive desertion, it is the party in the house that is in desertion. By his or her conduct, the other party is compelled to leave the matrimonial home.⁶⁷ The relevant time for the purposes of proving desertion is that the deserter must be in desertion for a continuous period of at least one year immediately preceding the presentation of the petition.⁶⁸

Living Apart Provisions

The Living apart provisions are sections 15(2) (e) and (f) of the Matrimonial Causes Act. These two sections are similar in the sense that once it is proven by the petitioner that parties to the marriage have lived apart for the stated periods immediately preceding the petition, then the court shall hold that the marriage has broken down irretrievably. However, there are some differences. Under Section 15(2)(e), the required period of living apart is a continuous period of at least two years and the respondent is not objecting to the decree being granted. But in Section 15 (2) (f) the statutory period is at least three years immediately preceding the petition. The requirement of non-objection is dispensed with. Living apart means that parties to a marriage are no longer living as one household.⁶⁹ Thus, they are living separately and apart. The implication of this is that, spouses who are living under one roof may be said to be living separately and apart.⁷⁰ In this sense, they are living as two households. Once there is cessation of consortium which are those lovely services spouses enjoy from each other, then living apart is consummated.⁷¹ Physical separation is not conclusive of living apart, so far as there is no intention by one or both parties to put an end to the marriage.⁷² Therefore, as long as the husband and wife see their marriage as subsisting, they cannot be seen as living apart just because of physical separation caused by employment, business and so forth.⁷³ The provision of section 15(2)(e and (f) typifies the non-fault theory as regards divorce proceedings in Nigeria.⁷⁴ Accordingly, it is seen as an honest application of the irretrievable breakdown principle in the dissolution of marriages in Nigeria.⁷⁵

Failure to comply with Degree of Resolution of Conjugal Rights

Another fact in proof of irretrievable breakdown is stated under section 15(2)(g). Thus, where a petitioner proves that the respondent has not complied with an order of court to restore the conjugal rights of the petitioner for a period not less than one year, the court is bound to hold that the marriage has broken down irretrievably. This provision confirms the fact that conjugal rights are fundamental and are regarded as vital incidences of consortium.

Presumption of Death

Once a party becomes absent from his spouse for a continuous period of seven years, immediately preceding the presentation of the petition, the court allows the other spouse to presume death. Thus, presumption of death in such circumstance is a fact in proof of irretrievable break down of marriage⁷⁶ and an instance of non-fault theory. Naturally, death brings marriage to an end and so one wonders why a spouse is expected to bring a petition under this heading. This conundrum may be addressed when one considers that, what is involved is not natural death but death by presumption. What happens if the person presumed death surfaces? Is this a case of irrefutable presumption? Ordinarily, no serious legal issue arises if the living spouse has not remarried. But where he or she has remarried, there could be some challenges for further judicial determination.

4. Fault and Non-fault Theories as Fundamental Principles in Nigerian Divorce Law

As shown above, the fundamental principle of divorce law in Nigeria is based on irretrievable breakdown and facts in proof of the principle of irretrievable breakdown. Analysis of these facts reveals that, contrary to the position that divorce in Nigeria is based on non-fault theory; there is a combination of fault and non-fault theories in the process of dissolution of marriages under the relevant divorce enactments. The provisions of section 15 (2) (a-h) strengthen this position. A petition based on adultery and intolerability is alleging that

⁶¹MCA LFN 2004 s 15(2) (d)

⁶²Simileoluwa Owotomo Akingbola, ‘Living Apart as a Ground for Dissolution of Marriage’ <<https://www.linkedin.com/pulse/liing-apart-round-dissolution-marriage-simileoluwa-owotomo>>assessed 24 June 2023

⁶³Ibid

⁶⁴Sagay (n 67) 290

⁶⁵Akingbola (n 86)

⁶⁶Peter OluwasholaAsa, ‘Legal and Recognizable Grounds for Divorce in Nigeria’<<https://medium.com/@peteroluwashola/legal-and-recognizable-ground-for-divorce-in-nigeria>>assessed 24 June 2023

⁶⁷Ibid

⁶⁸MCA LFN 2004 s 15(2) (d)

⁶⁹MCA LFN 2004 S 15(3)

⁷⁰Emeno (n 1) 201

⁷¹*Fuler v Fuler*(1973)IWLR 730

⁷²Akingbola(n 86)

⁷³Ibid

⁷⁴Ibid.

