

Ending Divorce without Bitterness: Making a Case for Only No-Fault Divorce under the Nigerian Matrimonial Law.

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Abstract

Marriage creates a legal status from which legally enforceable rights and duties arise. On the other hand, divorce terminates that legal status, thereafter, neither party has the legal rights nor owes legal duties attached to marriage. This paper discusses the arguments for and against fault and no-fault divorces which is an area of family law that is always subject of intense debate and emotional responses. The paper points to the fact that fault-based divorce system makes parting couples to apportion blame, often resulting in increased animosity and making it harder for ex-partners to develop positive relationships as co-parents. On the other hand, no-fault makes divorce less traumatic. The paper examines the current law and practice. It highlights the benefits of reform of the law and the removal of fault so that divorce is based solely on non-fault. The paper concludes in favor of removal of faults in divorce leaving only the non-fault concept, with the mindset that when divorce cannot be avoided, the law must not create conflict between the warring parties that so often harms the children involved. The paper is aimed at enabling divorcing couples not to be put through legal requirements which do not serve their interest and accordingly have poor outcomes on their children.

Key words: family law, divorce, no-fault, fault, living apart, separation, irretrievable break down.

1 Introduction

Families are the bedrock of society, and marriage has long proved its vital importance to family stability. When, sadly, a marriage has irretrievably broken down, continuing in it can be damaging for the couple and for any children they have, as well as undermining the institution of marriage itself which can work only if both parties are committed to it. The breakdown of a marriage is a difficult time for families. The decision to divorce is often a very painful one. Where children are involved, the effects in particular can be profound where there is ongoing conflict. Couple will be angry, upset and possibly devastated after relationship breakdown, this can cause further stress and upset for the divorcing couple which is detrimental in its outcome for them and their children. In situations where despite consideration, divorce cannot be avoided, the law should do all it can to reduce conflict and encourage good relations as ex couples move on to reach agreement about practical arrangements for the future. There may be differences in adjustment and acceptance of the separation between the leaver and the left, those to 'blame' and the 'blameless' but it should be with minimal acrimony.

It is common for petitions to bear several pages of shocking history concerning the marriage and the terrible things one party has done to the other (which most of the times exaggerated) and this results in conflict, bitterness, distress and humiliation. Acquiescing with Judge Garlis' view; '*...no longer are threats and accusations confined to letters, e mails or even affidavits, it is now a matter of where public can have a look at the dirty linen which is being washed*'.¹ Regularly divorces are happening, they are characterized by regular upload on social media feeds like the twitter, face book, what's app, and Instagram, this is apart from newspapers and magazines which lap them up and send them out with alarming regularity and updates for the public, giving lurid details. These make juicy readings for the public and make headlines in social media, on the electronic ones and the printed publications -newspapers and magazines. Some members of the society are in support of divorce for fault that is where one party can show adultery, intolerable behavior and desertion by the other party. Their argument is that there must be a moral base, a sense of right and wrong upon which stability of family life, the law and cohesion of the society depend. Also, that non -fault is said to be a means of getting fast divorce thereby increasing rate of divorce.

¹Disrtict Judge Garlis,(1996) 'Divorce's dirty linen' *Family Law* (UK) May 1996, 12.

On the other hand, it is argued that fault divorce can create or exacerbate unnecessary conflict with damaging consequences for children. In addition, the dominance of 'fault' within divorce law has not reduced conflict nor promote resolution in marriage. There is widespread concern about the current prevalence of divorce in Nigeria and the consequences which this can have both for the couple concerned and for their children.

1.1 Divorce process

Divorce brings an end to a legal relationship. During divorce process, couple move from the private arena of their personal partnership and societal belief about marriage into the public arena thereafter to the forum of the court which through its relevant and appropriate legislative laws had laid down procedures. The only ground for divorce is that the marriage has irretrievably broken down.² The court cannot hold that the marriage has broken down irretrievably unless the petitioner satisfies the court one or more of the seven facts,³ four of which are fault based (willful refusal to consummate the marriage, adultery, behavior, and desertion.⁴ Two of the facts relate to periods of separation (living apart) - two years if both parties consent and three years without consent.⁵ The divorce process is in itself commenced by one of the parties filing a petition at the State High Court providing particulars of facts alleged.⁶ The burden lies with the petitioner to establish at least one of the facts stated in s.15 (2) Matrimonial Causes Act 1970 (MCA). The court cannot hold that the marriage has broken down irretrievably unless the petitioner satisfied the court of one or more of the specified facts.⁷ Having recognized that the marriage has broken down irretrievably, there is the statutory procedure which provides a framework within which the end of the marriage can be accomplished.⁸ It is not possible to petition for divorce within two years of marriage except by leave of the court.⁹ This does not prevent evidence of conduct that occurred in the first year of the marriage from being relied on in the petition.¹⁰ Granting a decree of divorce is a two stage process. First, the court grants the decree nisi, at this stage the marriage has not legally ended. Second, the court grants the decree absolute which is the final decree of divorce and this ends the marriage finally.¹¹ In practice there may be a longer time gap between the two decrees, for example so that financial agreement can be agreed. The court also has the power to shorten the period.¹²

