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Examination of Matrimonial Remedies/Relief Under the Matrimonial Causes Act

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Abstract: *The importance of marriage between spouses has brought shout legal rules in every society in protect the legal union between spouses. The principal enactment in this respect in Nigeria is the Marriage Act and the Matrimonial Causes Act. The Matrimonial Causes Act (MCA) guarantees some safeguards in the manner of Judicial Separation, Restitution of Conjugal Rights, Jactitation, Maintenance, Custody and as a last resort, Dissolution of Marriage and Settlement of Properties. Though several reliefs avail spouses of statutory marriage in Nigeria, a number of these reliefs have proven inadequate overtime. The law on matrimonial causes in Nigeria has remained without appreciable improvement since the promulgation of the Matrimonial Cause Decree in 1970. In Nigeria, the law relating to alimony and settlement of matrimonial properties upon divorce, for instance, is a million miles away from reality and expectations of the society. This research work is basically aimed at examining some of the reliefs available to spouses of statutory marriage in Nigeria with a view to analyzing the scope and limitation inherent in these rights in the face of development in other jurisdictions. In order to achieve this aim, the research adopts the doctrinal research method which involves the use of both primary and secondary source material in dealing with the subject under review. The research demonstrates that a number of the available legal reliefs under the Matrimonial Causes Act are inadequate, and not in tune with development in other climes. The law on this has been unprogressive and the interpretation of these rights unimpressive in Nigeria. The research therefore makes a case for the review of some of the reliefs with a view to amending the law to give sufficient latitude to an elaborate and progressive interpretation of the law on the issue. Thus, the research work recommends that the Legislature or the Nigerian Law Review Commission should as a matter of urgency set legal machineries in place for a review of the Matrimonial Causes Act with the aim of improving on some of the reliefs in order to meet with societal expectations and reality of time*

INTRODUCTION

Marriage is one of the most sacred unions in human existence which is recognized and respected all over the world. It is a social institution that is founded on, and governed by cultural, social and religious norms

of the society where the couples reside. Marriage from biblical point of view was and is still seen as the first step towards the formation of a family.

Before the advent of colonial rule, there were different systems of marriage throughout Nigeria such that every culture has its own unique practices and customs. However, from the cession of Lagos to the British crown in 1861, matrimonial Causes in Nigeria were govern by English Law. The matrimonial Causes Act in Nigeria, a party who prays the court for an order of dissolution of a marriage must prove by credible evidence any of the grounds he or she is relying upon in establishing that the marriage has broken down irretrievable. With the high rate of divorce cases in recent time, there are concerns as to the extent and laws regulating the sharing of properties of the marriage during divorce proceedings. There is no doubt that the parties may have acquired properties before or after the marriage and the fear of losing these properties is likely to set in. During the proceedings for dissolution of marriage, the parties may be faced with the problem of how these properties should be shared. these properties may be in form of real estate, money, jewelry etc. The Matrimonial Causes Act contain provisions defining the extent of the properties to be shared, and the persons entitled to benefit from the settlement amongst other provisions.

Settlement of property is not peculiar to Nigerian jurisprudence as the laws of many countries in the world make provisions guiding how the properties of a marriage may be shared. It must be admitted that these laws have their unique differences as what is obtainable in Nigeria may not be obtainable in other jurisdictions. In April, 2023, news went around of a Moroccan footballer, Achraf Hakimi whose wife, Hiba Abouk filed a divorce petition claiming half of his entire wealth. According to the report, unknown to her, Achrad Hakimi did not own any property in his name as he had registered his properties under his mother's name.[1] This is just one of the many uncertain circumstances that may arise in respect of the settlement of properties. A good understanding of the legal position in respect of the settlement of properties in Nigeria and an insight into the law and practices in other jurisdictions will help in reducing the uncertainty of parties to a marriage as to the fate of properties of the marriage upon dissolution of the marriage.

