REFORMING THE IRRETRIEVABLE BREAKDOWN RULE – HISTORICAL PERSPECTIVES FROM COMMON LAW JURISDICTIONS AND LESSONS FOR NIGERIA*/**

Abstract

There are present efforts by a National Committee set up by the Ministry of the Interior to review the content of the Country's Matrimonial Laws namely: the Marriage Act 1914 (MA) and the Matrimonial Causes Act 1970 (MCA). One aspect of Nigeria's matrimonial regime in need of reform is the basis of obtaining divorce. Irretrievable breakdown (IB) is the law. However, the enactment of this rule under the MCA did not capture its normative essence and this has negatively impacted on the process of divorce in Nigeria. On the other hand, some common law jurisdictions have over time progressively sought to understand the no-fault divorce theory behind IB and have consistently adjusted their laws to align with this understanding. This article captures the highlights of these developments in these jurisdictions and argues that it is important that in adjusting the content of the rule the Nigeria's reform committee must pay attention to the understandings gained over time in these jurisdictions. Two important lessons are highlighted. Firstly, IB therapeutic and cannot be mixed with fault. Secondly, fault divorce has practical negative repercussions on individual family members.

1. Introduction

Divorce has a tangled history in common law jurisdictions.[1] The history of divorce law in Nigeria has its roots in English law on divorce and developments in other common law jurisdictions such as Australia, New Zealand and the United States. In England, divorce law began with the principle of fault as its sole basis. Presently, most common law nations have some form of no-fault divorce jurisprudence – commonly the irretrievable breakdown or irreconcilable differences rule. Before 1857 when secular divorce was introduced in the English legal system, Canon law exclusively applied in matters of divorce, administered by ecclesiastical courts. Then, marriage was considered an indissoluble union. Divorce was prohibited. The courts however did allow divorce *a mensa et thoro* (from bed and board); significantly, a legal separation, during which the husband's obligation to maintain his wife continued. In other words, before 1857, state regulation of divorce was non-existent. This paper considers the developments in these jurisdictions from this period beginning with England. It shows that divorce has undergone tremendous change in relation to both basis and procedure. These have been founded on concrete normative and pragmatic insights. Some effort is underway by the Ministry of the Interior[2] to review the content of the Country's Matrimonial Laws namely: the Marriage Act 1914[3] (MA)

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[1] L M Friedman, 'A Dead Language: Divorce Law and Practice before No-Fault' *Virginia Law Review* 86, no. 7 (2000) pp.1497-1501.

[2] This is the Government in charge of statutory marriage and divorce (i.e., other than those celebrated under customary law or Islamic law.

[3] Cap M6 Laws of the Federation of Nigeria 2011.

and the Matrimonial Causes Act 1970[4] (MCA). One aspect of Nigeria's matrimonial regime in need of reform is the basis of obtaining divorce. Irretrievable breakdown (IB) is the law.

However, the enactment of this rule under the MCA did not capture its normative essence and this has negatively impacted on the process of divorce in Nigeria.[5] On the other hand, the common law jurisdictions discussed below have over time progressively sought to understand the no-fault divorce theory behind IB and have consistently adjusted their laws to align with this understanding. This article captures the highlights of these developments in these jurisdictions and argues that it is important that in adjusting content of the rule the reform committee must pay attention to the understandings gained over time in other jurisdictions. Two important lessons are highlighted. Firstly, IB therapeutic and cannot be mixed with fault. Secondly, fault divorce has practical negative repercussions on individual family members.

2. England

The first legal instrument regulating divorce was the English Divorce and Matrimonial Causes Act 1857. The Act was introduced as a law to be administered by a Court of Divorce and Matrimonial Causes. It made divorce available to a husband (an innocent spouse) on the ground of a single act of adultery committed by his wife (a guilty spouse), and to a wife on the ground of her husband's "aggravated adultery"[6]. The fault theory held sway at this time, and divorce was conceived of as a remedy granted at the suit of one party to a marriage, whose legal rights had been infringed by the other. That other party's guilt in this case, was a breach of the fundamental obligation to which the marriage relationship gave rise. The process was delictual procedure, transacted in an accusatorial setting.[7] An allegation was made and had to be substantiated by appropriate evidence.

The doctrine of recrimination, or *compensatio criminis* which was applied under the system meant the denial of a decree of divorce for adultery to a party who had also committed adultery. It was described as a set-off of equal guilt, or mutual compensation.[8] This fault-based system of divorce survived for a long time and only ceased with the introduction of the Divorce Reform Act 1969 (DRA) in England. This same system was introduced into and followed strictly in Nigeria until 1970 when the Matrimonial Causes Act 1970 was promulgated on the heels of the

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4 Cap M7 Laws of the Federation of Nigeria 2011.

5 See M Attah 'Prescriptive and Evidential Challenges in Nigeria's Fault Divorce Regime' *The Nigerian Law Journal* 20, no. 2 (2017) pp. 512-536; M Attah & C Dim ;'No-Fault Divorce and the Right to Divorce in Nigeria: Are the Rules of Procedure not a Significant Interference' *Benue State University Law Journal* 7, no 1 (2016) 182-206; M Attah & L Osagie 'The Rugged Road to Divorce in Nigeria: Evaluating the Impact of Cross-Petitions' *University of Benin Law Journal* 19, no. 2(2019) pp.218-248.

6 This meant adultery in aggravated circumstances such as incest, bigamy, rape, cruelty or desertion. Finlay explains that the reasons for this discrimination were both economic and biological and rooted in inequality of spouses. A single act of adultery by a wife could result in the introduction of 'spurious offspring' into the husband's family so that titles, lands and wealth which might have been in his family for generations became suddenly exposed to depredation by alien stock. A husband's amorous peccadilloes on the other hand, no matter how often repeated would not have such consequences. See H.A Finlay 'Divorce Law Reform: the Australian Approach', *Journal of Family Law* 10, (1970-1971): pp.1and 3.

