The Dissolution of Statutory Marriage in Nigeria: The Need for Reform

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ABSTRACT

In Nigeria, the Matrimonial Causes Act makes extant provisions for the dissolution of a statutory marriage. This legislation was enacted in 1970 and has not been made subject to any amendments from then until now. This work seeks to identify the issues with the provisions of the Act in light of the recent social, cultural and economic developments. This work, like Aguda, studies the Act from a socio-legal perspective, taking into cognizance, the social and cultural positions of Nigeria on pious issues like marriage and divorce. In doing so, the work would include recommendations for the amendment of the Act, as it has become ultimately necessary to do so, in the interest of the sanctity awarded to the idea of marriage in Nigeria.

Keywords: *Dissolution, Statutory Marriage, Reform, Criticisms, jurisdiction.*

Â Introduction

The importance of family in every society cannot be overemphasized. Section 17(2) (h) of the Constitution of the Federal Republic of Nigeria, 1999(as amended), (herein referred to as CFRN, 1999) provides that â€œthe evolution and promotion of family life is encouraged.â€[1] In Nigeria, the concept of family is closely linked with that of marriage. The family is the building block of societies, thus, marriage is an important element of the family and it remains a necessity for societal existence.[2] Section 18 of the African Charter on Human and Peopleâ€™s Rights **(Ratification and Enforcement) Act**[3] guarantees the right to family life and this right is achieved principally by the institution of marriage and the sanctity thereof. The institution of marriage and the sanctity attributed to it, cuts across all religious, cultural and ethnic beliefs in Nigeria. Evidence of this can be seen in the recognition placed on the institution by both Christian[4] and Islamic beliefs.[5]

Nwogogu defines marriage as a universal institution which is recognized and respected all over the world as a social institution.[6] The most common definition of marriage can be found in *Hyde v Hyde****[7]*** where Lord Penzance defined marriage as the â€˜voluntary union for life of one man and one woman, to the exclusion of all othersâ€™.Â The Blackâ€™s Law Dictionary[8] defines â€˜marriageâ€™ as the â€˜legal union of one man and one woman as husband and wifeâ€™. These definitions are based on the traditional conception of marriage as a union of a man and a woman, and as such, to prove the existence of a valid marriage, it must be proved that both parties are of the opposite sex. This seems like a straightforward question; however, it has been made complicated by the existence of hermaphrodites and pseudo hermaphrodites and the advances in medical science which have made sex-change operations, possible.[9]

The sanctity of marriage in Nigeria cannot be overemphasized. Proof of this can be seen in the extreme cultural convictions and religious persuasions of the Nigerian people. These convictions are further applied into the notion of marriage, thus strengthening the fact that a marriage is intended to be for life.[10] Unfortunately, this area of the law which seems to touch our lives closely generates little to no interest in Nigeria both for the public and the government alike, as politics and business seems to constitute their major concerns and consuming passions.[11] The family, being the smallest unit of the larger society is often prone to attacks of dissolution and all other kinds of conflicts. The rate of divorce in the world is increasing alarmingly, and Nigeria is no exception to this. In spite of the cultural convictions, the social conspiracies we see from developed countries have to a large extent, influenced the notion of marriage to the average Nigerian.[12]

Criticisms of the Matrimonial Causes Act

Reconciliation

The Matrimonial Causes Act encourages the parties to embrace reconciliation when filing for dissolution especially on the ground of adultery, living apart and desertion.[13] Aguda delivered a speech centered on the Matrimonial Causes Decree and this researcher has identified it as the best attempt at addressing the issues in the Act, in spite of the fact that this speech was made over four decades ago. In this speech, Aguda gave a very detailed background of the law and practice in matrimonial causes before the MCA, before going further to address the intricacies of the Act itself.[14]On the provisions with respect to reconciliation under the Act, Aguda had stated:

> â€œSection 11 to 14 makes elaborate provisions relating to reconciliation of parties to a suit relating to matrimonial cause. In my view, the whole procedure laid down is nothing more than mere paper-work with no practical utilityâ€¦ this section stipulates that where the Judge thinks that there is a reasonable possibility of such a reconciliation, he may adjourn the proceedings to afford the parties an opportunity for reconciliationâ€¦ Honestly, I cannot see the practical reasonableness of this elaborate procedure, but I suppose it satisfies the emotions and sentiments of some peopleâ€.[15]

The truth in this statement by Aguda cannot be denied. It is clear from the wordings of the Act, the provisions for reconciliation do not seem to completely encourage reconciliation of the parties. The Act requires the court to, when hearing the petition, request the parties to consider reconciliation when it seems a reasonable possibility. However, the law should be more concerned with effecting reconciliation before the parties begin court processes. The provisions of the MCA 1970 frustrate the idea of a lifelong union which is assured by virtue of the sanctity of the institution of marriage. The law does not enforce the need for reconciliation. At the end of the day, parties claim to have attempted reconciliation, when indeed they have not.

Adekile had criticized the statutory provisions for reconciliation under the Act by stating thus:

> â€¦ It appears that reconciliation under the Act is to be considered only when there is a matrimonial cause before the court. There is no possibility or provision for reconciliation outside these grounds â€¦ The problem with this process as it is currently is that at the time the reconciliatory process is initiated parties would have adopted entrenched positions by the time they result to the court for a matrimonial relief and any attempt at reconciliation at this point is likely to be an exercise in futility. The law should be reviewed to make room for reconciliation process to be initiated outside the process of a matrimonial cause. In the absence of this it may amount to nothing more than a cosmetic exercise.[16]

The effect that the publicity of the court system has on the relationship between parties is another issue to be considered in light of the provisions on reconciliation. The court may refuse to dissolve a marriage after the contentious proceedings have been completed. However, at that point, the parties may have established a certain level of animosity that may have been absent at the start of the proceedings, and adding the fact that, all their dirty laundry has been aired to the public, it sours the relationship of the disputing parties.[17]

Confidentiality

The importance of confidentiality in matrimonial proceedings cannot be denied. For the purpose of protecting the sanctity of marriage, the interest of the parties and the children of the marriage, there is need for provisions that facilitate the secrecy of the institution. In his bid to understand the nature of matrimonial cruelty under the previous Act as opposed the current one, Ijalaye suggests that there is a need for some level of confidentiality to the matters of the family. [18] Thus, in event that a marriage is not dissolved, one cannot say that â€˜the dirty laundry of the family has been exposed to the publicâ€™. This is another vital issue with the current MCA. The Act fails to take cognizance of the need for the law to protect the interests of the parties and the sanctity of the union, in event that the marriage is not dissolved. There is no doubt, a need for the matrimonial laws of Nigeria to take into consideration, the sanctity of marriage as preserved by the religious, cultural and ethnic institutions in Nigeria, irrespective of the other ideals which the system may be exposed to. This opinion seems to be in line with the opinion of Aguda, as discussed above, as both writers encourage the legislative arm to come up with laws which satisfy the social, cultural and religious ideals that may exist in the society.

Ogundiji, in her work noted the effect of litigation on the parties. She had identified a major issue with respect to the confidentiality of the matrimonial causes proceedings.[19] This issue lies in the fact that, the provisions for litigation under the MCA takes no cognizance of the emotional effect that the process would have on the parties and the children of the marriage.[20] Apart from the parties to the dispute, there are other persons whose interests need to be protected by the legislation, like the children of the marriage.

Ease of the Procedure

Aguda had noted on this issue as follows:

> â€¦One had hoped that procedure in matrimonial causes would be made less complicated but here again, this hope has been in vain â€¦ the main achievement of this Decree is that it removes the necessity of proving one of the matrimonial offences before there can be a divorce. But even in that respect it is my view that a new approach, a new perspective, a new and radical thinking is called for. As long as divorce is to be based on proof of fault in the respondent, the parties to a divorce suit would appear like gladiators in a very veracious battle for reputation. In the process, they become impoverished through payment of high lawyersâ€™ fees and also embittered one against the otherâ€¦[21]

