Civil Divorce in Nigeria *Versus* Indissolubility of Christian Marriages Under Canonical Jurisprudence: A Critical Look

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Abstract

There is always a tension between civil divorce and indissolubility of Christian marriages. Civil divorce grants an aggrieved spouse the opportunity to petition for dissolution of their validly entered marriage under certain specified conditions. On the other hand, Christian doctrine and law on indissolubility upholds that a validly contracted marriage is not to be dissolved under any excuse whatsoever. The Church postulates that marriage is a permanent bond symbolizing the undying union of Christ and the Church. Divorce has actually come under attack recently due to the increasing rate of its frequent occurrence in the Nigerian society, especially as concerns its negative effects on the family fabric, and the waning societal values sequel to broken homes and solo parenting. Adopting a doctrinal methodology of analysis of data using comparative approach, this study examines the elements of the ground for dissolution of statutory marriage in Nigeria. This study, therefore, seeks to give a canonical response to these legal provisions and adumbrate the religious consequences thereof in the light of the nature of Christian marriages. The study capitulates with the fact that stability of marriages is the intention of the founder of Christianity for the good of human society.

Keywords: Indissolubility of Christian Marriages, Civil Divorce, Canon Law, Jurisprudence, Nigeria

1. Introduction

The Family is certainly one of the crises-ridden institutions in Nigeria today. This is despite the fact that the family is the basic unit of any society, which in Christian parlance is also called the 'domestic church'[1]. Whether good or bad happenings in the larger society become a reflection or bye-products of those in the family. In Nigeria today, cases of divorce and marital breakdown are legion, and enormous are the consequences thereof. Ranging from its religious implications, its adverse effects on the spouses and also on the psycho- moral upbringing of their Children, to its import on societal development generally, marital divorce, whether judicial or non-judicial, constitutes itself an *obex* to human progress. Yet, the present Nigerian matrimonial statutes and case law are agog with provisions under which a decree for dissolution of a validly celebrated statutory marriage can under certain circumstances, once proved, be issued. What are these conditions? To what extent can a petition based on them lead to a judicial divorce? What is the effect of a civil divorce on a valid marriage between Christian spouses? In other words, can a Christian petition for a civil divorce? One can feel someone wondering why we opt to discuss somewhat religious law issues within Nigerian legal system well known for its positivist bias. The truth, however, is that the matters under discussion constitute responses to very serious problems that bug our deeply religious people. Besides, these issues and their implications are quite germane since most of the Christian canonical marriages in Nigeria are at the same time statutory contracts complying of course with the requirements of civil law.[2] It is therefore the main task of this paper

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[1] See Vatican 11, Dogmatic Constitution on the Church, *Lumen Gentium*, n.11; Cf. also John Paul 11 (1981) *Familiaris Consortio*, Christian Marriage in the Modern World, n. 46.

[2] Before Christian marriages are celebrated in Nigeria today, certain statutory requirements must be met with regard to formal and essential validity. These include essentials such as attainment of marriageable age, taking cognizance of the prohibited degrees of consanguinity and affinity, the effect of previous bond (otherwise one commits the

to give a canonical and theological response to these legal matters and adumbrate the religious consequences thereof in the light of the nature of Christian marriages.

2. Meaning of Divorce

The dictionary meaning of divorce is 'separation between things that should go together'. It is the destruction of an existing union, either between things, ideas or people. In relation to marriage, divorce refers to the total destruction of that union of love and companionship in marriage between a man and a woman who, until the time of the marital crash, were known as husband and wife.[3] Divorce is therefore a total and complete breakdown *de facto* of a validly celebrated and consummated marriage.

Technically, divorce involves a declaration that a valid marriage has been dissolved by a competent judicial authority. It is in this sense that Mba refers to it as a consequence of a decree by which a marriage bond is dissolved.[4] Somewhat derogatorily, Lofton sees divorce as 'the funeral of a dead marriage and the result of a deterioration of any relationship, which should be called alive'.[5] Although the ancient Roman jurists used the term '*separatio*' to refer to it, they latter distinguished between perfect or absolute divorce and imperfect or relative divorce.[6] While the former dissolved the marriage in question whereby the parties regained their rights to enter another marriage, the latter did not guarantee such right to remarry. The practice of divorce is also not uncommon under various Nigerian customary laws even within polygamous marriages subject of course to fulfillment of certain conditions.[7]

It may be worthwhile to note at this juncture, that divorce is quite different from 'nullity'. Where divorce is the real breaking of the marriage tie, nullity means that marriage never existed *ab initio*[8] due to the presence of a prior vitiating factor or non-observance of an essential element or form. In this sense, there was only an 'appearance' of marriage that was not really there. It may not therefore be proper to use the expression 'to annul a marriage' or 'annulment of marriage' without putting the term 'marriage' in inverted commas for such a 'marriage' never had existed.[9] Under

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offence of bigamy under section 380 of the Nigerian Criminal Code, cap C38, Laws of the Federation of Nigeria,2004, an offence punishable by seven years imprisonment), proper consents. The statutory forms are: that genuine preliminary notices and registrations are properly done, marriage is celebrated in a licensed place of worship in the presence of at least two witnesses apart from the officiating priest and within the allowed time frame (8am to 6pm), adequate treatment of caveats if any, issuance of marriage certificate in form E of the Marriage Act, cap M6, Laws of the Federation of Nigeria 2004, etc. Failure to do any of these does not only invalidate the marriage legally though not necessarily canonically but will also subject offender to adequate punishment under the Nigerian laws. The Christian celebration of marriage has however been harmonized to meet up with these legal requirements. For detailed study, see Nigerian Matrimonial Causes Act, Cap. M7 Laws of the Federation of Nigeria, 2004, *and* Marriage Act, Cap. M6, L.F.N. 2004.