7 *Ibid*

8 H.A Finlay, 'Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce,' *The Law Quarterly Review* 94, (1978): 120, 122-124

new developments in England. Even so, vestiges of the old system are still evident in the discretionary bars provided for under the MCA.[9]

During the first half of the 20th Century the outlook on divorce underwent an important change in England. Divorce came to be seen as a misfortune rather than a manifestation of fault that called for retribution. The notion of the destruction of a marriage by one of the parties gave way to the more complex view of a breakdown of the marital relationship. Ironically, the new doctrine of breakdown of marriage was first seen as a variation of the fault concept: the notion of *responsibility* for the breakdown of marriage. The development enabled much of the original thinking to be preserved. The doctrine of recrimination was able to survive and the discriminatory treatment in ancillary matters equally continued to hold sway. And sadly, breakdown was first seen to require a concomitant quest for *causation*. However the new concept of breakdown of marriage marked a transition from the rather simplistic view of a unilateral event and brought with it the possibility of recognizing a principle of mutuality in the deterioration of a matrimonial relationship.[10] Conceptually, the change was fundamental, even though at first its implications were slow to find unreserved acceptance. Finlay identifies the reasons for the change were complex and includes the fact that:

> Society had become more secular in outlook, and the former ecclesiastical doctrines of the canon law ceased to have widespread appeal. Psychological insights into human relationship were more discerning and complex and led to a greater understanding of the motivations of human conduct. The unequal position of women had started to shift and progress slowly towards equality. The greater efficacy of birth control and methods of family planning enabled women to exercise a greater measure of control over their own fortunes. The legal, social and economic sanctions and inhibitions attending adultery, separation and *de facto* relationships were on the decline. For marriage to retain any meaning, the law of marriage needed to be brought more into line with the changing mores of society.[11]

The breakdown principle of divorce evolved in the first half of the twentieth century *with the introduction of insanity* as the first non-fault ground by the Matrimonial Causes Act 1937. Before then, the cases involving the judicial discretion in relation to a petitioner's adultery hinted at the breakdown principle. The House of Lords decided *Blunt v Blunt*[12] in 1943 and declared the possibility of the public interest being best served by the dissolution of a marriage which had utterly broken down. Some judges had also consider the view. McCardie J in 1920 made a careful analysis of the changing attitude to recrimination after 1857 in *Pullen v Pullen*.[13] His review of the authorities showed that whereas before 1857 recrimination was quasi-vindictive, the discretion given to the courts after 1857 to grant divorce in the face of a petitioner's adultery

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9 For a graphic historical account of illicit practices in the various US states when the matrimonial offence philosophy reigned, see L M Friedman, 'A Dead Language: Divorce Law and Practice Before No-Fault' *Virginia Law Review* 86, no. 7 (2000): 1497

10 Finlay *op cit* at pp.123-124

11 Finlay, *op cit.* at p.125

12 [1943] A.C 517, 525

13 36 TLR 506

was intended to be exercised in support of public morality.[14] This introduced the possibility of changes in applying the law in the light of changes in attitudes to morality thereby leading directly to the principle enunciated in *Blunt v Blunt* and the development of the concept of irretrievable breakdown.

The Matrimonial Causes Act 1923 removed the unequal provisions of the law of adultery and the 1937 A.P Herbert's Act,[15]extended the grounds for divorce by adding cruelty, desertion and insanity to adultery. The introduction of insanity as a ground for divorce heralded the arrival of breakdown of marriage principle.[16]It is said to have represented England's first acceptance of the 'breakdown' principle.[17] In 1955, the Morton Commission in England, which spread its inquiry over five years, discussed irretrievable breakdown but did not make any clear-cut recommendations in its favour.[18] Even though it affirmed matrimonial offence as the sole basis for divorce, its report has been described as neutral.[19] The nine members who advocated the introduction of irretrievable breakdown as a ground for divorce saw it only as an additional ground. Only Lord Walker argued in favour of its being the sole ground. According to him:

> The true significance of marriage… is the life-long cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie – as empty ties accumulate – adds increasing harm to the community and injury to the ideal of marriage. The simplest and I think the best, solution is that the law – which will not enforce cohabitation – should favour the dissolution of broken marriages at the suit of either party.[20]

The next significant development was "Putting Asunder,": the 1966 report of a Commission appointed by the Archbishop of Canterbury.[21] The report found that the existing law concentrated exclusively on making findings of past delinquencies, whilst ignoring the current viability of the marriage. The commission favoured irretrievable breakdown as the desirable basis for divorce and did not support an admixture of the fault grounds and breakdown as being mutually incompatible.[22] The Report pointed out that it was likely that the attitudes and procedures appropriate to the trial of matrimonial offence cases would be extended to cases

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14 *Ibid*, at p.508

15 Matrimonial Causes Act 1937

16 Finlay, 'Fault, Causation and Breakdown,' pp.125. This also amounted to a secularization of the notion of 'fault.'

17 A C Holden,'Divorce in the Commonwealth A Comparative Study,' *International and Comparative Law Quarterly* 20, (1971):pp. 58, 61; see also P M. Webb., 'Breakdown Versus Fault – Recent Changes in United Kingdom and New Zealand Divorce Law', *International and Comparative Law Quarterly* 14, (1965): 194

18 *Royal Commission on Marriage and Divorce, Report 1951-1955,* Cmd 9678 (1956)

19 See Holden, 'Divorce in the Commonwealth,'at p. 61. It saw matrimonial offence as the only means to ensure the stability of the institution of marriage. See The Law Commission, *Facing the Future, A Discussion Paper on the Ground for Divorce*

20 *Royal Commission on Marriage and Divorce,* 341.

21 *Putting Asunder - A Divorce Law for Contemporary Society,* S.P.C.K, 1966

22 *Ibid*., para. 69

turning on the "new ground".[23] It was felt that the principle of breakdown should "pervade the whole divorce law".[24]

The Law Commission, to which *Putting Asunder* was referred later in the same year, endorsed that view.[25] However, the principal difference between the Archbishop's Committee and the Law Commission was as to the method by which irretrievable breakdown was to be established. *Putting Asunder* had advocated the ascertainment of breakdown by inquest in each case.[26] The Law Commission on the other hand pointed to a number of objections and difficulties, some of them of a logistic nature.[27]

The major conceptual objection, however, was that marriage breakdown is not a triable issue and that a court of law is not an appropriate forum for its determination.[28] Such an inquiry would be humiliating and distressing to the parties and would necessitate a vast increase in expenditure of money and human resources.[29] The Law Commission proposed a simple expedient: a period of separation as an indicator of breakdown. It noted that the ending of cohabitation and the sustained failure to resume it are the most cogent, objective and justiciable indications of breakdown.[30]despite these differences, the significance of both reports is their agreement that breakdown of marriage was a better basis for a modern law of divorce than spousal fault.