Statement of the Problem

With the increase in the rate of divorce in Nigeria, concerns have been raised regarding the extent, proportion and provisions of the law on how the properties of the marriage should be settled between the parties after divorce including their children in certain circumstances. This concerns have transcended to the unwillingness of some persons to go into statutory marriages for the fear that the spouse of the marriage would be give half and in other cases, the whole of the properties of the marriage.In the family, there are diverse issues that may arise within the unit after it has been built and the reliefs or remedies available under the Matrimonial Causes Act are inadequate to properly address certain issues that may arise in the union most especially when such a union has broken down irretrievably. The remedies are not broad enough to encompass and address the family issues that may arise in the event of the broken down of the

[1] Adeuyi Seun, "Divorce: Hakimi's Wife Loses Out as Player Registers all Assets in Mother's Name" *(Daily Trust,* 14 April, 2023) <http://www.dailytrust/divorce-hakimis-wife-loses-out-as-player-registers-all-assets-in-mothers-name/> accessed 24 April, 2023.

marriage.Furthermore, reliefs in the Matrimonial Causes Act are not adequately enough to address the future needs in the family as it pertains to the children of the marriage. The problem of this research therefore is "Why are there still inadequacy in the Matrimonial relief when Matrimonial Causes Act is enacted to address such inadequacy?

Aim and Objectives of the Study

The general aim of this research is to examine the adequacy or inadequacy of Matrimonial reliefs remedies under the Matrimonial Causes Act.

Specific Objectives of the Study

The specific objectives of the research are to:

i. examine the conceptual and legal element of marriage under the Matrimonial Cause Act.
ii. examine and analyze the available matrimonial reliefs under the Matrimonial Cause Act.
iii. to investigate the seemingly shortfall inherent in the present reliefs under the Matrimonial Cause Act.
iv. suggest possible way forward in addressing the shortfall in the Matrimonial Cause Act.

Methodology

Method is the various techniques involved in the process of achieving objective. Methodology is the science of method. In legal research, there are two basic methods, the doctrinal and non-doctrinal methods. Doctrinal method refers to researching into the law as it is in the books while non-doctrinal method is researching into the actual working of the law in the society. In this research, the researcher adopted the Doctrinal research method. This type of research method entails the retrieval of all necessary sources materials from both primary and secondary sources dealing with the subject matter. This include relevant domestic legislations, international instruments, judicial decisions, textbooks, legal encyclopedia, magazines, newspaper, internet materials etc.

Scope of Study

The issue of family and marriage is very broad as it affects all and sundry. However, the scope of this research work is limited to the examination of matrimonial remedies/reliefs under the Matrimonial Cause Act.

Significance of the Study

This research is an examination matrimonial reliefs/ remedies Matrimonial Cause Act. This research will reveal the available reliefs under Matrimonial Cause Act. And lacuna or shortfalls in them.

Literature Review

Sagay is his book, Nigeria Family Law[2] treated statutory marriage and customary marriage; looking at the issues like preliminary matters, formal and essential validity, nullity- void and voidable marriages and grounds for divorce. The focus of Sagay is mainly on principles, cases and commentaries on statutory law

[2] Sagay – Nigerian Family Law Principles, Cases, Statutes & Commentaries (Malthouse Press Ltd. 1999).

marriage. He also reported in full, cases that show that Christian religion has little or nothing to do with legal marriage. Cases like *Agbo v Udo*[3] and *Anyaegbunam v Anyaegbunam*[4] were reported in full and analyzed, began the issue of marriage by stating that "marriage is a universal institution which is recognized and respected all over the world. As a social institution, marriage is founded on, and governed by the social and religious norms of the society". He explained statutory marriage, divorce, judicial separation.

Asein provide a historical background of customary and statutory law, what existed before and what came after and by what instrumentality were customs and statutes coexist and the dichotomy that exists among them. Asein provides an understanding of the dynamic between the legislatures and the judiciary and the interpretation of the law by which they play.

Onokah treated extensively the relationship between church marriage and statutory law marriage in the sense that the ministers must make themselves familiar with the marriage laws and to see that the people who come to them to be married understand their legal position.

Nigel Lowe & *Gillian Douglas* in Bromley's Family Law[5] traced the historical background of statutory law marriage. The book emphasized that the development of the civil law in the area of marriage was under the guidance of ecclesiastical court which before the separation of the two courts had the exclusive jurisdiction on matrimonial issues. This history emphasized the influence of Christian Religion on the statutory marriage but did not show how Christian Religion influenced the statutory marriage with the Christian doctrines. This book view marriage from the western backgrounds.