[3] A. Unimna, 'Divorce: Always the Most Painful Marriage Problem', *Koinonia* 1, (2001), 87.

[4] C.S Mba, 'Divorce and Remarriage in Nigeria', *Lucerna* 4, 1 (1983), 49.

[5] H. R. Lofton, *Till Divorce Do Us Part: A Fresh Look at Divorce*, Nashville/New York: Thomas Nelson Inc. Publishers, 1973, 15.

[6] Cf *New Catholic Encyclopedia* 4, 928; 9, 3, 8-13.

[7] Technically, under customary laws, there are no specific grounds for divorce since divorce may be effected *simpliciter* by the mutual consent of the spouses. However, adultery, loose character, impotency of the husband or sterility of the wife, laziness, ill-treatment and cruelty, harmful diseases, witchcraft, addiction to crime, desertion etc may lead to divorce. Return of bride price to the husband mainly, can effect such as divorce (E.I Nwogugu , *Family Law in Nigeria*, Ibadan: Heinemann Educational Books (Nigerian) PLC, 1974, 216-224).

[8] P.E. Halleth, *Nullity of Marriage*, London: Catholic Truth Society, 1936, 5.

[9] *Ibid.*, 4.

the Nigerian civil law of nullity, a further distinction with regard to the role of the courts is made between *void* and *voidable* 'marriages'.[10] In void 'marriage', there is no need to seek for a court decree to bring the 'marriage' to an end, so to speak. When however, a decree of nullity is granted in respect of a void 'marriage', the decree being a mere surplusage is merely declaratory of an existing fact. On the other hand, annulment of a voidable 'marriage' is always a result of decree of the High Court of competent jurisdiction annulling the 'marriage' with effect from the date on which the decree becomes absolute (S. 38 (1) of MCA). Hence, the decree has no retrospective effect for until the annulment, the 'marriage' is regarded as valid in civil law. In canon law however, it may be necessary to have recourse to the marriage tribunal in the case of both void and voidable 'marriages' in order for proper investigation to be carried out due to the sanctity and sacramental character of Christian marriages.

Again, divorce (*a vinculo matrimonii*) is different from the term 'separation'. A decree of judicial separation under civil law relieves the petitioner from the obligation to cohabit with the other party to the marriage while the decree remains in operation (s. 41 of MCA). It does not empower him to remarry. This is similar to the provision under the canon law where there can be separation from bed and bench (*separatio a mensa et thoro*) while the bond remains (can. 1152). This is without prejudice to another canonical provision which guarantees dissolution of a non-consummated marriage between baptized persons, a judicial act reserved only to the Pope for a just cause (can. 1142).

Thus, what is meant by divorce in this paper is complete severance of the marital knot that was veritably and validly tied between two spouses. In what immediately follow, we shall consider the ground for divorce under the Nigerian marriage laws.

3. Divorces under the Nigerian Matrimonial Causes Act (MCA), Cap. M7, L.F.N., 2004

An indigenous matrimonial statute with provisions on divorce is relatively a late comer in Nigeria. Prior to 1970, the Nigerian Law on divorce was based on 'matrimonial offence theory' founded as it were on English Law. Thus, changes in English law in this respect became part of Nigerian law as an aspect of colonial legacy. The latest of such English statutes that applied to Nigeria was the English Matrimonial Causes Act, 1965. In England, the matrimonial offence theory dates back to the old protestant ecclesiastical courts. These originally had exclusive jurisdiction in the dissolution of marriages. When in 1817 secular divorce was introduced, the offence theory continued to hold sway. By this theory 'a marriage may only be dissolved when a spouse has committed a matrimonial offence like adultery, cruelty or desertion'.[11] While this was in force in Britain and many of its colonies for a long time, another legislative movement inaugurated in some parts of the commonwealth like New Zealand and Australia began to experiment with the concept of 'breakdown of marriage'.[12] The subsequent study of this new trend by a Review Panel appointed

[10] Under civil law, void marriage is one that has never been in existence and the parties thereto never acquired the status of husband and wife due to presence of invalidating factors even after marriage ceremonials. A voidable marriage, on the other hand, is one that is good while subsisting, but may be annulled at the instance of one or both parties owing to some existing defect. Cf. Lord Green in *De Reneville v De Reneville* (1949) p. 100, 111 (C.A).

[11] Cf. E. I. Nwogugu, *Op. Cit.,* 155. The 'matrimonial offence theory' can also be referred to as the 'fault principle' in which the petitioner is required to prove both the fault of the respondent and the fact that he/she has no fault at all. This is differentiated from the 'no-fault theory' by which once a marriage has broken down irretrievably, it becomes an actionable ground for dissolution irrespective of whether there is fault or no fault on the part of either party. See S.C. Ifemeje, *Contemporary Issues in Nigerian Family Law*, Enugu: Nolix Educational Publications (Nig), 2008, pp. 88-124.