Along the same lines, the House of Lords in *Gollins* v *Gollins*[31] and *Williams* v *Williams*,[32] removed fault as a necessary ingredient in matrimonial cruelty. Unfortunately, despite these developing insights, even though the Divorce Reform Act 1969 that followed introduced breakdown of marriage as the one ground of divorce, the traditional matrimonial offences[33]were to be evidence of that breakdown.[34] These reforms were consolidated in the Matrimonial Causes Act 1973 which forms the current law of divorce in England.[35] This was a historical slip for England. This state of the law has been unsatisfactory and calls for further reform resulted in the publication of a consultation paper by the ministry of justice in 2018.[36] The case for reform was framed as to echo the arguments of *Putting Asunder* and the *Law Commission* of 1966 as follows:

> The current law in England and Wales – which has remained unchanged for fifty years – sets requirements which can themselves

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23 *Ibid*., para (b)
24 *Ibid.*
25 *Reform of the Grounds of Divorce. The Field of Choice*, 1966, Cmnd 3123.
26 *Putting Asunder*, paras 80-89
27 *Reform of the Grounds of Divorce. The Field of Choice*, paras 58(k), (l), (p), 70-71
28 Ibid., para 58 (i) cf *Pheasant v Pheasant* [1972] Fam. 202; *Watchel v Watchel* [1973] Fam. 72 at 79-80 both per Ormrod J
29 Rebecca Probert, Cretney and Probert's *Family Law* 7th ed. (London: Sweet and Maxwell, 2009) 65
30 *Reform of the Ground of Divorce,* para 72
31 [1964] AC 644
32 [1964] AC 698
33 Adultery, desertion, behavior that might previously have been classed as cruelty or constructive desertion and separation for specified periods of time.
34 Finlay, 'Fault, Causation and Breakdown,' pp.127-128
35 Also see, M.D.A Freedman "Marriage and Divorce in England" *Family Law Quarterly* 29, no. 3 (1995-1996): 549, 550-551
36 Ministry of Justice *Reducing Family Conflict Reform of the Legal Requirements for Divorce* (London: Crown, 2018) available at https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/ accessed 14 February 2020

> introduce or aggravate conflict, and which encourage a focus on the past, rather than on making arrangements for the future. The Government believes there is now broad consensus that the current divorce process does not serve the needs of a modern society. Difficulties with the current law have also been highlighted recently before the Supreme Court. In particular, the current divorce process is complicit in exposing children to the damaging impact of ongoing adult conflict during, and too often after, the process. While the wider family justice system is focused on helping people to resolve family issues in a non-confrontational way, the legal divorce process can make this more difficult because of the way it incentivizes the attribution of what is perceived as blame. Parents in particular, who need to continue to work together in their children's bests interests, may struggle to overcome feelings of hostility and bitterness caused by the use of "fault" to satisfy a legal process. Under the current requirements, couples must either live apart for a substantial period of time before a divorce can be obtained, or else one spouse must make allegations about the other spouse's conduct. This is sometimes perceived as showing that the other spouse is "at fault". Three out of five people who seek divorce make allegations about the other spouse's conduct. Both routes can cause further stress and upset for the divorcing couple, to the detriment of outcomes for them and any children. There have been wide calls to reform the law to address these concerns, often framed as removing the concept of "fault". Marriage is a solemn commitment, and the process of divorce should reflect the seriousness of the decision to end a marriage. The Government believes that the law should not exacerbate conflict and stress at what is already a difficult time. The Government accepts the principle that it is not in the interests of children, families and society to require people to justify their decision to divorce to the court.[37]

The government formulated two objectives to guide the reform process namely (i) to make sure that the decision to divorce continues to be a considered one, and that spouses have an opportunity to change course; and (ii) to make sure that divorcing couples are not put through legal requirements which do not serve their or society's interests and which can lead to conflict and accordingly poor outcomes for children. The proposal put forward to achieve these objectives include:

i. A move away from an approach that requires justification to the court of

the reason for the irretrievable breakdown of the marriage to a process that requires notification to the court of irretrievable breakdown.

ii. Removal of the ability of a spouse, as a general rule, to contest (defend)

[37] *Ibid*, at 5

> the divorce. The Government reasons that if one spouse has concluded that the marriage is over, then the legal process should respect that decision and should not place impediments in the way of a spouse who wants to bring the marriage to a legal end. Importantly, this change would also prevent the legal process from being used to exercise coercive control by one spouse over the other spouse who may be a victim of domestic abuse.

It remains to be seen how these proposals will be translated in an eventual legislation. However, this reform process indicates that the admixture of fault and non-fault facts as facts of irretrievable breakdown is generally unsatisfactory.

3. Australia/New Zealand

Prior to the English Matrimonial Causes Act 1923 and the 1937 A.P Herbert's Act, the ascendancy of the breakdown principle was seen in New Zealand and Australia. New Zealand had passed a statute in 1920 enabling either spouse to present a petition where the parties had been living separate and apart for at least three years, provided the separation had originated in an agreement or court order[38]. Little more than a year later, public opinion induced a retreat as a result of the case of *Mason v Mason*.[39] Section 2 of the Divorce and Matrimonial Causes Act 1921-1922 was enacted and it gave the respondent the right to prevent the granting of a decree if he or she could show that the separation was the petitioner's fault. In 1953, partly divorce was made possible where the parties had been living apart for a period of seven years and were unlikely to be reconciled.[40] Webb observes that despite these developments, it was felt that public opinion was not ready for the idea that a so-called "guilty" person should be able to procure a divorce against the wish of the other party.[41]

Four years later, the provision which gave the respondent veto if the petitioner was responsible for the separation was the subject of judicial criticism in *Towns v Towns,*[42] and was protested against both by the New Zealand Law Society and by members of the public. In consequence, it was not repeated six years later when the Matrimonial Proceedings Act 1963 was enacted.[43] Even though the ground was a discretionary one, the law did not attempt to indicate the basis on which the court might exercise its discretion to refuse a decree.[44] Currently, divorce is regulated by the Family Proceedings Act 1980. An application for a dissolution order could be made by either party to the marriage or jointly by both parties on the ground that the marriage has *broken down irreconcilably*. This ground is satisfied if the parties have lived apart for two years before the application or there is a separation agreement which has been in force for two years between the parties. The law prohibits the proof of any other matter to establish the ground.[45]

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38 Divorce and Matrimonial Causes Amended Act 1920, s. 4.