It seems that Aguda, in this speech, looks at the MCA from a socio-legal perspective, as he tries to align the law with the position and perspectives of the society. Aguda considers the effect of extended family in marriage life, where he recognizes that before a person can decide to go through the whole process of litigation for his matrimonial disputes, there must have been a number of attempts at reconciliation by the family members, the church and then every possibility of settlement seems to fail.[22] Aguda had stated also that:

> â€œIn my view the present Decree is an intermediate stage between the 1857 position and what I consider the ideal position â€“ that divorce should be available as of right to whichever spouse asks for itâ€¦ I take the view that the only questions for decision by the court should be those relating to ancillary reliefsâ€¦ After all when a party to a marriage is so fed up with it that he or she petitions for a divorce, the state has no moral justification to continue to force the legal continuation of such marriage on the unwilling partyâ€.[23]

Based on the cultural and religious notion in Nigeria, it goes without saying that, for a party to willingly seek to go through the tedious process of litigation, then such a party must really be fed up. For the court then, to force such a person to return to such a marriage, in spite of the animosity that may have been created, is not completely reasonable. The objectives of a divorce law have been admirably laid down by the Law Commission where they said:

> â€œIt seems to us that a good divorce law should seek to achieve the following objectives: (i) to buttress, rather than undermine, the stability of marriage, and (ii) when, regrettably, a marriage has irretrievably broken down, to enable the shell to be destroyed with maximum fairness and minimum bitterness, distress and humiliation.[24]

In interpreting this provision, Nwogogu[25] had stated that the first objective of a good divorce law aims at ensuring a divorce law is not so easy as to dissuade the parties from making efforts to overcome their matrimonial difficulties. With regard to the second objective, he quoted paragraph 17 of the Law Commission Report[26] to the effect that, the object of the law is to ensure that, if the marriage is dead, then it should be given a decent burial in a way that is just to all the persons that are concerned, including the children and the spouses, which causes them the minimum of embarrassment and humiliation.[27] A good divorce law is seen as one which is able to provide a way out of a dead relationship, and to enable parties to enter into a new relationship if they so desire.[28] Ilegbune has advised that Nigeria brings its matrimonial laws closer in conformity with the objectives as meted out by the English Law Commission.[29]

Jurisdiction

Although matrimonial causes are regulated under the exclusive legislative list, jurisdiction is given to the high courts of the states and the Federal Capital Territory.[30] It has become trite law that the basis for the conferment of jurisdiction on any stateâ€™s high court is the domicile of the petitioner.[31] In this regard, Section 2(2) of the MCA provides that only a person domiciled in Nigeria can institute a matrimonial cause.[32] Ilegbune has noted the â€˜jurisdictional monopolyâ€™ of the High Court over divorce proceedings; he also noted the â€˜elaborateâ€™ provisions of the Act on reconciliation and found an issue in the fact that the Judge is responsible for effecting reconciliation, anytime during the proceedings.[33] The High Court of the State has unlimited jurisdiction, thus, they are very prone to numerous cases.

Due to the backlog of cases, family matters that are to be resolved in a timely manner end up in courts for much longer than necessary, especially when the matter is contentious. The fact that

the court system is overwhelmed with cases has contributed immensely to the delay of matrimonial proceedings in courts. It has been observed that a divorce under customary law may be as quick as three months, while a divorce in the High Court may take as long as two years to be concluded, especially when it is a contentious divorce.[34] This is detrimental to the prospect of reconciliation between the parties, during the hearing of the petition or after the petition has been heard.

In Nigeria, like other developed countries, parties should be able to dissolve their marriage without have any level of animosity between them.

Maintenance

The Matrimonial Causes Act provides for maintenance of the parties and children of the marriage. The Act gives the Courts a wide discretionary power with respect to ancillary matters in matrimonial causes proceedings.[35] Despite what appears to be the obvious placing of the husband and wife on the same pedestal in terms of the right to ask for maintenance it appears that the practice of the Common Law continue to influence proceeding today as no man has boldly taken advantage of the Act to ask for maintenance from the wife. This is coupled with the patriarchal society which Nigeria clearly is. A major question which has always generated an issue and which the Act fails to resolve is whether an action for maintenance may be brought independently of any matrimonial causes.