[12] See New Zealand's Divorce and Matrimonial Causes Act. 1920; Australia's Matrimonial Causes Act 1959.

by the Archbishop of Canterbury in 1964 and the further consideration by the English Law Commission gave rise to adopting a compromise solution. Thus, the report[13] of the commission while admitting the introduction of 'marriage breakdown' as ground for divorce retained the old matrimonial offence principle. It was this report that formed the basis of the resultant amending legislation, namely, Divorce Reform Act, 1969.

The Nigerian marriage and divorce law, no doubt, was greatly influenced by the above English reform. The Matrimonial Causes Decree, Number 17 of 1970,[14] which latter became an Act of the National Assembly was promulgated by the then Military Government to replace the English rules, which up till then applied in Nigeria. That therefore became the first autochthonous legislation in the field. The most important highlight of the Act was the introduction of the marriage breakdown principle into the Nigerian law of divorce while at the same time retaining elements of the matrimonial offence principle. Through various stages of compilations, this Act has been known presently as Matrimonial Cause Act, Cap. M7, Laws of the Federation of Nigeria, 2004. This is what we use in this paper.

Section 15 (1) of the Act provides that either party to a marriage may petition for a divorce 'upon the ground that the marriage has broken down irretrievably'.[15] Consequently, the section establishes a single ground for divorce – irretrievable breakdown' instead of several grounds that existed in the old law. Thus, Nigerian courts have interpreted section 15 of the Act as establishing 'irretrievable breakdown of marriage' as the sole ground of divorce. Be that as it may, section 15 (2) stipulates eight facts proof of each of which will enable the court to come to the conclusion that a marriage has irretrievably broken down.[16] This goes to show that the matrimonial offences of adultery, cruelty and desertion have each in a modified form been incorporated in the notion of irretrievable breakdown. It may therefore be congenial to comment on each of those evidences probative of irretrievable breakdown in order to help us do some canonical reflections on them.

3.1 Willful and Persistent Refusal to Consummate Marriage

While incapacity to consummate is a ground for nullity of 'marriage', a willful and persistent refusal to consummate is evidence for dissolution under Nigerian law. Consummation is an act of sexual intercourse in a human fashion after a valid celebration of a statutory marriage. What constitutes willful and persistent refusal to consummate will however depend on the facts of each case. Mere neglect to comply with a request is not necessarily the same as a refusal. It must be shown that refusal was a conscious and free act of the respondent,[17] refusals before which a number

[13] Reform of the Grounds of Divorce: The Field of Choice, CMND, 3123.

[14] The 1970 Nigerian Matrimonial law came into existence as a decree, namely Matrimonial Causes Decree, Number 17 of 1970 of the Federal Military Government under General Yakubu Gowon. It later became an *Act* of the Nigerian Parliament and christened Matrimonial Causes Act, 1970. When the laws of the federation of Nigerian (L.F.N) were compiled in 1990, it became Matrimonial Causes Act, cap 220, Laws of the Federation of Nigerian, 1990. Also in 2004, it changed name into Matrimonial Causes Act. Cap. M7, L.F.N., 2004. All these statutes are in *pari materia* with one another. Generally, 'the above matrimonial causes Acts make provisions for matrimonial causes (Cf. the long title). Apart from the Matrimonial Causes Act, there is also the Matrimonial Causes Rules, 1983, which guides matrimonial actions in the High Court. But for the purpose of this write-up, we restrict ourselves mainly to the provisions of Matrimonial Causes Act, 2004.

[15] *Putting Asunder: A Divorce for Contemporary Society* (1966) London: S. P.C.K.

[16] See *Ezirim v Ezirim*, Suit No. FCA/L/56/78 (UNREPORTED) February 6, 1981, Court of Appeal, Lagos Division, per Nneemeka-Agu J.C.A; *Ojeladi v Ojeladi (1979) 4-6 CCH, 52; Ajai-Ajagbe v. Ajai-Ajagbe* (1978); 10 – 12CCHJ, 183; *Egbueje v. Egbueje* (1972)2ECSLR, 747; etc.

[17] *Hardy v Hardy* (1964) 6 FLR; *Awobiyi v Awobiyi* (1965) 2 All NLC, 200.

of requests, direct or implied, is made and an opportunity to comply with such request existed.[18] For a court to find that there is a willful and persistent refusal to consummate, section 21 of the Act requires it to be satisfied that the marriage had not been consummated up to the commencement of the hearing of the petition.[19]

3.2 Adultery and Intolerability

Adultery is the voluntary sexual intercourse between a spouse and a third party of the opposite sex, not being the husband or wife during the pendency of the marriage. Although, adultery is not an offence under the Nigerian Criminal Code,[20] it can still be privy to divorce petition when the petitioner finds it intolerable to live with the spouse. Intolerability is therefore very vital[21] for the success of any divorce petition based on adultery. This is contrary to what obtained before 1970 when proof of mere adultery was sufficient.

3.3 Conduct which the Petitioner cannot Reasonably be Expected to Bear

For the purpose of this fact, section 16 of the Act mentions commission of rape, sodomy, bestiality, being a habitual drunkard, using to excess any sedative, narcotic or stimulating drug, suffering frequent convictions for crime, leaving the petitioner without reasonable means of support, imprisonment for felony up till the time of petition, conviction for attempting murder or unlawfully to kill the petitioner, or intention to inflict grievous harm on the petitioner, being of unsound mind and unlikely to recover, etc as examples of conducts or behavior for which a petitioner cannot reasonably be expected to live with the respondent. It should however be shown that any or more of the above conducts in question must have occurred since the celebration of the marriage. It must also be shown that it relates to the marriage and must be sufficiently grave. The test of the reasonability on the part of the petitioner is objective and its application is function of the court and not the petitioner.[22]

3.4 Desertion

Desertion is 'the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the spouse'.[23] Hence, four elements must be present to wit, *de facto* separation, *animus deserendi* (intention to withdraw from cohabitation permanently), lack of just cause, and absence of consent of the deserted spouse. A long line of decided cases however

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[18] *Horton v Horton* (1947)2 All England Report, 871, 874.