⁷⁵Sagay (n 67) 331

⁷⁶MCA LFN 2004 s. 15 (2)(h)

the respondent has committed adultery and because of this, the petitioner finds it intolerable to live with the respondent. For the purposes of dissolution of marriages in Nigeria⁷⁷ adultery is a matrimonial 'offence'. Thus, a petition founded on section 15(2) (b) is based on the fault of adultery. More so, adultery is a criminal offence under the Penal Code of Northern Nigeria.⁷⁸ A petition based on section 15(2) (a), that is, willful and persistent refusal to consummate the marriage is also based on fault. Here the respondent has a settled mind not to consummate upon repeated requests. Thus, the refusal is persistent. It is not just a mere neglect but a conscious, voluntary act⁷⁹ not to heed to the request to consummate. Since consummation actualizes the marriage, a willful and persistent refusal not to consummate is indicative of the fact that, the respondent has no intention of cementing the marriage. Since sexual intercourse is an important incident of consortium, refusal to do what is required by law attracts some blameworthiness. Fault principle is more evident in section 15(2) (c) which provides for intolerable behavior. Section 16(1) of the Matrimonial Causes Act which amplifies section 15(2) (c) enumerates instances of fault such as rape, sodomy or bestiality, habitual drunkenness, intoxication by reason of excessive narcotics, stimulating drugs, frequent convictions for crime and so forth. Virtually all the enumerated behaviors are crimes or offences under our Criminal code or Penal Code.

In desertion, one party withdraws from cohabitation with the intention of remaining separated for ever without justification and without the consent of his or her spouse. Such unjustifiable withdrawal from cohabitation translates to a matrimonial offence and it is fault oriented. Thus, cessation from cohabitation must be without justification. Where the desertion is constructive, the party who remains in the matrimonial home has chased away the other party due to his or her faulty conduct. He or she becomes the deserter. The non-fault theory is more evident in the living apart provisions. Thus, it is regarded as constituting the most surgical departure from other provisions.⁸⁰ It is aptly described as non-fault provisions.⁸¹ Hence, the provisions of section 15 (2)(e and f) evidence the lack of fault element that characterizes most of the provisions of section 15 (2).⁸² In living apart provisions the law is not interested in right or wrong, guilt or innocence of the parties to the marriage.⁸³ Once it is shown that parties have lived apart subject to certain conditions as provided by law, the court is bound to declare that the marriage has broken down irretrievably.⁸⁴ In such circumstances, the guilty party, that is the person who caused the living apart can bring up a petition for dissolution of the marriage. And so, the innocent party can be divorced against his or her will by the party who caused the living apart.⁸⁵ The absence of fault in section 15(2) (e and f) distinguishes the section from most of the other provisions of section 15(2) which requires a petitioner to prove a matrimonial offence.⁸⁶ The claim that the Matrimonial Causes Act abolished the matrimonial offence doctrine is unwarranted. Thus the list of facts in proof of irretrievable breakdown of marriage majorly contains the classical matrimonial offences and fault of either party to the marriage.⁸⁷ In sum, the Matrimonial Causes Act only attempted a paradigm shift from fault based dissolution of marriages, to a divorce law where guilt, fault or blame is inconsequential. However, this mission was not sufficiently achieved.⁸⁸

5. Modern intricacies of Divorce

A modern perspective to divorce laws is argued to be based on the principle that a subsisting marriage should not be a trap for adult parties who may want to end same without strain. As it were, the justification to divorce was essentially based on fault of a party. Consequently, most laws specify only one ground for divorce- the irretrievable breakdown of the relationship. Yet it has been shown that the courts will only allow the divorce if the person making the petition relies on one or more of the facts stipulated in section 15 of the MCA. Certain facts under the provision of section 15 are still fault based which obscures the supposed standing of the law on a no-fault based theory. Adultery, unreasonable behavior and desertion are facts which do not only outline faults in a party but is required to be established by proof. Where a couple who petitions for divorce is not able to satisfy at least one of the five facts, the court may not grant the divorce, even if the relationship has broken down irretrievably. This situation does not reflect the true reality of current jurisprudence on matrimonial causes. The fault based system of divorce has been criticized for forcing couples to air their grievances in open court which only serves to stir up conflict between couples which can lead to lengthy, expensive and avoidable court litigation. Given the sanctity and sacredness marriage exudes, it will be somewhat destructive to litigate on divorce like commercial disputes in court. For this, the no-fault divorce is expected to improve the process for the vast majority of separating couple. A no-fault system apparently removes the need to place the entire responsibility for the breakdown of the marriage onto one party and will furnish a party an opportunity to exit a failed relationship where failure to prove facts will mean to remain in such relationship. In this context, the no-fault divorce process is expected to be a more realistic reflection of how relationships come to an end. After all, where both parties agree to divorce, it may be unreasonable to enquire into reasons and facts necessitating such decision. The courts in a no-fault system do not tend to investigate a couple's reasons in order to circumvent the figurative problem a fault-based divorce poses. Many couples are tied to marriages due to evaluations of the technicalities; need to prove facts and embarrassment of a fault based divorce process. An example of the problems associated with a fault based system is the case of *Owens v Owens*⁸⁹ in the United Kingdom. The court in *Owens* case considered the reason for a petition to divorce as a flimsy and exaggerated point. This forced the petitioner to stay married against her will for five years after which she was then able to apply to divorce on the ground of separation or living apart. Basically, an exact adoption of a no-fault system will mean that divorce becomes more accessible. There are certain levels of advantages to consider in view of the intricacies of a no-fault system as opposed to a fault based system of divorce. The first is that it reduces the compulsory time to wait for a divorce. Under the fault based system, where adultery or unreasonable behavior does not apply, parties have to wait for a