On this issue, two schools of thought have arisen. While the first school believes that an action for maintenance may be instituted independent of any pending matrimonial causes, the other school believes that there must be a pending matrimonial causes proceeding. These schools have been given backing by different judicial decisions as follows. In the case of *Esua v Vesua,**[36]*** the Court held the view that the right to an order of maintenance can only exist if there is a suit for any of the Matrimonial Causes like dissolution of marriage, jactitation of marriage judicial separation, nullity of marriage, restitution of conjugal rights.[37] In *Nakanda v. Nakanda*[38] on the other hand, the Court of Appeal held that a spouse can bring an independent action without seeking any principal relief like divorce, nullity of marriage. According to the Court, it is possible to maintain an action for maintenance under Section 70(1) as an independent proceeding unrelated to any pending proceeding relating to Matrimonial Causes under the principal decree. In other words, any party to a marriage can ask for the maintenance under Section 70(1) if he wishes to. This is an issue that will continue to generate controversy until the legislation clearly spells out the appropriate terms.

Conclusion and Recommendations

This paper has given a background on the concept of marriage and the sanctity awarded to marriage, more than those developed nations, due to the cultural and religious convictions of the Nigerian people. The writer has further identified issues in the Matrimonial Causes Act. In line with the report of the Law Reform Commission, can it be said with certainty that the divorce law in Nigeria is a good one? On one hand, the current Act is a major step up from the previous Act which is highly commendable. However, in terms of making laws based on the ideals of Nigeria in all its multi-ethnic glory, Nigeria has a long way to go.

For the Matrimonial Causes Act to be regarded as being a good divorce law, there is need for a re-organization of the law. On the issue of confidentiality, it is suggested that the Act establishes a Family Court to strictly handle matters with respect to matrimonial causes. This will definitely prevent the issue of backlog of cases from affecting matrimonial causes matters which are very sensitive, not only to the parties but also to the children of the marriage. It would also go a long way in enforcing a certain level of confidentiality in family matters.

It is also recommended that the Matrimonial Causes Act makes clear provisions as to the institution of proceedings for maintenance, to avoid disparity in the decisions of the courts and practice procedures. Finally, it is important that the Act makes more certain provisions as to reconciliation. The provisions in the Act currently, seem half-hearted. The Act can make provisions for the inclusion of alternative dispute resolution mechanisms before filing any petition. This will definitely increase the chances of reconciliation because of the amicable nature of the proceedings; and it may reduce the number of cases that go through to court for hearing. At this point, parties are still on the same side, that is, trying to save their marriage, thus, if the parties still seek to go to court after this, then the courts should not force these parties to stay together when clearly, they do not want to.

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References

[1] CFRN 1999 (as amended) Cap C23 LFN, 2004; See also E.I. Nwogogu, E.I., â€˜What Next in Nigerian Family Law?â€™ (Nigerian Institute of Advanced Legal Studies 2006) Series No 7 *NIALS Foundersâ€™ Day Lecture, 2006,* 1.

[2] Y. Olomojobi â€˜Marriage in Nigeria across Ages: Problems and Prospectsâ€™ (2016) SSRN <http://dx.doi.org/10.2139/ssrn.2858618> accessed 11 November 2019.

[3] Cap A9, LFN 2004.

[4] The Holy Bible, King James Version (KJV), Genesis 2: 24.

[5] The Holy Quâ€™ran, Chapter 4 v 5.

[6] E.I. Nwogogu, â€˜*Family Law in Nigeria*â€™ Revised Edition (Heinemann Educational Books 1990) 1xxviii.

[7] [L.R.] 1 P & D 130.

[8] 6thedn, 972.

[9]E.I. Nwogogu, (n 8) 1xxix; See Omrod J. in *Corbett v Corbett* (1971) P 83.