[19] Matrimonial Causes Act (M.C.A), 2004, section 21; *Oladele v Oladele*, CCCHCJ/12/72, 119.

[20] Under the Criminal Code governing the Old Southern part of Nigeria there is no offence referred to as 'adultery' going through all its 521 sections. Since it is written neither there nor in any other enactment, it does not constitute an offence in accordance with the provisions of section 36 (12) of the Constitution of Federal Republic of Nigeria, 1999. Cf. also *Aoko v Fagbemi* (1961) 1 All N.L.R; 400. However, adultery is an offence under the Penal Code, cap. 89, Laws of Northern States of Nigeria, (1960) guiding the old Northern Region (see sections 387 and 388). Be that as it may, adultery and intolerability can constitute evidence of irretrievable breakdown of marriage between a man and a woman thereby occasioning a divorce under section 15 (2) (b) of M.C.A. 2004. Normally, the co-respondent, that is, the third party with whom the adultery was had, if known by name, is made a necessary party (section 32 (1) of M.C.A; 2004).

[21] *Egbueje v Egbueje* (1972) 2 ECSLR, 749; *Labode v Labode* (1972) 2 CCCHCJ, 107; *Oni v Oni* (1977) 10 YHC, 178.

[22] That is to say, test must be on the standard of the ordinary reasonable man of the society. It will depend on what the ordinary man or woman of the society being in the same circumstance as the petitioner would do.

[23] Cf. Jackson, J. and Turner, C. F (eds.) (1971), *Rayden's Practice and Law of Divorce***,** 9th Ed. London, 165; *Ogbenevbede v. Ogbenevbede (1973) 3 UILR*, 104.

maintain that desertion is not necessarily a 'withdrawal from a place, but from a state of things'.[24] This is true as desertion can occur even where the parties continue to live under the same roof. Be that as it may, the requirement of the Act is that desertion must have lasted for a continuous period of one year immediately succeeding the presentation of the petition. The implication is that this fact would not be actionable once there is a termination of desertion before the petition. Such a termination can arise by offer to return *(animus revertendi)* by the deserting party, supervening consent of the deserted spouse, petitioner's adultery or other misconducts, or a proved insanity of the deserting party.[25]

3.5 Separation and Respondent's Consent to Dissolution

A marriage will also be regarded as broken down irretrievably where the parties have lived apart for a continuous period of at least two years immediately preceding the proceedings and the respondent does not object to a decree being granted.[26] There are therefore two arms of the provision: Living apart for two years, and non-objection to dissolution by the respondent. Let it be noted in this connection that mere physical separation does not constitute living apart under section 15 (2) (e) of the Act. Living apart involves physical separation together with the termination of *consortium* thereby treating the marriage as having come to an end.[27] It will not however amount to 'living apart' if the parties are compelled by the exigencies of external circumstances such as professional or business pursuit, ill health, confinement in jail or outbreak of war. In addition, to found a petition for divorce under this section, the respondent must not have objected to a decree being granted. Any positive act to demonstrated non-objection is sufficient. As for negative acts like silence or omissions, all depends on the peculiar circumstances of each case.

3.6 Three Year Separation

By virtue of section 15 (2) (f) of the Act, a marriage is seen by the courts as having broken down irretrievably where the parties have lived apart for a continuous period of three years immediately preceding the presentation of the petition. Here, the basic concept of living apart is the same as in the two-year separation above. However, the provision of section 15 (2) (f) is differentiated from that of section 15 (2) (e) only by the fact of covering a continuous period of three years, not two, and of not requiring the non-objection of the respondent with regard to dissolution.

3.7 Failure to Comply with a Decree of *Restitutio Iuris Coniugalis*

It is provided in section 15 (2) (h) of the Act that a marriage may be dissolved where the respondent has for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights. This provision will come into effect where the respondent in defiance of a court order, has refused to resume cohabitation even without sexual intercourse with the petitioner for the statutory period.

3.8 Presumption of Death

It is also a fact for dissolution of marriage under the Nigerian law if the respondent has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presuming that the respondent is dead. Continuous absence for seven years immediately before the

[24] Cf. *Pulford v Pulford* (1923), 18, 21 per Lord Merrivale.
[25] Cf. E. I. Nwogugu, *Op. Cit*., 178-182.
[26] Section 15 (2) (e) of M.C.A. 2004.
[27] *Sharp v Sharp* (1961) 2 FLR, 343; *Collins v Collins* (1961), 17. Consortium refers to a number of duties which the spouses owe each other. They include duty to cohabit, to exchange sexual intercourse, to offer mutual defense, to change of name, and to respect marital confidence.

petition together with the petitioner's reasonable belief that the other part was not alive within the said period is therefore quintessential to the effect of this provision.