What is the current law and how did we get here? The current law on divorce in Nigeria is the Matrimonial Causes Act 1970. The historical development of the law dates to the period of colonial era in Nigeria. This is best understood by examining:

2 Sources, development and the current basis for divorce under the Nigerian family law

The sources of Nigerian law can be divided into three.¹³ First, the Received English law (consisting of the general law of England introduced into Nigeria. Before Nigeria independence in 1960, Nigeria was a colony of Britain and due to Britain's imperial sovereignty, the general laws of England were introduced into Nigeria as its own laws. The general laws of England consist of common law, the doctrines of equity and the enacted English statutes.¹⁴ The general laws of England were introduced into Nigeria via reception laws, first through Ordinance No 3 of 1863 and currently through s.32 of the Interpretation Act of 1964.¹⁵ From the foregoing, only statutes of general application which were enacted in England, are applicable in Nigeria so long as they were in force in England as at 1st January 1900.¹⁶ These statutes are certainly part of Nigerian laws, being received as two of the statutes of general application which were in force in England at the appropriate date and are also under the probate and matrimonial sections of the High Court laws.¹⁷

² S.15 (1) MCA

³ S.15 (2) MCA

⁴ S. 15 (2) (a)-(d) MCA

⁵ S. 15 (2) (e) (f) MCA

⁶ S.2 (1) MCA

⁷ Note 4 supra. See also *Megwalu v. Megwalu* 1994 7 NWLR (Pt 359) 718 @ 730

⁸ *Owens v. Owens* [2018] UKSC41

⁹ S. 30(1) MCA

¹⁰ S.30 (8) MCA

¹¹ *Dejonwo v. Dejonwo* (1993) 7 NWLR Pt 306) 483

¹² *Ibid*

¹³ Park, A. E. W. (1963) *The Sources of Nigerian Law*. London: Sweet and Maxwell, pp. 1&2.

¹⁴ *Obilade, A.O. (1979) The Nigerian Legal System*, Spectrum Law Publishing, Ibadan, p. 69.

¹⁵ Cap.192 LFN of 1990 now

¹⁶ *Obilade supra* at p.81

¹⁷ Harvey, Brian (1968), *The Law and Practice of Nigerian Wills, Probate and Succession*, African University Press, Lagos

From the time of English settlement in the various colonies, marriage and divorce laws were inherited from England, that is, the English law on matrimonial causes applicable in the English Superior Court used to apply in Nigeria by virtue of s.4 High Court Act¹⁸ Since its emergence as judicial procedure in 1857, English divorce law has been characterized by its reliance on the concept of matrimonial fault that is- the fault doctrine having initially provided it as the sole basis for obtaining a divorce.¹⁹ On independence, the Nigerian Federal Constitution 1960, gave the country power to legislate its laws. Despite this almost all the provisions of Nigerian Laws on Matrimonial Causes were borrowed from England and thus were identical with English laws on Matrimonial Causes having a sole ground of irretrievable breakdown.²⁰

In 1970, the Nigerian Matrimonial Cause Act 1970²¹ was enacted and most of the provisions of the Act are based mainly upon the Matrimonial Cause Act, 1959 of Australia and to a limited extent on the Family Law Reform Act 1969 of England.²² Under the Nigerian Matrimonial Causes Act 1970, the unambiguous statutory message of s.15 (1) of the Matrimonial Causes Act 1970 is that the sole ground for divorce is the irretrievable breakdown of the marriage. However, a petitioner can only establish this by proving one or more of seven facts.²³ Once one or more of the statutory facts has been proved, the breakdown of the marriage will be inferred.²⁴

These facts as enumerated in s.15 (2) (a) – (h) MCA are;

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

Courts can only hold that such a breakdown has in fact been established on proof of one or more of the seven facts contained in the Act.²⁵ These facts embrace both instances of fault- namely; willful refusal to consummate marriage, adultery, behavior, desertion and the no fault situations namely; living apart for a continuous period of two years where the parties agree on divorce and living apart for a continuous period of three years and consent or agreement from the respondent is not required (divorce simplicial)²⁶ Divorce based on fault is one where one party can show either willful refusal to consummate marriage,²⁶ adultery,²⁷ intolerable behavior²⁸ or desertion by the other.²⁹ Only section 15 (2)(e) and (f) are non-fault based facts. Fault based facts that will be discussed in this paper are; behavior, adultery and desertion.

¹⁸ Cap 177 Laws of Federation and Lagos Colony 1958.

¹⁹The Matrimonial Causes Act 1857 – adultery is the sole ground for divorce, but women must prove aggravated adultery (adultery plus cruelty, bigamy, sodomy or desertion). See Standley, K. (2006) *Family Law* Hampshire: Pelgrave Macmillan, 154.

²⁰Adesanya, S. A. (1973), *Laws of Matrimonial Causes*, Ibadan, Ibadan University Press Chapter 2, p.36.