39 [1921] N.Z.L.R 955

40 Divorce and Matrimonial Causes Amendment Act 1953, s.7; Webb, 'Breakdown Versus Fault,' 195

41 Webb, 'Breakdown Versus Fault,'195

42 [1957] N.Z.L.R 947

43 S. 30; it was therefore possible for either party to obtain a divorce on that ground despite the opposition of the other.

44 Webb *op.cit* at pp. 195-196

45 S. 37, 39

South Australia towed the New Zealand path in 1938 with the qualification that the separation must have been founded on a court decree or order.[46] In 1945, Western Australia allowed divorce after a five-year separation irrespective of cause.[47] The Matrimonial Causes Act 1959 substituted a uniform federal law for the divorce laws of the six states.[48] Uniformity was achieved by the simple expedience of adopting the grounds from each state and aggregating them.[49] Most of these were fault based but one which proved to be of immense importance to the subsequent development of divorce law in Australia enabled either party to obtain a divorce on the basis that the parties had separated and lived separately and apart for not less than five years.[50] For the first time, the separation of the parties for a period of years and the absence of any likelihood of reconciliation became available to all states, having previously existed only in Western Australia.

The significance of this development lay in the availability of the ground to either party irrespective of fault or causation. The five-year separation was significant because it made divorce available in cases of mere incompatibility where no actual offence could be laid at the door of one or other party.[51] The notion that marriage breakdown should lead to dissolution found little general opposition. Thus the view articulated in 1943 in *Blunt* v *Blunt* by the House of Lords and followed in 1948 by the High Court of Australia in *Henderson* v *Henderson*[52] was clearly in accord with public opinion. Other extensions of breakdown doctrine included section 29 of the 1959 Act which removed the requirement of expulsive intent from constructive desertion[53] and cruel intent from matrimonial cruelty. These were in keeping with the gradual abandonment of fault and the recognition of marital breakdown as the most appropriate ground for the dissolution of marriage. In retrospect, it could be said that the admixture of fault and non-fault grounds in the Australian Matrimonial Causes Act 1959 was a compromise and may be seen as a transitional phase. The 1959 Act lasted for 15 years and was replaced in 1976 by the Family Law Act 1975.[54] This Act replaced all the previous 14 grounds of divorce by a single one: separation for not less than one year, which was available to either party.

The absence of a likelihood of cohabitation being resumed was no longer required to be proved or inferred as an ingredient, as was the case with the five-year separation ground in the 1959 Act. Only if such likelihood appears to the court to exist, is the court required or indeed entitled to refuse a decree.[55] The philosophical basis of the new law was the belief that an inquiry into the cause of breakdown was not proper. Marriage was thought of as being the most complex

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46 Holden., "Divorce in the Commonwealth," 61

47 Supreme Court Act Amendment Act 1945 (W.A)

48 The areas of marriage and matrimonial causes had been assigned to the Commonwealth Parliament under the Constitution but it had not exercised this jurisdiction until then (Commonwealth of Australia Constitution Act, 63 and 64 Vict, c 12, 8 51 (xxi) and (xxii).

49 This resulted in the existence of no fewer than fourteen grounds. Only four were statistically significant – adultery, desertion, cruelty and the new five year separation ground. Others were habitual intoxication by drink or drugs, refusal to consummate, frequent convictions, imprisonment, insanity.

50 Matrimonial Causes Act 1959 (Aus). S. 28(m)

51 H.A Finlay, 'The Grounds for Divorce: The Australian Experience' *Oxford Journal of Legal Studies* 6, no.3 (1986): pp.368 and 371.

52 (1948) 96 CLR 529.

53 It was described as a "Fundamentally New Juristic Concept of Desertion" in *Manning v Manning* (1961) 2 F.L.R 257, 260 per Burbury C.J.

54 H.A Finlay "A New Deal for Family Law – The Australian Family Law Act 1975" *Rabels Zeitschrift* 41, (1977): 71.

55 Family Law Act 1975, s. 48(3).

and intimate of relationships where each spouse sees the marriage from his or her own differing perspective, especially in retrospect. It should not be assumed that the law is capable of establishing, after a form of inquest into the marriage, an objective explanation for its demise and an allocation of responsibility for it. According to Finlay, the factors that might bring a matrimonial relationship to an end defy categorization. Thus, to try to define certain conduct as having such an intrinsic moral quality that it should be reflected in a ground for divorce or in decisions on property or maintenance is to adopt an oversimplified view of the matrimonial relationship. Considerations of this kind influenced the decision of the Australian Parliament to abandon the old matrimonial fault as the basis for divorce.[56]

4. United States of America

Before the 1960s, legal rules regulating marriage reflected the belief that the state had profound interest in the institution and therefore could closely regulate its formation, organization and dissolution.[57] In *Maynard v Hill*[58], the US Supreme Court summarized this attitude:

> [M]arriage is often termed by text writers and in decisions of courts a civil contract – generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization – it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.[59]

Originally, the question of what law should govern divorce posed a riddle to state governments. Unlike in England where ecclesiastical courts governed domestic relations, there were no comparative church courts to serve as a ready mechanism for obtaining divorce. Prior to the middle of the 19th Century, many of the divorces were granted on an *ad hoc* basis through special legislative acts of annulment in the state legislatures.[60] In the mid-1800s state legislatures began conferring general divorce jurisdiction to state courts, following the heels of England, where civil courts assumed jurisdiction over domestic matters in 1857. By the early 20th Century,

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56 Finlay, *op cit* at p.368 .

57 L Bradford, 'The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws', *Stanford Law Review* 49, (1996-1997): pp.607- 609.

58 125 U.S. 190 .

59 *Ibid*, at pp.210-211.