The above, therefore, constitute the actionable issues for divorce petition under the Nigerian legal system. Once any of those facts is proved to the satisfaction of the courts, one can readily obtain a decree for divorce based on the principle that a marriage though validly celebrated has broken down irretrievably. The effect of such a decree is the dissolution of the marriage bond and right to remarriage by either party. The success of each factor is however subject to whether or not there are defenses or bar to a petition for divorce. While some of these bars are absolute whereby the courts are bound not to issue a decree for divorce, others are mere discretionary in which case the courts can exercise discretion. Hence, while condonation, connivance and collusion are absolute, petitioner's adultery, desertion and conducing conduct are discretionary.[28] Our discourse does not however mean that the Nigerian courts have no regard howsoever for the stability of marriage. Indeed, it has always been the attitudes of civil courts dealing with matrimonial causes to try as much as possible to effect reconciliation between the spouses.[29] This is the jurisprudential reasoning for preceding the decree absolute for divorce with the decree *nisi* during which[30] three-month time interval the courts allow a room for prospects of reconciliation. This is also the *raison d'etre* of the provision at section 30 (1) and (2) of the Act for the 'two year rule' in which except for certain exceptional circumstances no proceeding for divorce may be instituted within two years of a marriage without leave of court. No doubt, the rationale of this rule is not only to deter people from rushing into ill-advised marriages, but also to prevent them from rushing out of marriages as soon as they discovered that their marriages were not what they expected'.[31]

However that may be, the attitude of the courts with regard to the said stability and sanctity of marriage still falls short of the ideal. It is our view that a more appropriate attitude is to be found in Christian canonical provisions. And it is to these very important considerations that we now turn.

4. Canon Law *versus* the Ground of Divorce under the Nigerian Statute

The canonical considerations on the question of divorce under the Nigerian laws should, no doubt, be a function of the proper analysis of the nature of Christian marriages. Although marriage has always enjoyed a unique understanding in Christianity, its nature is more poignantly adumbrated in Book IV, Part 1, Title VII of 1983 revised Code of Canon Law. While delineating its covenantal and sacramental character, canon 1055 (1&2) thereof following article 48 of the Vatican II constitution, *Gaudium et spes*, draws on the rich biblical and theological traditions on the meaning of Christian marriage.

First and foremost, it is by means of a covenant that Christian spouses commit themselves to each other. A covenant (*berith*) in Jewish tradition was an agreement, which formed a relationship equal

[28] See E.I. Nwogugu, *Op.Cit.,* 196-205.

[29] For instance, in considering whether to exercise its discretion in favor of the petitioners' adultery, the court considers, *inter alia*, whether if the marriage is not dissolved there is prospects of reconciliation between the spouses. (*Blunt v. Blunt* (1943) AC, 517.) Cf. also section 1 (2) of the English M.C.A. 1965) which makes special provisions with regard to reconciliation in cases of desertion. In Nigeria's Matrimonial Causes Act, 2004, reconciliation prospects are well provided for in section 11-14 thereof.

[30] A decree of dissolution of marriage is granted in two stages: First is the *decree nisi* after which parties can still reconcile, and lasts for 3 months (section 58 (1) (b) of the MCA, 2004). Second is the *decree absolute* (section 59 *supra)* given after the expiration of 3 months.

[31] Cf. Bucknill, L. J. In *Fisher v Fisher* (1948), C.A, 263-264.

in binding force to that of blood. Consequently, the relationship does not cease with mere withdrawal of consent by one or both of the parties. The notion of covenant with regard to the theological dimension of marriage recognizes the spiritual equality of the spouses and the capacity to enter into an agreement which demands the gift of the whole person, one to another.[32] Once entered into, it no longer depends on the will of the spouses for its existence nor it is simply the sum total of the marital obligations. With the covenant, the spouses become two in one flesh.

Secondly, Christian marriage is a sacrament (can 1055 (1)). Although there is no scriptural evidence of direct institution by Christ, according to Corriden, the sacramentality of marriage is grounded in his saving work.[33] Defined since 13th century as one of the seven sacraments of the new law, Christian marriage images Christ's everlasting union with the church (Eph. 5: 21ff). This explains why unity and indissolubility constitute the essential properties of sacramental marriage between two baptized spouses (can. 1056). It is therefore on the above fundamental principles that one stands to give a canonical response to civil dissolution of marriages in Nigeria.

One of the facts for the so-called irretrievable breakdown of marriage under the Nigerian law is, as discussed above, willful and persistent refusal to consummate. According to canon law, the bond of a non-consummated sacramental marriage is not absolutely indissoluble. Thus, canon 1142 permits that if consent has not been consummated by sexual intercourse in a human fashion (*humano modo*), the Pope can dissolve the bond, permitting the parties to marry again. The 1917 Code at its canon 119 refers to this papal power as *dissolution by dispensation*. But this is not without some academic problems: Can this papal act be a type of divorce? Is there really a real marriage without consummation? What makes a marriage after all? It is actually the determination of the latter question that in the Middle Ages set the theologians respectively of Paris and Bologna into debating camps. While the former say that mere *consent* is sufficient, the latter maintain that consummation is necessary. Be this *consensus* – *copula* debate as it may, the papal dissolution of non-consummated marriage is unique in itself deriving as it were from the vicarious power of the Pope which he cannot delegate to any person. Besides, the canon law envisages a proportionately just cause for dissolution of the bond in this regard. A greater pastoral good should result from the dissolution than from the marriage's continued existence. Thus, this canonical effect appears to agree in many ways with that under the Nigeria law on non-consummation. It however fundamentally differs from it as the term 'divorce' is not part of the Church's canonical lexicon and praxis.