²¹ Now Cap M7 LFN

²²Family Law Reform Act (UK) 1969 c.46. see also Adesanya, *Laws of Matrimonial Causes* Chapter 2, p.36.

²³ s.15(2).MCA

²⁴Ibid See also Probert, R. and Harding M. (2018) *Cretney and Probert's Family Law*, Sweet & Maxwell London p.78

²⁵ s.15(2)MCA

²⁶ S.15(2)(a)MCA

²⁷ S.15(2)(b)MCA

²⁸ S.15(2)(c) MCA

²⁹ S.15(2)(d) MCA

2.1 Behavior

Behavior fact is mostly confusing. It is often referred to as “unreasonable behavior”, which suggests blameworthiness or outright cruelty on the part of the respondent; but this has been called a ‘linguistic trap’,³⁰ because the behavior itself need be neither unreasonable nor blameworthy: rather, its effect on the petitioner must be such that it is unreasonable to expect him or her to go on living with the respondent. This is a significantly different and more flexible concept which is obviously capable of varying from case to case and court to court. Although the test is to be applied by an objective reasonable outsider, the character and personality of the petitioner are particularly relevant in deciding what conduct he or she should be expected to bear.³¹ For behavior under s. 15(2) (c) irretrievable breakdown is to be inferred if the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him or her. It may well be unreasonable to expect a petitioner to live with a spouse who is mentally ill or disabled³² or has totally incompatible values or lifestyle.³³ Behavior as a fact to base that marriage has broken down irretrievably is very wide enough to cover not only acts which would amount to cruelty but also acts of an expulsive nature which would give rise to behavior on the part of one spouse which makes it unreasonable to expect the other to live with him or her.³⁴ Behavior consisted of physical ill treatment, non-violent behavior, though the court does not take into account the particular circumstances of the home, temperaments and emotions of both of the parties, their status, their ways of life, their past relationship and almost every circumstances that attends the act or conduct complained of. Most times the petitioners lie, or at least exaggerate, in order to get what they want. Many lawyers and members of the public do not know exactly how low the threshold is and as a result some are filing stronger petitions than necessary. In effect, they are required to throw mud at each other, this encourages parties to enter a blame game which therefore increases acrimony within the family. Uncertainty about what constitutes unreasonable behavior undermines the principle for the rule of law to be intelligible, clear and predictable when petition is based on behavior.

2.2 Adultery

One of the facts from which irretrievable breakdown can be inferred is adultery plus the fact that the petitioner finds it intolerable to live with the respondent. In legal terms adultery is a ‘matrimonial offence’. It is recognized in moral and social terms as a breach of the matrimonial relationship. The statutory definition of adultery incorporates two elements: that the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent.³⁵ However, the intolerability does not have to be related to, or be triggered by, the adultery.³⁶ Adultery is when it is committed with opposite sex only. It is only sexual intercourse with a member of the opposite sex that can count as adultery, whether the marriage is same or opposite sex.³⁷ The absolutely required elements are; the date the petitioner became aware of the adultery, a brief statement of case, some form of admission from the respondent. In addition to adultery it is necessary for the petitioner to establish that he/she finds it intolerable to live with the respondent.³⁸ This involves a subjective test. The court will be concerned only with the petitioner’s state of mind and not with the application of any objective standards of behavior. In great majority of cases in which adultery is alleged, the co-respondent was named. The court will rely upon an admission on the acknowledgement. Most petitions do not elaborate on why it was intolerable to live with the respondent, presumably because the intolerability does not have to be related to the adultery.

2.3 Desertion

Irretrievable breakdown may be inferred from the fact that the respondent had deserted the petitioner for continuous period of at least one year immediately preceding the petition.³⁹ Desertion requires a one-year physical separation, an intention to desert, lack of consent from the petitioner and that the desertion is without just cause.⁴⁰

³⁰*Bannister v. Bannister* (1980) 10 Fam. Law 240, per Ormond L.J

³¹*Astwood v. Astwood* (1981) 131 N.L.J. 990.

³²*Katz v. Katz* [1972] 1 W.L.R. 955

³³*Livingstone-Stallard v. Livingstone-Stallard* [1974] Fam. 74

³⁴S.16 (1)(a)- (f) Matrimonial Causes Act. See also *Williams v. Williams* (1966) 1 All NLR 36 at 41 &42

³⁵S.15(2) (b) MCA

³⁶*Cleary v. Cleary* (1974) 1 All ER 498

³⁷*Dennis v. Dennis* (1955) P.153. In Nigeria, Same Sex Marriage Prohibition Act 2013 (SSMPA) prohibits same sex marriage therefore adultery can only be alleged between people of the opposite sex.

³⁸ S.15(2)(b) MCA

³⁹ S.15(2)(d)

⁴⁰*Lang v Lang* [1955] 1 AC 402, *Hopes v Hopes* [1949] P 227.

In practice, the desertion fact has been little used comparatively, as either behavior or two years' separation with consent would be easier to establish.