60 A M. Morse, Jr., 'Fault: A Viable Means of Re-injecting Responsibility in Marital Relations' *U. Rich Law Review* 30, (1996): pp.605- 607.

all American states, with the exception of South Carolina, had passed laws authorizing courts to dissolve marriages for cause.[61]

Originally, the fault grounds in most states included narrowly defined transgressions such as adultery, cruelty and desertion. In the early 1900s many states expanded and secularized their notions of fault. The new faults typically included conviction of certain crimes, homosexuality, insanity and drug addiction and numerous others with great variety across the nation.[62] Defences also developed to defeat accusations of fault – recrimination, connivance and condonation. The fault-based regime reflected the view of marriage as a status relationship that united the interests of husband, wife and child. Alimony and child support were granted in recognition, not only of the husband's misconduct, but also women and children's economic dependence. The state treated marriage as a private sphere immune from government interference. Only the possibility of dissolution, or a threat to the purity of the unit justified state intrusion.[63]

According to Bradford, changed attitudes about the individual and the family and the prevalence of divorce in the early 1960s led to a distaste for public intrusion into the marital relationship; and this led to the decline of the fault system in America.[64] The secularization of divorce led to less restrictive attitudes about breaking the marriage contract. There was gradual acceptance of the view of marriage as a partnership between individuals, terminable at will when it failed to meet the needs and desires of either party.

The restrictive fault regime had imposed intolerable obstacles in front of a procedure desired by more and more couples. The spectacle of couples parading their marital problems in front of judges fed the impetus for reform. The movement toward no-fault was supported by the fact that divorce seeking couples often subverted or ignored the restrictive fault rules. The most common evasions were migration and collusion; couples would either go to a jurisdiction with more lenient divorce laws or would perjure themselves before the court to manufacture instances of marital fault.[65] In the 1960's, ninety per-cent of divorces were granted without contest. The judicial participation in this evasions consisted in 'brief and perfunctory' hearings as judges sought to avoid ugly airings of marital grievances.[66]This new view of marriage questioned the idea that divorce could be fully explained by simplistic notions such as fault. More complex conceptions of human psychology led to the understanding that divorce stemmed not from a factor but from a variety of complicated circumstances affecting both parties. Schneider identified other factors which led to this trend:

> changing moral values as evidenced by the sexual revolution and the decline of religion in American life – this reduced popular consensus about marital norms;
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> the decline of religious homogeneity – this weakened moral base of family law;

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61 H H Kay, 'Beyond No-Fault: New Directions in Divorce Reform' in *Divorce Reform at the Crossroads* ed. S D Sugarman, and H H Kay, (New Haven: Yale University Press, 1990): 6; L M. Friedman, 'Dead Language,' 1501. South Carolina allowed Judicial Resolution of divorces in 1984.

62 Bradford, *op.cit* at p. 610

63 Bradford, *ibid* at p. 611.

64 *Ibid*

65 For a graphic description of these trends, see L M. Friedman, "Dead Language"

66 E S. Scott, 'Rational Decision-making about Marriage and Divorce' *Virginia. Law Review* 76, (1990): 9, 16

> the rise of the "psychological man" – who craves for self-realization and personal well-being more than seeking to fulfil religious and moral duties.[67]

Added to these was the changing gender roles which contributed to the modern conception of marriage as an equal partnership. Then there was the Supreme Court's redefinition of family privacy in terms of individual autonomy and respect for individual choice in areas such as marriage, procreation and child-rearing.[68] It could be said that the central goal of the movement towards no-fault was preservation of judicial integrity; it was originally conceived neither as a way of encouraging easy divorces and revolving door marriages nor as a method for reforming the basis upon which courts should determine spousal support and child custody awards. It was to shore up the integrity of the law and to preserve the dignity of the couple, as it mirrored what was already occurring in practice.[69] In 1969, California became the first jurisdiction in America (and in the western world) to adopt a modern, purely 'no-fault' divorce law when it passed the Family Law Act of 1969.[70] It eliminated all fault grounds and provided that apart from the rare case of 'incurable insanity,' marriage could be terminated only upon the ground of "irreconcilable differences which have caused the irremediable breakdown of the marriage."[71] Legislatively, efforts (hearings) at reform had begun in California by 1964 and a Governor's Commission on the Family set up in 1966 submitted its report recommending the elimination of all fault grounds for divorce as well as the adoption of an extensive family court system. Notwithstanding this, it was the developments in England about this period that did much to legitimize divorce reform in the US. And while California's no-fault divorce law constituted a much more radical departure from the traditional divorce methods than the English law (DRA 1969) the English divorce reform movement helped clear the path for California's divorce reform.[72] Between 1969 and 1985, all fifty states of the US incorporated no-fault

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67 C E. Schneider, 'Moral Discourse and the Transformation of American Family Law' *Michigan. Law Review* 83, (1985): pp.1803-1807.

68 See for example *Eisenstadl v Baird*, 405 U.S. 438, 453 (1972) where it struck down state legislation interfering with the right of individual, married or unmarried to purchase contraceptives: "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

69 Bradford, *op cit* at p. 614.

70 Cal. Civ. Code SS 4000-5138 (West 1983). See L D. Wardle, 'No-Fault Divorce and the Divorce Conundrum,' *Brigham Young University Law Review* 79, (1991): pp.79- 142. Previously, the statutory grounds for divorce in California as in most other states, consisted of several specific fault grounds such as adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of a felony or incurable insanity. Before this law, a handful of states had adopted no-fault grounds for divorce but unlike California's enactment and most subsequently enacted modern no-fault divorce grounds, these earlier grounds reflected powerful anti-divorce philosophy of the fault system, were narrowly defined and strictly construed; Wardle, 'Divorce Conundrum' 83

71 Cal. Civ. Code ss 4506, 4507 (West 1983). "Irreconcilable differences" were defined under s. 4507 as 'those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." This is so even if there appears to be 'a reasonable possibility of reconciliation.' This would only warrant a postponement of the proceedings for a period not exceeding 30 days to accommodate reconciliation efforts: s. 4508.