But it is on the effect of adultery even if intolerable by a spouse that the canon law and the Nigeria law disagree *in toto*. No doubt, adultery being a derogation from marital covenant itself has always been considered in Christian and non-Christian traditions as an ultimate offence against the marriage relationship and the right to fidelity enjoyed by spouses. In fact, according to Corriden, just as the union of the two in one flesh is effected and symbolized by sexual consummation, so too the rupture of this union is symbolized by intercourse with a third party'.[34] But in spite of its gravity, intolerable adultery cannot lead to the dissolution of Christian sacramental marriage, as it tends to do under civil law. Canon law appeals to the essential covenant element of Christian

[32] J. A. Corriden, J.J. Green & D. E. Heintschel (eds.) (2001), *The Code of Canon Law. A Text and Commentary*, London: Geoffrey Chapman, 740. See also S. O. Eboh (2004), *An Introduction to Canon Law: Reflections for the African Church*, Port-Harcourt: Heb-Uni-Global Publ., 83-90; S. O. Eboh (2002), *Implications for Marital Consent*, Enugu, Snaap.

[33] *Decretum Pro Armenis*, Ench, 695; Trend, session VII, C.

[34] J. A. Corriden *et al, Op. Cit.,* 820.

forgiveness. The canonical jurisprudence behind this is that marital union is not merely founded on sexual union but on a more comprehensive joining of the spouses that is based on Christian charity. Besides, the canon law and Christian theology consider the good of the family as a motivation for forgiving the adulterous spouse.

It is on the above ground that the only canonical remedy available in this regard is 'separation' which does not in any way break the bond. No wonder canon 1152 (1) encourages forgiveness by the injured spouse though at the same time allowing him/her the right to severe conjugal living if condonation is not possible, subject of course to the fact that there will be no remarriage by either spouse.

Furthermore, there is a striking commonality of observation by both civil and canon laws of certain manner of behavior that can render conjugal life quite unbearable. Section 16 of he Act specifically mentions, *inter alia*, attempts to murder and assault the petitioner, habitual and willful failure to support same, frequent convictions etc as such manner of behavior. In the same manner, canon 1153 (1) recognizes the possibility of either of the spouses causing serious danger of spirit and body to the other or to children, or otherwise renders common life too hard. Yet, despite the similarity of these observations, the two legal systems differ on the effect of these behaviours on the stability of marriage. While civil law regards them as veritable facts for outright divorce suits under section 15 (2) (c) of the Act, canon law looks at them as possible grounds for mere separation either by virtue of a decree of the diocesan Bishop or by the injured party *suo motu* if there is danger is delaying. But to demonstrate that this separation comes only as a last resort, canon 1153 (2) enjoins a restoration of conjugal living once the reason for the separation ceases to exist. (cf. also can. 1695). However, the fact of separation even if protracted does not guarantee a right to remarry on the part of either spouse. This is quite in accord with the indissoluble nature of Christian sacramental marriage.

More still, even though *desertion* with all its ingredients can found a petition for divorce under section 15 (2) (d) of the Act, its effect is restricted to a peculiar circumstance in canon law, namely, granting of Pauline privilege. Canon 1143 (1) states that 'a marriage entered into by two non-baptized persons is dissolved by means of the Pauline privilege in favour of the faith of the party who has received baptism by the very fact that a new marriage is contracted by the party who has been baptized, provided non-baptized party is said to have departed if he or she does not wish to cohabit with the baptized party without insult to the creator'. On a deeper consideration however, one notices a wide gap between the attitudes thereto of the two legal systems. While in civil law, *desertion/departure* is evidence of irretrievable breakdown of marriage, in canon law, the idea is invoked only in relation to the question of danger to the faith of the baptized or in case of insult to the creator. Besides, the consequent dissolution of the prior non-sacramental marriage of the non-baptized persons by the subsequent marriage of the now baptized is a privilege of faith (can. 1150) that is grounded in scriptures. Hence in 1Cor: 12-15, Apostle Paul advised coverts to depart if their unbelieving spouses refused to continue married life in peace, subject of course to the fact that the baptized party would not be the culpable cause of the separation.

There is also no gainsaying that separation without the consent of the other spouse for either two or more years can under certain circumstances be a veritable factor for a divorce petition by virtue of section 15 (2) (e) & (f) of the Act. But it is not necessarily so under the provisions of canon law. This is clearly demonstrated by the stringent canonical procedures involved in seeking for a relief to remarry even when there is a presumption of the death of a spouse. Under section 10 (2) (a) of

the Act, a petition brought under a presumption of death due to an absence of a spouse for continuous period of seven years preceding the petition can readily found a decree for divorce. Under the Church law however, canon 1707 (1) provides that 'whenever the death of a spouse cannot be proved by an authentic ecclesiastical or civil document, the other spouse is not considered free from the bond of marriage until after a declaration of presumed death is made by the diocesan bishop'. No doubt, this provision must have been influenced by the ruling of Pope Clement III that a woman whose husband has been missing for many years was not free to remarry unless she received some certain news of her husband's death'.[35] Be that as it may, the diocesan bishop can make a declaration of presumed death only after appropriate investigations have enabled him to attain moral certitude of the death of a spouse either from the deposition of witnesses, from rumor, or from circumstantial evidence and indication. Otherwise, the general rule in canon law is that mere absence of a spouse, even for a long time, is insufficient for the purpose of dissolution of a valid sacramental marriage (canon 1707 (2).