2.4 Separation for two years or three years (*Living Apart (non - fault based)*)

For the two- and three-years' separation facts, the 'separation' entails both a physical separation and a 'mental' element – a recognition that the marriage is at an end. The mental element does not however have to be communicated to the respondent.⁴¹ The phrase 'living apart' imports more than mere physical separation. To establish living apart, it is necessary to prove something more than the husband and wife are physically separated. The element that is required in addition to physical separation is one which is capable of being brought into existence unilaterally, in that it depends on the attitude of mind of one of the parties to the marriage, and it must involve at least a recognition that the marriage is in truth at an end.⁴² It is not necessary that the existence of the additional element be communicated to the other party before it becomes operative in law.⁴³ In essence, living apart means that the parties lived apart and at the same time one or both of the parties recognize that the marriage is at an end. Under the MCA, s. 15(e) & (f) the living apart sections are non- fault-based facts for irretrievable breakdown of marriage. No- fault is defined as termination of divorce whereby parties can do this on grounds of separation without having to cite a marital offence.⁴⁴

2.4.1 Living apart for two years with consent (*otherwise referred to as two years separation*)

Matrimonial Causes Act (MCA) states that:

The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts...

(e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted.⁴⁵

The court recognizes that this might cause hardship to a party who did not agree that the marriage is at an end and had not been told of the other party's decision about the marriage. An hypothetical example of such a case would be if the husband goes abroad on business or in search of 'greener pastures' for over two years, even though he and his wife had been on excellent terms for virtually all of that time, either might unilaterally decide that the marriage has finished just before the husband returns home and seek to rely on s.15 (2) (e) MCA as a ground for divorce. As a result, the petitioner is required to establish that the marriage was at an end when the parties commenced living apart. Divorce court does not as other courts do act on mere consent or defaults of pleading or mere admission by parties since the stability of the marriage lie and the terms on which it will be dissolved involve far wider consideration than the will or consent of the parties to the marriage.⁴⁶ Such evidence could be in form of letter or a cessation of visits to a spouse,⁴⁷ or by cohabitation with a third party. The court would look at all the circumstances, how the separation of the parties came about, what the petitioner's attitude to the marriage was at the time and when had the petitioner changed his mind about the marriage and what led to change in mind.

Consent

The petitioner is required to provide the respondent with information enabling him or her to consent to the decree and the steps he or she would take to indicate consent. The notice of proceedings and the acknowledgement of service must be sent to the respondent alongside with the petition.⁴⁸ The respondent is required to give a positive indication of consent by sending to the court a notice to the effect that he or she consents to the petition. This is normally the acknowledgement of service of the petition signed by the respondent (if unrepresented) and by both the respondent and his solicitor (if represented). The burden of showing that the respondent has consented is on the petitioner. The mere fact that a petition is not contested is not a sufficient evidence of consent to the dissolution of marriage.⁴⁹

⁴¹*Santos v Santos* [1972] 2 All ER 246.

⁴² *ibid*

⁴³*Hopes v. Hopes* (1948) 2 All ER 920

⁴⁴Fairbairn, Catherine, 'No-fault divorce' Briefing Paper Number 01409, 9 April 2019 House of Commons Library

⁴⁵ S.15(2)(e) MCA

⁴⁶*Williams v. Williams* (1966) WNLR 40

⁴⁷*Sadipe v. Sadipe*(1964) WNLR 82

⁴⁸Order VI MCR Cap220

⁴⁹*Lucy Ibeawuchi v. Aloysius Ibeawuchi* (1974) UILR 67, (1974) 3ECSLR 56.

In the absence of any specific consent from the husband, the court refused to imply his consent and the decree was refused.⁵⁰ Corroboration is highly desirable in matrimonial causes.

2.4.2 Living apart for three years (otherwise referred to as three years separation)

From most decided cases the attitude of the court is that once three years separation is proved then the decree is granted. Onalaja J. stated that: ‘...once parties have been living apart for a period beyond three years before the presentation of petition for divorce, the court is not to look into reason leading to the living apart, but must concern itself with whether or not the parties have in fact been living apart.’⁵¹ The same view was held by Ilori J.⁵² To succeed under s.15(2)(f) MCA, the petitioner must establish to the court’s satisfaction two elements; First, the fact of living apart from the time prescribed by the Act and second, total lack of *animus revertendi*. Although the ground for living apart is free from fault finding, that is the court can act on it without apportionment of fault on either side, the court must nevertheless be satisfied that at a point in time, during the living apart and for a period of at least three years thereafter, there was cessation of consortium. Where petitioner filed for divorce on facts that parties have lived apart for three years and cruelty, court held that;

‘... there was no doubt that parties have lived apart for more than three years immediately preceding the presentation of the petition as this is a ground for divorce under s.15(2)(f) MCA, the petition must succeed. As regards the incidents which led to the beating up of the petitioner by the respondent, court was of the view that they could not have been unprovoked and would not be more than wear and tear of marital life. This could not therefore be regarded as cruelty in law’.⁵³

If the petitioner had relied on separation or living apart for over three years alone as the only fact to prove irretrievable breakdown of marriage, the divorce will still succeed. Now she had to be faced with the unsympathetic comments of the judge which was opposite of what she expected.⁵⁴