72 It has also been noted that the reform of the New York divorce law in 1966 and 1968 benefitted the California reform. In New York, divorce was only permitted upon proof of adultery. A divorce reform bill passed in 1966 added other fault grounds and permitted divorce upon living apart for two years pursuant to a decree of

provisions into their divorce laws.[73] Although the primary objective of the no-fault movement was to change the grounds for divorce, reformers also proposed to eliminate fault as a basis for property division and alimony awards.[74] Indeed, many states took their lead from the Uniform Marriage and Divorce Act 1970 and eliminated fault as a factor in the allocation of property and the setting of spousal support. Other states have retained fault as one of the many factors that a court may consider when deciding awards; yet there is no guarantee of permanent support from a guilty spouse. What the court does is to provide lump sum settlements to avoid prolonged financial relationships between the parties. Under this system, the court designs 'equal' or 'equitable' property awards and where appropriate, minimal alimony allocations which are gradually phased out as the supported spouse retrains for a new career.[75] It is on this angle of divorce that the most criticisms of no-fault has been focused.

5. Nigeria

Before the 1954 Constitution, Nigeria was administered under a unitary system of government. There was one Supreme Court for the whole country with several judicial divisions sitting locally. There was one single law applicable in the whole country. Nigeria became a federation under the 1954 Constitution; thus the unified judicial system was regionalized and each of the regions and the Federal Territory of Lagos had its own High Court.[76] The effect of this regionalization was that "each region (became) a foreign country in relation to the other regions (including Lagos) for purposes… of the exercise of judicial powers."[77] There was therefore the usual division of powers between the federal government and the regions. Statutory marriage and other matrimonial causes relating to it were put within the legislative competence of the regions since they were on the residual matters.

However, in 1957 these items were transferred to the exclusive legislative list of the federal government.[78] The effect of this change was that the regional courts which hitherto had jurisdiction in matrimonial causes relating to statutory marriages could no longer do so unless

separation or written separation agreement. This was seen conceptually as the acceptance of no-fault concept of divorce. Added to this was the endorsement of no-fault divorce by the National Conference of Commissioners on Uniform State Laws (NCCUSL) which approved a Uniform Marriage and Divorce Act (UMDA) in 1970. While acknowledging the state's interest in stability of marriages the NCCUSL proposed to "totally eliminate the traditional concept that divorce is a remedy granted to an innocent spouse." (UMDA Prefatory Note, 9A U.L.A 147, 148 (1987). It authorized dissolution of marriage solely on the ground "that the marriage is irretrievably broken" : s. 302(a)(2) and explicitly provided that property division, spousal maintenance and child support were to be made "without regard to marital misconduct": s. 307-309. The American Bar Association after hesitation and extensive negotiation approved a revised UMDA in 1974: see Wardle, "Divorce Conundrum," 86-87

73 By 1997 fifteen states had strictly no-fault divorce laws which abolished all fault-based grounds for divorce and marital breakdown as the sole basis for dissolution. Twenty-one states have added a no-fault provision to their existing fault grounds. Fourteen states and the District of Columbia have combined fault with a no-fault provision based on voluntary separation or incompatibility: Kay, "New Directions," 211

74 See e.g., California Family Law Act, s. 8, Cal. Civ. Code s. 4801 (West 1984) (amended from 1969 Original); Uniform Marriage and Divorce Act s. 308(b), 9A U.L.A 160 (Supp.1987) (Unchanged in substance from 1970 version)

75 Bradford, "Counterrevolution," 614-615

76 A.B Kasunmu and J.W Salacuse, *Nigerian Family Law* (London: Butterworths, 1966), 112

77 B.O Nwabueze., *Machinery of Justice in Nigeria* (London: Butterworths, 1963): 84; *British Bata Shoe Co.v Melikian* (1956) 1 F.S.C 100

78 L.N 117 of 1957 which came into effect on August 30 1957

empowered by a federal statute. The confusion which trailed this development led to the passing of the Regional Courts (Federal Jurisdiction) Act 1958.[79] This statute conferred jurisdiction to dissolve a statutory marriage on regional High Courts and also directed them on what law to apply.[80] Under section 4 of the Act,[81]

> the jurisdiction of the High Courts … in relation to marriage and the annulment and dissolution of marriage and in relation to other matrimonial causes, shall subject to the provision of any laws of a Region so far as practice and procedure are concerned, be exercised by the court in conformity with the law and practice for the time being in force in England.

While it was clear that the above provision only enjoined Nigerian High Courts to exercise jurisdiction in accordance with the law and practice in England, the question was whether it also imposed on them the application of English substantive law. Nigerian courts interpreted it to mean that Nigerian courts should not only assume jurisdiction but should also apply English substantive law and procedure.[82]

Over the years, English courts had developed an immense body of case law defining such important family law notions as 'cruelty', 'desertion,' 'non-consummation' and the common grounds for nullity. It may perhaps have been appropriate had the provisions of the Act enabled Nigerian courts to define these concepts with reference to the social conditions and attitudes which existed in the country. But the Act did not permit such flexibility for it directed the High Courts to apply "the law…for the time being in force in England"[83] and made no provision for such English law to be modified to meet local conditions. 'Time being in force' was interpreted by the courts[84] and commentators[85] as having an ambulatory effect and to mean the law that was *currently* in force in England. As was stated in *Taylor* v *Taylor*,[86] "the law and practice in Nigeria change as the law and practice in England change"[87] It appeared that the West African Court of Appeal (WACA) did not follow its earlier decision in *Godwin* v *Crowther*.[88] In this case, which was decided nine months before *Taylor*, WACA stated that "strong evidence would be required if the intention of the legislature is to effect such an unusual purpose as the wholesale

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79 Cap 177, Laws of the Federation of Nigeria 1958. It came into effect on September 25 1958. See *Nwokedi v Nwokedi* [1958] LLR 94; *Okonkwo v Eze* [1960] NNLR 80

80 Kasunmu and Salacuse, *Nigerian Family Law*, 113

81 See also, the High Court of Lagos Act, Cap 80 Laws of the Federation of Nigeria 1958, s. 16

82 Below

83 Which included rules of practice such as the English Matrimonial Causes Rules: *Omole v Omole* (1960) NRNLR 19

84 E.g., *Omole v Omole*, supra.; *Adeoye v Adeoye* (1961) 1 All NLR 792 at 794; *Falohun v Falohun* (1944) 17 N.L.R 108

85 E.g., E.W Park, *The Sources of Nigerian Law* (London: Sweet and Maxwell, 1963), 17; A. Allot, "Marriage and Internal Conflicts of Laws in Ghana" *Journal of African Law* 2, no. 3 (1958), 164; A. Phillips, "Marriage Laws in Africa" in *A Survey of African Marriage and Family Life* (ed.) A. Phillips (London: Oxford University Press, 1953) 173, 293