5. Indissolubility of Christian Statutory Marriage: A Challenge before the Nigerian Civil Courts.

What we have just done is a juxtaposition of the seemingly parallel and related provisions of the canon law with the facts of irretrievable breakdown of marriage in view of divorce under the Nigerian matrimonial laws. Our discourse reveals an existence of a world of difference between the submissions of the two legal systems with regard to the effect of those facts on a valid marriage. This can hardly be surprising since the two systems are products of two different sources in their concerns towards marriage. While the Christian Church, especially Catholic, traces the ordination of marriage to God himself, the Nigerian matrimonial law is a positive law made by man. In Christianity, the natural marriage between a man and a woman is further raised to the status and dignity of a sacrament by a divine act. It therefore calls for a special intervention of God himself who sustains it. As a sacrament, Christian marriage becomes a channel of grace and a means of worship. It is this that gives rise to the need for stability especially for the good of the children produced by the marital union.

It therefore goes without saying that the idea of divorce cannot be entertained by any Christian church worthy of the name nor can it be thought of by any witnessing Christian. This Christian attitude is clearly based on the scripture. The prophecy of Malachi, chapter 2, verse 16 contains the voice of God thus: I hate divorce'. In the New Testament which is a radical fulfillment of the Old, Christ said his mind on the issue of divorce. Hence, in the gospel of Mark, chapter 10, verses 11 to 12, he says: Whoever puts away his wife and marries another woman commits adultery' (cf. also Mt. 19: 9; Lk. 16: 18). Biblical studies reveal that the bill of divorcement permitted by Moses in Deuteronomy chapter 24, verse 1 was merely to circumvent the hardness of the heart of Israelites for whom divorce is occasioned at every least provocation. Thus, the *Mosaic* permission was a mere concession in view of a lost ideal. It has to be remembered that it is this question on possible grounds of divorce that divided the Jewish rabbinic institution into camps – the school of *Shammai* and school of *Hillel*. While the former was stricter, the latter was more liberal.[36] But the ideal of

[35] *Ruling X, IV, I, 19; Corpus Juris Canonici* 11, 668 Cited in J. A Corriden *et al*, *Op. Cit*., 1018.

[36] According to the school of *Shammai*, 'a matter of indecency' was strictly interpreted to mean adultery and adultery alone, and not for any other reason could a wife be put away. On the other hand, the school of *Hillel* interpreted the expression in the widest possible sense. A man could divorce his wife if, for instance, she spoiled his dinner, if she spun or went with unbound hair, or spoke to men in streets etc. A leading proponent Rabbi Akiba even went the length in explaining the clause 'if she finds no favour in his eyes' to mean that a man could divorce his wife if he

marriage, according to Barclay, is to be found on the unbreakable, perfect union of Adam and Eve.[37]

Moreover, the insincerity of the Jewish practice is demonstrated in the fact that women more often than men were ready victims of divorce.[38] In a culture where women are regarded as chattels, divorce becomes an avenue for women subjugation as evident in the totality of that heritage than an exercise in the obedience to God's law. Thus, Christ as an avowed liberator of the oppressed condemns divorce in no uncertain terms based on a clearly well defined divine intention: 'male and female, God created them' (Gen. 1: 27). It is because of this Christ's stance that the Catholic Church more than any other holds firm to the deposit of faith on stability of Christian marriage despite the protestation of some of its dissenting moral theologians. These argue, albeit erroneously, that once there is no love lost between spouses, a reasonable ground for dissolution shall have been attained.[39]

It should also be noted that the Christian understanding of and intention for marriage is deeper for which divorce, for whatever reason, should be frowned at. Beyond a mere contractual agreement, even though one *sui generis*, Christian marriage is a covenant and a sacrament. Rather than a relationship based merely on offer and acceptance, consideration and specific performance, for which one can, under the law of contract, talk of a breach, it is a commanded love rapport between spouses. Therefore, in our view, even the civil courts are not immune to the divine prohibition: what God has united, may no man put asunder'. It should thus be open to the courts may be *via* statutory amendments, to decline jurisdiction to entertain issues of divorce especially on marriages between two baptized Catholic parties. Dissolution of any sacramental marriage clearly belongs to God alone either through death of a spouse or by the non delegable vicarious power of the Pope in the case of a ratified but non-consummated marriage, which power is an aspect of the power of the keys given to the Pope by Christ himself who is God. No man or any human panel ought to assume that power.

That is not to say that the Nigerian Courts should have nothing to do with any matter on statutory marriage even if it is sacramental. There is no gainsaying that the church and canon law recognize the importance of civil courts in resolution of family disputes arising from marriage relationships. Matters, for instance, on inheritance, support for the children after judicial separation, settlement of property after dissolution, ordeals encountered by widows, legitimacy or illegitimacy, adoption of children, etc can more properly be determined by the civil court. This is because the civil court is certainly more equipped to stand to this task by virtue of the unique methodologies of its adjudicatory processes and coercive apparatuses. But beyond this, it seems the courts play God in

found a woman whom he liked better and considered more beautiful (Cf. W. Barclay, (1975), *The Daily Study Bible:* The Gospel of Mathew, Vol. 2, Chapter 11-28, Scotland: Saint Andrew Press, 198-199).

[37] *Ibid.,* 205.

[38] In the eyes of Jewish law, a woman was a thing being a possession of her father if not yet married or of her husband after marriage. She had technically no legal rights. A woman may be divorced with or without her consent, but a man can be divorced only with his consent. The woman could never initiate the process of divorce. She could not divorce, she had to be divorced. (See W. Barclay, *Op. Cit.,* 197). Old Roman law too shared in this gender sentiments.