⁷⁷MCA LFN 2004 S. 15 (2) (B)

⁷⁸Sections 387 and 388

⁷⁹Enemo (n 1) 161

⁸⁰Sagay (n 67) 331

⁸¹Ibid.

⁸²Akingbola (n 86)

⁸³Ibid

⁸⁴Ibid

⁸⁵Sagay (n 67) 331

⁸⁶Ibid

⁸⁷Andreas Rahmatian, 'Termination of Marriage in Nigerian Family Law: The Need for Reform and the Relevance of the Tanzanian Experience' (1996)

10 *International Journal of Law and Policy and Family* 281,290

⁸⁸ Ibid 291

⁸⁹ (2018) UKSC 41

period of time from the date of separation to file for divorce. Thus a new law on divorce based on a no-fault system will mean that there will be no requirement to wait. This is particularly important in domestic abuse cases as the victim will no longer be trapped in a dangerous marriage; having previously only faced the option of citing behavior allegations that they fear could result in greater abuse and exacerbation of issues.

Further, persons who dread the divorce process due to delays or lack of understanding can now terminate their marriage and carry on with life easily. Again the no-fault system eliminates the option to place blame on either party within the legal process of divorce which can therefore reduce unnecessary conflict. It is submitted that the fault based system places enormous burden on the parties to prove and defend allegations tied to the facts enumerated under the MCA as grounds for divorce. The no-fault system presents no further conflict as parties simply part ways or chart other cause and ideals in life. Indeed the no-fault system may present an opportunity for parties to direct their energies on the practical and impactful issues such as child arrangements or financial orders. In addition, the children from the marriage are insulated from being exposed to the intricate and mentally damaging details of their parents' divorce, which is hoped to make an already devastating process easier for them.

Although there are certain disadvantages of the no-fault divorce, chief of which is the consequent rise in divorces, it is appropriate to situate the two standards in a context that portrays its relevance or otherwise. If the no-fault philosophy is challenged in view of its disadvantages, it may be important to note that the social and legal changes that have followed in its wake have produced a context in which it is now entirely appropriate. Although inequities may persist under the no-fault system, to rely on fault as a determinative factor in divorce in contemporary times would be ill-advised and unwise. The focus would be to prevent financial and emotional harm to spouses whose choices may have been made up much earlier regardless of the legal process they ought to submit to. The motivation behind a no-fault system should be public interest in view of accounts of the realities of married life, the economic needs of divorced dependent spouses, the embarrassment and social damage to person as well as the best interest of children.

6. Conclusion

The Nigerian law on divorce may not have closed out the gulf between the divorce laws on the statute books, which declares marriage indissoluble except for marital fault and the law in practice, which tolerated divorce by mutual consent. Although the MCA outlines a single ground for divorce, there are facts in proof of irretrievable breakdown which must be discharged by the petitioner. A good number of these facts contain proof of matrimonial offences, indicative of fault. It is therefore misleading to maintain that Nigerian divorce law is based on non-fault principles. The facts in proof of irretrievable breakdown are a combination of fault and non-fault principles. Thus, a petitioner can obtain a divorce order from the court on the basis of fault of either party to the marriage.⁹⁰ The global perspective to marriage as a union for convenience may have introduced a concept into the family law principles in Nigeria as elsewhere. That concept posited an end to fault finding and to the perpetuation of conflicts that emanate from a litigation modeled divorce processes. It is recommended that our courts remodel the divorce law in Nigeria to truly reflect the non-fault principle, which may rightly provoke the amendment of section 15(2)(a-h) of the Matrimonial Causes Act.

⁹⁰ Ibid