86 (1935) 2 WACA 348 (where the West African Court of Appeal was construing section 16 of the Nigerian Supreme Court Ordinance which provided that with regard to probate, divorce and matrimonial causes, jurisdiction was to be exercised in conformity with "the law for the time being in force in England,")

87 I*bid*, at p.349.

88 (1934) 2 WACA 109

application of all future English law, whatever it might be on the subject in question as well as on those of divorce and matrimonial causes."[89] It is reasonable to hazard that the policy considerations which seemed to have influenced *Godwin* were and are still germane.[90]

Regardless of this consideration, Nigerian courts steadily assumed that it was the current English law of matrimonial causes and matters which were in force in Nigeria.[91] Just before the Matrimonial Causes Act 1970 was enacted, Nigeria applied the English Matrimonial Causes Act 1965 which had consolidated the Matrimonial Causes Acts of 1950 and 1963. The principle which underpinned the 1965 Act was that marriage could only be terminated if there had been the commission of a "matrimonial offence" by one of the parties to the marriage. The commission of such a matrimonial offence did not automatically terminate the marriage but only gave the other party to the marriage an option of terminating it by divorce. Presumably, the five grounds under that law were regarded as offences on the ground that they were acts so grave in nature so as to affect the root of the marriage. The idea of a matrimonial offence on its own was rooted in fault. The grounds included adultery since the marriage, desertion for three years immediately preceding the petition, cruelty, incurable unsoundness of mind and for the wife alone, that the husband had committed rape, sodomy and bestiality.[92] In addition to these, for offences like adultery the courts sometimes required proof beyond reasonable doubt as in criminal cases.[93]

6. Conceptualising Irretrievable Breakdown

The historical outline above shows the varying factors which influenced the movement from fault or matrimonial offence theory of divorce to the no-fault divorce doctrine and its irretrievable breakdown rule. Those factors also define the concept itself. The idea of breakdown is based on observable conduct; conduct that is of neutral moral connotation. However, it advocates that it is wrong to inevitably think in terms of a guilty party and an innocent party who is entitled to a divorce. A breakdown principle reveals divorce as what in essence it is – not a reward for marital virtue on the one side and a penalty for marital delinquency on the other but a defeat for both, that is, a failure of the marital relationship however unequal their responsibilities.[94]

Men and women do not behave with the same predictability of physical objects. Finlay illustrates the intricacies of the course of marital breakdown. According to him, If H beats his wife, this may motivate her to leave him and the beating may be popularly spoken of as causing

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89 *Ibid*, at p. 111

90 One could take as an example the way adultery was viewed by the different social jurisdictions. While it was so grave a conduct that would affect the root of a marriage when committed by a wife, some social zones did not view it that way when committed by the husband and this is still so today. Conversely, in English societies alternate sexual orientations such as homosexuality has been tolerated and the state has created the necessary legal environment for them to flourish. These alternatives are still strongly frowned upon both socially and legally in Nigeria.

91 Kasunmu and Salacuse, *Family Law*, 12-13

92 Matrimonial Causes Act 1965, s.1 (1)

93 *Akinyemi v Akinyemi* (unreported) F.S.C 303/62; *Martins v Martins* I/55/63 (beyond reasonable doubt); *Lewis v Lewis* [1960] LLR 215, a 'high standard of proof'; *Oloko v Oloko* [1961] WNLR 101 'the proof is not less high required than in a criminal case'.

94 A Irvine, 'Report of the Mortimer Group on Divorce Law,' *The Modern Law Review* 30, (1967) 72; Finlay, *op cit.* p. 126.

her to leave, but this is not usually predictable. And it may be due to other factors additional or alternative to the beating. The ideal of breakdown views such conduct as a symptom of breakdown of marriage rather than as a cause. H may have been induced to beat W by W's constant nagging, the nagging being her response to H's drinking habits. H's drinking may have been his reaction to her slovenliness. He may be a bad provider. The family's financial difficulties may have been aggravated by W's fertility and the large number of children.[95] Thus the ideal breakdown doctrine properly sees the process of breakdown of marriage as one of gradual deterioration with a large number of contributing factors proceeding from both parties, as well as from outside sources. In those circumstances, to lay blame exclusively or even predominantly on one party or the other would then be quite unrealistic.[96]

Various descriptions or definitions have been offered to explain breakdown of marriage. Lord Walker in the Morton Commission defined breakdown as a situation where the facts and circumstances adversely affecting the lives of the parties are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation.[97] *Putting Asunder* adopted this definition when it stated that breakdown is "such failure in the matrimonial relationship or such circumstances adverse to that relationship that no reasonable probability remains of the spouses again living together as husband and wife for mutual comfort and support"[98] MacKenna states that a marriage has broken down if the parties had ceased to cohabit and if one or both intended not to resume cohabitation.[99]Mayo adds that the "permanent disruption of conjugal life" is the principle governing the availability of relief where dissolution of marriage is based no-fault rule of irretrievable breakdown. In such a circumstance, the state's interest lies in providing, rather than denying irreconcilable parties (e.g. those separated for a reasonable period of time) the opportunity to establish new relationships.[100]

7. Lessons for Nigeria

The central lesson of the outline above is that Nigeria does not have a pure no-fault divorce legislation even though it proclaims irretrievable breakdown as the ground for dissolution of marriage. Wardle acknowledges that because of the diversity of legislation on the subject, efforts at categorization is elusive. She however states that a statute is a "modern no-fault statute" if it provides for divorce upon one of the generic modern "marital breakdown" grounds i.e., "irretrievable breakdown," "irreconcilable differences," or "incompatibility" or if it provides for divorce upon proof that the parties have lived separate and apart for a relatively short period of time, no more than one year; or if it provides for divorce using some combination of these approaches. [101] Irretrievable breakdown is but one form of no-fault divorce doctrine.