[10] A.O. Ogundayisi, â€˜Settlement of Matrimonial Causes through ADR Mechanisms: The Best Alternative to Litigationâ€™ Academia.edu <https://www.academia.edu/250922688> accessed 20 January 2020, p 4.

[11] E.I. Nwogogu (n 3) 1.

[12] A.O. Ogundayisi (n10) 1.

[13] I.Sagay, *Nigeria Family Law: Principles, Cases, Statutes and Commentaries* (Malthouse Press Ltd 1999) 138.

[14] A. Aguda, â€˜An Examination of the Matrimonial Causes Decree, 1970â€™(Being the full text of a Public Lecture delivered at the University of Lagos on June 5, 1970), *Select Law Lectures and Papers by Justice Akinola Aguda* (Associated Publishers Nigeria Limited 1971)Â 89-125.

[15]*Ibid,* 101-102.

[16] O. Adekile, â€˜Legal Framework for Settling Matrimonial Disputes through Reconciliation in Nigeriaâ€™ *SSRN* <http://ssrn.com/abstract=1503384> accessed 29 January 2020.

[17] C.B. Duruibe, â€˜The Possibility of Alternative Dispute Resolution Mechanism in Matrimonial Causes in Nigeriaâ€™ Academia.edu<https://www.academia.edu/25092268> accessed 20 January, 2020.

[18] D.A. Ijalaye, â€˜English Matrimonial Cruelty Law in Nigeria: Dead or Alive?â€™ <https://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjXwJX57PrlAhXyuXEKHan3CGIQFjAAegQIAxAC&url=http%3A%2F%2Fdigitalcommons.law.uga.edu%2Fcgi%2Fvi _Ba5Yw> accessed 13 November 2019.

[19] T.V. Ogundiji, *An Appraisal of the Application of Alternative Dispute Resolution Methods to Marriage Disputes* (Being a Long Essay submitted to the Faculty if Law at University of Ilorin, April 2011).

[20]*Ibid.*

[21]O. Adekile, â€˜Legal Framework for Settling Matrimonial Disputes through Reconciliation in Nigeriaâ€™ *SSRN* <http://ssrn.com/abstract=1503384> accessed 29 January 2020.

[22]*Ibid,* 124.

[23]*Ibid.*

[24] The Law Commission, *Reform of the Grounds of Divorce: The Field of Choice*, CMND. 3123 (1966) para 15.

[25] E.I. Nwogogu (n 6) 174.

[26]*Supra.*

[27] Law Commission Report, para 17; See *Ajiboye v Ajiboye* [2005] 2 SMC 1.

[28] S.O. Okuefuna, â€˜Grounds for Divorceâ€™<https://www.academia.edu/25092268> accessed 13 November 2019.

[29]*Ibid,* 197.

[30] E. Etomi and E. Asia, â€˜Family Law in Nigeria: Overviewâ€™*, Thomson Reuters Practical Law*<https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 27 January 2020.

[31] I.O. Omoruyi, â€˜Domicile as a Determinant of Personal Law: A Case for the Abandonment of the Revival Doctrine in Nigeriaâ€™, *Nigerian Law Guru* <http://www.nigerianlawguru.com/articles/family%20law/DOMICILE%20AS%20A%20DETERMINANT%20OF%20PERSONAL%20LAW,A%20CASE%20FOR%20THE%20ABANDONMENT%20OF% accessed 27 January 2020.

[32] E.I. Nwogogu (n 1) 129.

[33]*Ibid,* 193.

[34] Family Law Team at Resolution Law firm, â€˜Divorce in Nigeria: Cost of Getting a Divorce in Nigeriaâ€™ (2018) Resolution Law Firm <resolutionlawng.com/brief-summary-of-the-process-and-cost-of-getting-divorced-in-Nigeria> accessed 18 November 2019.

[35] MCA 1970, S. 70 grants the court the power to make an order for the maintenance of the spouse and children of the marriage.

[36](High Court of Lagos State, Lagos Judicial Division) 4 December 1970.

[37]See *Adekoya v. Adekoya* (High Court of Lagos, Lagos Judicial Division) 16 February 1973.

[38](Court of Appeal) 17June 1988.