The court has power in two or three years living apart cases to delay or prevent the decree absolute in certain circumstances. Once the court has granted a decree on either fact (i.e. two years with consent or three years without consent of living apart), no other fact, the respondent can apply to the court for consideration of his or her financial position after the divorce. The court must then consider all the circumstances including age, health, earning capacity, financial resources and financial obligations of each of the parties and the financial position of the respondent. The court will not make the decree absolute unless it is satisfied; that the petitioner should not be required to make any financial provision for the respondent, and that the financial provisions made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances or notwithstanding the foregoing, there are circumstances making it desirable that the court has obtained a satisfactory undertaking from the petitioner that he/she will make financial provisions for the respondent as the court may approve.⁵⁵

In sum, for the two- and three-years’ separation facts, the ‘separation’ entails both a physical separation and a ‘mental’ element – a recognition that the marriage is at an end. The mental element, does not, however, have to be communicated to the respondent. Consent remains an essential element of two-year separation fact. If the parties have lived apart for two years and the respondent consents to a decree the court is entitled to infer irretrievable breakdown. If the parties have lived apart for three years, the court may infer irretrievable breakdown, whether or not the respondent consents. The court is only concerned with the fact that parties have lived apart not with the reasons for the separation. The safeguards in the case of grave financial or other hardship and in respect of financial provision would of course apply. It would in all the circumstance be wrong to dissolve the marriage if the respondent raises the defense of grave financial hardship for example, a divorce when the parties are nearing retirement age or in their old age can leave the husband most time significantly better off than his former wife. Older spouses are able to successfully argue on grounds of grave financial hardship arising out of the divorce as defense.⁵⁶ A seriously ill child who would need a lot of money for the treatment and is in custody of respondent who is not financially very buoyant as the petitioner. Such financial hardship would be considered by the court before the divorce is granted.

⁵⁰ *Mc Gill v. Robson* (1972) 1 All ER 362

⁵¹ *Onwuzulike v. Onwuzulike* (1981) 1-3 CCHCJ 277

⁵² *Odedina v. Odedina*. (1981) 1-3 CCHCJ 377

⁵³ *Ogunsanwo v. Ogunsanwo* (1970) 2 All.NLR 214

⁵⁴ If it were a post 2014 divorce, the wife could also have also sued the husband under Violence against Persons (Prohibition) Act (VAPA) 2015

⁵⁵ *Krystman v. Krystman* (1973) 3 All ER 274, see also *Cumbers v Cumbers* (1975) 1 All ER 1

⁵⁶ *Parker v. Parker* (1972) 1 All ER 41, *Julian v. Julian* (1972) Sol Jo 763

3 Argument in support of fault divorce

Petitions based on the fault facts of adultery, behavior or desertion have consistently accounted for the majority of divorces. One core argument in favor of fault is that having to produce a fault for the divorce will act as a deterrent and hence protect marriages. Parties who have their allegations of fault heard by the court feel sense of restoring moral base to the divorce proceeding, they consider that conduct should still have a part to play in determining the consequences of that breakdown. It is also argued that the retention of fault provides a public affirmation of ‘guilt’ and ‘innocence’ within the marriage which enables the innocent party to feel vindicated in his or her decision to end it, which to the party is an important psychological point. However, one of the difficulties with the whole concept of divorce for fault is that it assumes that fault is the only possible justification for divorce. People who hold this belief, whether for religious or other reasons, may well need to feel that they are morally justified in what they have done. Unfortunately for them, most times the law cannot accurately allocate moral blameworthiness, for there are always two sides to every marital history and different people assess these in different ways. The theory underpinning the use of fault as a basis for divorce is that petitions are an accurate account of who or what was responsible for the breakdown of the marriage and indeed that is precisely what many ordinary people think the law does or should say. What the law in fact requires, as well as the practice, are different. Rather than accurate accounts of the primary reason for the breakdown of the marriage, most petitions are probably best styled as narratives produced to achieve a divorce.

There is a strong presumption that irretrievable breakdown will be established if a fault fact is made out. However, both elements – irretrievable breakdown and a Fact – need to be established. Even where it is accepted that the marriage has broken down beyond repair, a Fact still must be made out. This was reaffirmed in the recent UK divorce case where both the Court of Appeal in 2017, and the Supreme Court in 2018, dismissed petitioner’s appeal, agreeing with the husband that behavior had not been made out on the evidence. And that petitioner had failed to prove, within the meaning of section 1(2)(b) of the Matrimonial Causes Act 1973 (UK legislation), that her husband had behaved in such a way that she could not reasonably be expected to live with him.⁵⁷ Despite the fact that most divorces are fault based, the concept of matrimonial fault is still unable to act as deterrent as divorce has not decreased, therefore ascribing fault is hardly acting as a restraint. The futility of attributing blame is hence seen or recognized. It is believed that fault is to provide a moral framework for marriage and will act as a restraint on the divorcing parties. For this reason, fault divorce is an ineffective means of trying to achieve acceptable standards of marital behavior. A decision that a spouse is responsible for the failure of the marriage does not contribute positively to arriving at a settlement of the financial position where for example that ‘guilty’ spouse is to continue to take care of the couple’s children. Instead focus is shifted from giving attention to the likely needs of the parties and the children in the aftermath of the breakdown of their relationship. Fault is in most cases needlessly generating or exacerbating conflict between the parties.