[95] At p. *Ibid*
[96] *Ibid*, at p. 127
[97] Cmd 9678 at 340

[98] *Putting Asunder*, 38-39

[99] MacKenna, at p. 122

[100] M M. Mayo 'Responsibility of the Law in Relation to Family Stability' *International and Comparative Law Quarterly* 25, (1976): pp.409

[101] L D. Wardle, 'No-Fault Divorce and the Divorce Conundrum,' *Brigham Young University Law Review* (1991): pp.79-88.

Irreconcilable differences and incompatibility are the other forms. Again various models of no-fault divorce schemes exist. Using the United States as a case study, three models are discernible:

1. Pure No-Fault: having a no-fault ground as the sole ground for divorce. This is called a modern no-fault ground. California was the first in 1969. At least fifteen states have "irretrievable breakdown" or "irreconcilable differences" between spouses as the sole ground for divorce. The other form of pure no-fault is living separate or apart for a short period as the sole ground. This is also the case in New Zealand and Australia.
2. Alternative Pure No-Fault: Here "irretrievable breakdown" or "incompatibility" and living separate or apart for a short period of time are alternative grounds for divorce. This is the case in three states in the United States.
3. Mixed or Compromise Schemes: the addition of one modern no-fault ground for divorce as an alternative to fault grounds for divorce such as adding irretrievable breakdown provision to traditional fault grounds or a breakdown provision and a modern "short separation" as alternatives to traditional fault ground or adding short separation provision as the sole no-fault ground to the list of traditional fault grounds for divorce. These schemes are operational in thirty states in the United States.[102]

This third model is the model in Nigeria under the MCA which was enacted on the heels of the English Divorce Reform Act 1969. Under section 15 of the MCA, eight facts are listed as evidence of irretrievable breakdown of marriage. They include:

(a) That the respondent has willfully and persistently refused to consummate the marriage;[103]

(b) That since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;[104]

(c) That since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;[105]

(d) That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;[106]

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[102] See Wardle, "Divorce Conundrum," 88-89 (notes 41-50) for lists of the states in the United States.

[103] The marriage must not have been consummated as at the commencement of the hearing of the petition for a conclusion that this fact is established.

[104] Evidence of conviction for rape or any other offence in which sexual intercourse with a person of the opposite sex is an element in Nigeria or elsewhere is sufficient evidence of adultery: s. 87(1) (a) MCA

[105] Section 16 MCA gives an inexhaustive list of examples of such behavior:

[106] For this and the living apart "facts", the continuity of the requisite periods is not broken by the fact that parties resumed living with each other [in the same household: s.17(3) MCA] where such period (s) did not exceed six months. Any other period would not count as part of the period of desertion or living apart as the case may be: s. 17(2) MCA. Regardless of intention, a married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart and actually occasions that other person to live apart is in willful desertion: s.18 MCA. Finally, where a husband and wife are parties to a separation agreement whether oral or in writing or constituted by conduct, the refusal by one of them without reasonable justification to comply with the other *bona fide* request to resume cohabitation constitutes willful desertion without just cause: s.19 MCA

(e) That the parties to the marriage have lived apart for a continuous period of at least two years immediately presented the petition and the respondent does not object to a decree being granted;
(f) That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;
(g) That the other party to the marriage has, for a period of not less than one year failed to comply with a decree of restitution of conjugal rights made under (the MCA)
(h) That the other party to the marriage has been absent from the petitioner from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.[107]

Even though the MCA proclaims irretrievable breakdown, but because it does not entirely eliminate fault, it can therefore at best be said to constitute an imperfect adoption of the breakdown policy. In *Bibilari* v *Bibilari*[108]Nwodo JCA declared that;

> "prior to 1970, the principle governing the dissolution of marriages was the traditional offence or fault doctrine. Marriages were dissolved on the commission of a matrimonial offence by one spouse. Section 15(1) represents a compromise between the fault doctrine and irretrievable breakdown principle."[109]

Secondly, it is important that the practical effects of fault divorce be acknowledged. Studies in these jurisdictions show that requiring fault and proof of same exacerbates marital conflict, impacts on children and distorts post-divorce relationships which may be crucial to overall health of members of family particularly children. Corollary, it has not been shown to be an effective tool to control egregious marital misconduct nor does it necessarily promote marital virtue.

8. Conclusion

The historical outline above shows that divorce has moved from a period of absolute prohibition to a period of gradual liberalisation. The changes in divorce administration have affected the granting authority, the basis for the grant and the procedure for the grant. Greater psychological insights into human behaviour and its motivations as well as learned experience in practical effects of the application of divorce law to family life have informed reforms. These are in addition to changed and changing outlooks and attitude to traditional family forms. The outline

[107] Proof of continuous absence over a period of seven years immediately before the date of the petition in addition to a reasonable belief of the petitioner that the respondent was not alive at any time within that period is sufficient to establish this fact: s. 16(2)(a) MCA.

[108] [2011] 13 NWLR (Pt. 1264) 207

[109] *Ibid*, at 226. This view was earlier expressed by Achike who described it as "a beneficent compromise" in O. Achike 'Adultery Under the Matrimonial Causes Decree 1970' *The Nigerian Bar Journal* XIV, no. 2 (1977): pp.120

shows that a most important subject of liberalisation which has occupied the jurisdictions is the basis for divorce because this would determine both the granting authority and the procedure for same. A policy of divorce restriction particularly in relation to basis perceives divorce law as an effective tool to ensure the maintenance of large numbers of "intact" marriage families (family stability). Such policy usually finds expression in tough divorce laws implemented through substantive confinement (for example using fault grounds as the basis for divorce), herculean and uncertain procedures and limitation in the number of granting authorities to a barest minimum – typically one; that is, the courts.

The policy assumes that minimal divorces and divorce figures automatically translate to marital stability. It thus enforces the ascendance of public interests in marriage over private choices about and in marriage.[110] History has not shown this to be true and such policy has been desultory. On the other hand, no-fault divorce is amenable to liberalised substantive, institutional and procedural approaches. It considers that therapeutic processes (which assist the parties and alleviate distress on divorce) and the policy of according greater importance to private choices by parties to marriage should be chief goals of a good divorce law. This is the path that the jurisdictions considered above have taken and this is the path Nigeria should take in its present reform efforts.

[110] See Wardle, "Divorce Conundrum,"