[39] Cf. for example Charles Curran and latter Bernard Haring. Curran's view on the question of divorce is well delineated in his *Contemporary Problems in Moral Theology* (1970), Indiana: Fides Publishers Inc., 147. The orthodox positions are contained in the magisterial teachings such as Pope Pius XI)1931), *Castii Connubi*. Pope John Paul II (1981), *Familiaris Consortio***,** Vat II, *Gaudium et Spes***,** 48., etc.

any attempt at dissolution of sacramental marriage which knot is tied by God himself. As intended by him, the family is a place of worship and communication of faith being a domestic church.

Yet, the need for family's stability and preservation is not only a demand of Christian faith; it is equally a necessity for genuine societal development. Sociologically, the family is the basic stratum of any society and a veritable agent of socialization and transmission of culture. It is therefore only reasonable that such an institution would be allowed to last. But according to Pope Benedict XVI, 'marriage and the family are neither in fact a chance sociological construction nor the product of particular historical and financial situations. The question of the right relationship between man and woman is rooted in the essential core of the human being'.[40] The stability of marriage as an institution should therefore not be unduly interfered with by the society or any authority, judicial or non-judicial. Hence, as an elementary truth of our shared humanity, the human authority should respect not only the Christian sacramental marriage but also all valid marriages for the good of the individual and of society.

6. Conclusion and Recommendations

From the above discourse, it is clear that marriage is not the result of human caprice or ingenuity. The common denominator of all marriages across cultures is the fact of having a religious and sacred character. But further in Christian marriage, Christ has made the sensible and covenantal union of man and woman the source of something sublime, above and beyond its merely human beauty, sexual accessibility and exclusivity, natural nobility and matrimonial dignity. In other words, he fashioned a sacrament out of marriage. And it is elementary Christian theology that a sacrament is an outward sign of inward salvific grace merited for man by Christ, albeit, on the cross. Thus, Christian marriage being an effective instrument of salvation cannot really be dissociated from the cross. That means that in some cases, petition for civil divorce can certainly be a rejection of the cross, for there is no doubt that sometimes the married life can develop into a visible and very trying cross. In the event of this, the genuine Christian, in our view, ought to see this state of affair as an opportunity for sacrifice and selflessness.

There is no doubt that the second Vatican Council mentions at least three reasons why marriage is indissoluble (G. S. 46-48). In the first place, divorce is opposed to the good of the spouses (*bonum conjugum*). For it frustrates the objective of mutual assistance and completion in love, marital security and surrender, and the totality of self disclosure and trust in marriage. In its psychological structure, marital love strives after permanency even in the most trying and attenuating circumstances. This is why the liturgical formula for the exchange of consent requires a relationship that endures whether in time of riches or poverty, in health or sickness, for better or for worse, till death do them part.

Secondly, divorce is prejudicial to childbearing in general and to children already born in particular. It is thus inimical to the procreative good (*bonum proles*). Abundant evidence exists too to demonstrate the havoc wrought on the young and society at large where civil divorce is liberalized.

Thirdly, since Christian marriage in particular reflects, mirrors and symbolizes the loving and living union of Christ with the Church, it seems that to petition for divorce is to invariably petition for the dissolution of the union of Christ with the body of Christians. What an absurdity!

[40] Pope Benedict XVI (2005), *Do Not Obscure the Value of Legitimate Family*, Congress of the Dioceses of Rome.

Therefore, it is only necessary that to forestall the above problematic, all hands both of families, society, the Church and government agencies, must be on deck to help and assist families to attain and achieve stability. Therefore, the following recommendations may constitute a panacea.

1. The Church has an onerous duty to teach its adherents that Christian matrimonial bond is not in any way affected by the civil action of divorce. In Christian marriage, it is the grace of God that is in question; and a Christian cannot petition the state or any of its agencies to suspend or remove the gift of God. Such an action would certainly be presumptuous, null and void, and of no canonical effect. For a genuine Christian, any civil effect of Christian marriage should always be distinct from the bond of marriage.
2. The Church should also teach the faithful that man is made up of body and soul, the visible and invisible aspects. The good Christian should not construct his/her life as if human life is earth-bound. The Christian should be convinced that whether problem or no problem in marriage, the supreme law is the salvation of the soul (*Salus animarum suprema lex*) – canon 1752.
3. The Church also has a basic pastoral duty to present marriage as an indissoluble union of persons in a relationship where they pursue perfect union of mind and full communion of life between themselves and with the Church. They do this not only by charting out programmes of more intensive pre-marriage instructions and counseling but also after marriage, adequate pastoral care of the married.
4. But above all, there is the need to effect an amendment in Nigerian marriage laws. Provisions on divorce should be expunged in the light of the invaluable gains of stability of marriage for the development of individuals and society at large.

Finally, the problem of divorce is an existential challenge to everybody – pastors of souls, the judiciary, lawyers, marriage counselors, theologians, social scientists, and so on. Nobody is free to do Pilate's hand-washing in this matter.[41] This is particularly so, as divorce far from remedying marital breakdown when it occurs, serves instead to encourage it.[42]

[41] Cf. Mtt. 27: 2ff; John Paul II (1981) *Familiaris Consortio*, 85.
[42] R. Nowell (1984), 'Divorce – Symptom or Disease', *Doctrine and Life*, 450.