4 Criticism of the fault divorce

It takes a longer time to obtain as there is much reliance on affidavit and evidences hence takes time of the court. It involves several court appearances therefore lawyer will charge more so it is quite expensive. In fault, the respondent is sometimes confronted with a heavy weight behavior petition containing an assemblage of fictions and so respondent will feel anger, with hostility and bitterness resulting from this. Allegations from faults make juicy news and headlines in the papers. It encourages petitioners to make allegations most times exaggerated against their spouses. This can result in needless conflict, unfairness and a sense of injustice which does not save marriage. The whole story may never be brought out which would at least enable the court to form a valid judgment as to who is at fault, this is particularly true especially in undefended divorce. In petition relying on fault-based facts, the petitioner is encouraged to dwell on past. Where antagonism is created or exacerbated by the petition due to allegations in fault divorce, the respective bargaining power of the parties is distorted, the atmosphere is not conducive to calm and sensible negotiation about the future needs of the children. The bitterness of most such divorce proceedings will simply be transferred to the issues of custody and financial provision and property adjustment. Petitioner might not know how much evidence would be sufficient to prove the particulars of the fact being used, he/she might feel the need to make additional or exaggerated more forceful allegations to ensure the petition was successful, and this could increase acrimony between the parties. Divorce petitions are often not accurate descriptions of why a marriage broke down and the courts make no judgement about whether allegations are true. Using fault had made the process more bitter, fault had made it harder to sort out arrangements for children, and fault made sorting out finances harder. The use of fault, mainly behaviour, had had a negative impact on contact arrangements, including fueling litigation over children. Fault does not protect marriage or deter divorce.

⁵⁷ *Owensv.Owens* [2018] UKSC 41

It encourages people to enter into a blame game and therefore increases acrimony within the family.⁵⁸ Blaming one person for the breakdown of the marriage and listing their failures is likely to cause difficulties in what may well already be a fairly fraught relationship where any trust may be quite fragile, if it exists at all. What fault does is fanning the flames and does increase conflict. Being on the receiving end of, especially behaviour particulars, could be a deeply uncomfortable and upsetting experience for respondents. For some, it also felt a deeply unfair process, where the petitioner was given free rein to say what they wished about the respondent and the court would take that at face value. Respondents on the receiving end of fault-based petitions inevitably feel cast as the 'guilty' party. It falls short of fairness and justice. Fault can be seen as needlessly generating or exacerbating conflict between the parties. There is the driving desire in fault divorce to see that the guilty party is punished especially if the other party is the victim to justify his/her position. In most cases this affects planning the children's future.

5 Advantages of no - fault divorce

It saves the time of litigation in terms of affidavit and evidences thus saves time of courts. There is reduction in the number of court appearances. Cost of getting divorce is reduced in terms of charges by lawyers and the filing costs are reduced. In other words, it keeps to the minimum the cost to the parties. It is faster, no- fault divorce makes divorce not only easier but also faster. It minimizes the bitterness and hostility between the parties and reduces the trauma for the children. It is undesirable to hold two people prisoners in forced situation, where a petitioner lacks the appropriate fault based grounds to obtain a divorce, he or she would not be able to get divorce, as a result of this, two undesirable people are held prisoners in forced unions, and this is not good for the husband, wife and the children. A marriage which has broken down should be ended with minimum distress and conflict to the parties and the affected children. It removes any lingering pretense of examining the details of marital breakdown. The true fact is that having no- fault divorce is to make the society to recognize that it is in everyone's interest to dispose of the empty shell, with the affected parties acting rationally, and recognizing the necessity of calm reflective deliberation.⁵⁹ The reality is that marital breakdown is a fact of life to be dealt with rather than something to be corrected or discouraged. After divorce, parties can deal with each other fairly and with consideration. Most do so and many others with encouragement. Allegations by one party against the other will lead to feelings of bitterness and resentment in the other party which in turn could result in damage to the children. Instead of having to say who is at fault why not give a decent burial with the minimum of embarrassment, humiliation and bitterness to the marriage that is indubitably dead.⁶⁰ Serious problems with the divorce law, including the lack of honesty of the system with the parties exaggerating behaviour allegations to get a quick divorce, while the court could do little more than 'pretend' to inquire into allegations. There is no proof and no evidence that fault prevents or slows down the decision to divorce. In several cases, the assertion of fault is a charade.

6 Criticism of no - fault divorce

Without doubt there are criticism of no-fault divorce. It is argued that no- fault will trivialize marriage and will cause divorce on demand. Making divorce and quicker will inevitably change the nature of commitment that is made when marrying, because those doing so will recognize that it is something that can be exited easily and quickly without having to prove that the relationship has broken down. No-fault will increase number of divorce cases and so will cause an upsurge in divorcing rate. There is also the argument that no- fault does nothing to save marriage. It is open to abuse, which may lead to bitterness especially on the part of the vulnerable party. For example, the husband can move out to live with another person and after three years file petition for divorce on no fault based to regularize his relationship. This was the view of Dame Elaine Kellet- Bowman, when she said;

'...I often found that a middle-aged lady would come to our chambers, who had loyally supported her husband for many years by helping him to get on in his industrial life and by bringing up their children. In fact, she had done everything she could. Her one crime was that she had become middle-aged, fat and possibly a little dull. Her husband therefore wanted a shiny new model. In what way has such a woman committed a fault? As my honorable friend said, she would feel bitter if she were just discarded like an old glove with no good reason being given...'⁶¹

From moral and/or religious standpoint no- fault divorce is criticized as too accessible and that it devalues marriage vows. There is the fear that no fault would reduce the status of marriage to that of a tenancy contract which can be dissolved at minimal notice by either side thereby undermines both marriage contract and marriage itself. Also, an unwilling and blameless spouse can be unilaterally divorced and a court's discretion in respect of this is limited.

⁵⁸ *Owens v Owens* supra, note 9.

⁵⁹ Nwogugu, E. I. (2014) *Family Law in Nigeria*. 3rded, Ibadan, HEBN Publishers Nigeria.

⁶⁰ *ibid*

⁶¹ HC2R 24 April 1996, Col 449 House of Commons Hansard Debates for 24 Apr 1996 (pt 26).

And a wife unwillingly divorced will suffer loneliness and reduced standard of living. Non-fault amounts to divorce by unilateral demand and does not supply an opportunity for one spouse to contest the other's allegation that the marriage has broken down. It punishes the spouse who is faithful to their marriage vows who now experience without any defense in the court, the termination of their marriage. On the other hand, certain arguments tend to show that it is a mistake to think that only no-fault does nothing to save marriage, because fault too does nothing to save the marriage. The law cannot prevent people from separating or forming new relationships, although it may make it difficult for people to get a divorce. A spouse who wishes to be divorced is obliged either to make allegations against the other or to live apart for a lengthy period. According to Martin Richards,

'Those who argue for harder divorce seem to have an exaggerated view of the power of the law to control people's domestic living arrangements...Such a view suggests that it is only the difficulty of getting out that keeps people married.'⁶²

If 'easy' results in short or painless divorce, is it not better, while 'hard' may end long or painful. The emotional pain which many people feel at the breakdown of their marriages is not necessarily linked in any way to the ease or difficulty of the divorce process. A nasty divorce keeps parties reliving with resentment.

7 Why fault should be removed from the MCA

The reality is that marital breakdown is a fact of life to be dealt with rather than something to be corrected or discouraged. After divorce, when there are no bitterness parties can deal with each other fairly and with consideration. The fact is that having no-fault divorce is to make the society to recognize that it is in everyone's interest to dispose of the empty shell, with the affected parties acting rationally, and recognizing the necessity of calm reflective deliberation. Most do so and many others with encouragement. It is hoped that elimination of fault will enable the parties to dissolve the marriage with minimum distress in a manner designed to promote as good a continuity relationship as possible in the circumstances. Allegations by one party against the other will lead to feelings of bitterness and resentment in the other party which in turn could result in damage to the children. Divorce should be based on fairness and justice. It is unfair for respondent to be on the receiving end of allegations that were not properly tested and where they were extremely difficult to defend. Marriage which will become terminable, why not part amicably. There are cases where parties can achieve perfectly reasonable agreement. This should be the basis on which divorce is granted. The current MCA works against these principles. It incentivizes an adversarial process which can undermine efforts to reconcile and which can fuel conflict when deciding for dividing assets or for the future care of children. The legal process should be one which promotes amicable agreement, which is fair, transparent and easier to navigate. The goal should be to minimize the opportunity for conflict rather than exacerbating it. The use of fault may trigger, or exacerbate, parental conflict, which has a negative impact on children. The ideal marriage law is the no-fault divorce because it looks forward through its administration to the reality of marriage breakdown. It is about saying let's find out marriages that are save able. Even though most divorces are fault-based, the concept of matrimonial fault is still unable to provide either a moral framework for marriage to act as a restraint on the behavior of spouses. Removing blame from divorce will not make it more likely that parties will separate more. It will simply make it easier for people to manage their separation with as little conflict and stress as possible.

8 Conclusion and suggestion for reform

On balance, having examined arguments for and against fault, whether in favor of no-fault or retention of fault, it is unanimous that generally, the society is strongly in favor of marriage and opposed to anything that would undermine marriage as an institution. In the words of Justice Secretary Robert Buckland;

'No one sets out thinking that their marriage is going to end, no one wants their marriage to breakdown, none of us therefore is indifferent when a couple's lifelong commitment has suddenly deteriorated. It is very sad, but the law, is expected to reduce the conflict when it arises by making the divorce process less painful.'⁶³

Marriage involves mutual legal obligations of support and sharing which other relationships do not. The law should certainly do its utmost to recognize and enforce these. It must also be realistic and practical. If people who are unhappily married are denied a means of reordering their lives in a sensible fashion, many of them will simply walk away. Others may be deterred from marrying in the first place but will live together instead.

⁶²Martin Richards, 'Private Worlds and Public Intentions – the Role of the State at Divorce' in Andrew Bainham and David Pearl (eds), *Frontiers of Family Law* (Chancery Law Publishing 1993) 15.

⁶³Justice Secretary and Lord Chancellor Robert Buckland QC during the opening of debate in the parliament on June 17 2020, for the Divorce, Dissolution and Separation Bill, accessed from www.paradigmfamily.co.uk on 13/03/2021.

Support for the institution of marriage cannot be achieved by turning it into an institution which no-one any longer wishes to enter. But the recognition that a marriage has broken down does not mean that the obligations resulting from it should be ignored. The reality is that marital breakdown is a fact of life to be dealt with rather than something to be corrected or discouraged. Conflict will occur on separation whether the divorce law includes fault or not. Divorce couples do not have to be friends in order to preserve a relationship based on fairness and dignity. There is the social myth that divorce either ends relationships or leads to unending war of attrition. This is not to say that fault should be completely removed from the system. It may still play a part if it is relevant to a particular issue to be decided between the parties. The arrangements made for the children will be affected if one of the parties has behaved in a way which reflects adversely upon his or her capabilities as a parent. The adjustment of the parties' property and finances generally depends upon their respective needs and resources, the needs of their children, and the fair sharing of the assets accumulated between them. But if one has behaved so much more badly than the other that it would be inequitable to ignore this, it will be considered. As legal marriage was created by the mutual consent of the spouses in the absence of marriage impediments, so also, divorce upon mutual consent is possible. Removing the needs to blame the other spouse for the breakdown of the marriage will hopefully result in a more dignified process for all concerned and enable divorcing spouses to focus on the real issues between them. It makes the divorce process kinder. The institution of marriage will always be vitally important, but we must never allow a situation where our laws exacerbate conflict and harm a child's upbringing.⁶⁴ The goal is to minimize the opportunity for conflict rather than exacerbating it. It enables parties to navigate through the divorce process towards a fair outcome as quickly as possible. It is hoped that elimination of fault will enable the parties to dissolve the marriage with minimum distress in a manner designed to promote as good a continuity relationship as possible in the circumstances. What is needed is a legal process which promotes amicable agreement, which is fair, transparent and easier to navigate. Where, despite reflection, divorce cannot be avoided the law should do all it can to reduce conflict and encourage good relations as couples move on to reach agreement about practical arrangements for the future.

It is hereby concluded that it is time for the law to be reformed to address the mismatch between law and practice. The current divorce law in Nigeria is now fifty years old. It has not kept pace with the significant changes in family life or family law that have occurred since the 1970s. In the UK (where our matrimonial laws originated from), no-fault divorce bill have been backed by MPs. It has passed its first hurdle in the commons by 231 vote to 16 against follow a debate.⁶⁵ From autumn 2021 divorce will be non-fault based in England and Wales.⁶⁶ The present MCA has enhanced the potentially damaging impact of allegations and the unfairness to the respondent where allegations are taken at face value. Wherever possible divorce needs to be amicable and there is need to remove blame as necessity. It is now time for reform and bring divorce law into the 21st century.

8.1 Recommendation

On adoption of non-fault divorce as the only facts for irretrievable breakdown of marriage, there should be a provision in the Matrimonial Act, which is intended to afford some protection to a respondent who is divorced against his or her will without any allegation of fault, this would serve as a check on abuse of law. The section will involve a 2 stage test first, grave-hardship- not only must grave hardship be made out but also it must be shown that in all circumstances it would be wrong to grant the divorce, and second, that it would be wrong in all circumstances (including the conduct of the parties and the interests of any child of the family) for the marriage to be dissolved. It is suggested that such provision be introduced when no-fault forms the basis or fact for dissolution of a marriage which has broken down irretrievably. The safeguards in the case of grave financial or other hardships would of course apply. The law should allow people to move on constructively when divorce is inevitable, as this would benefit children. It is hoped that if divorcelaw is amended to remove faults, this will mean that couple no longer have to blame each other for the breakdown of a marriage which will remove unnecessary conflict during the divorce process and allow families to move on with their lives and preventing needless antagonism.

8.2 Concluding Remark

Marriages should be saved wherever possible wherever possible. The institution of marriage must be supported, and couples are to be encouraged. If a marriage is to be ended, this should be done with minimum distress to the parties and to the children, in a way designed to promote as good continuing relationship between all those affected.

⁶⁴ibid

⁶⁵ BBC News 18/06/2020.

⁶⁶www.lawgazette.co.uk retrieved 13/03/2021.

It should be noted that while divorce brings closure to the status of marriage, the support functions of marriage may continue after divorce. It is hoped that this could be achieved when parties quit reliance on faults which will only escalate conflict.

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