Kolayo On Customary Law in Nigeria,[6] it is a fourteen chapters' book on customary law in Nigeria. Chapter one capsulated the meaning and characteristics of customary law. Chapter two discussed the validity of customary law, chapter three dealt with proof of customary law, chapter four dealt with application of family law, chapter five considers coexistence of statutes, common law and customary law, chapter six discussed general characteristic of family property, chapter seven dealt with determination of family property, chapter eight discussed issues of acquisition of land under Bini customary law, chapters nine ten and eleven discussed succession and property chapter 12 dealt with arbitration under customary law.

Emiola, the Principles of African Customary Law.[7] It is a ten chapters' book which focused mainly on the principles of African customary law dealing with various aspects like nature and Concept of Law and Society, Special features, African legal System, Status and Legal Rights of Kings and their Subjects, Customary Judicial System, the Law of Family. Chapter six relates with this dissertation as it discussed

[3] (1944) 18 NLR 152.
[4] (1973) 4 SC 121.
[5] Nigel Lowe & Gillian Douglas in Bromley's Family Law (9th Ed. Butterworth, 1998).
[6] A.A. Kolayo Customary Law in Nigeria, Through the case (Revised Ed. Spectrum Books Ltd. 2001) pp. 235-247.
[7] Akintunde Emiola, The Principles of African Customary Law (2nd Ed. Emiola Publishers Ltd. Nig. 2005) pp. 89-111.

African traditional marriage and their principles, like betrothal, capacity of the parties, consent, marriage consideration, solemnization of marriage, consummation of the marriage.
Tonwe and *Edu*, Customary Law in Nigeria.[8] this is a twelve chapters' book dealing with customary law in Nigeria. chapter one dealt with African society organization and structures, chapter two discussed the proof of customary law while chapter three discussed the validity of customary law, chapter four discussed conflict of customary law and English law, chapter five dealt with status and capacity and their legal relations. Chapter six dealt with the law of wrongs, while chapter seven discussed customary judicial process chapter eight discussed African family. Chapter nine discussed customary mortgage or pledge of property and tenancy. This research have examined matrimonial remedies/reliefs under Matrimonial Act. *Cretney* and *Masson*, in their book, Principles of Family Law,[9] discussed marriage under the English law completely leaving out customary law marriage which is recognized in Nigeria. although it is a foreign book with foreign peculiarity, this dissertation have discuss both English and customary law marriage with further explanation on available reliefs under Matrimonial Act.

Literature review shows the existence (if at all) of other works in the area of research and also shows the viability of the research topic. In Nigeria, there exist a number of works on matrimonial reliefs in one form or the other, the researcher has examined several textual works in this study in order to ascertain what particular area is still fallow and unplugged.

After the pioneer study of *Kasumu* and *Salascuse,*[10] Nigeria Family Law, a number of changes took place in the field of both Judicial decision and statutory law. Most fundamental change was initiated by the Matrimonial Causes Decree of 1970, which represent the first indigenous legislation on the subject. This Decree put an end to the erstwhile incorporation into our law, of English Matrimonial Causes enactment since 1857 as well as the judicial divisions based on such English laws.

The Matrimonial Causes Decree of 1970, marked the starting point of the quest for an indigenous law on matrimonial causes to suit local circumstance in Nigeria. In 1974, the first comprehensive text on family law in Nigeria was published by *E.I. Nwogugu.*[11] The publication of the book was prompted by the far-reaching change, effected by the Matrimonial Causes Decree of 1970, and also as a result of the need for a comprehensive volume dealing with all aspect of the subject. In order to enlarge the scope of information to students, researchers and practitioners alike, a revised edition was published in 1989. The revised edition is made up of sixteen chapter of four hundred and forty-one pages. The book discussed Marriage in Part 1, Matrimonial Relief in Part II, Relationship Between Parent and Child in Part III, and the Family and Property in Part IV. However, the author did not discuss the shortcomings of some of these reliefs in his book and this will be discussed in this dissertation.

[8] S.O. Tonwe and O.K. Edu Customary Law in Nigeria (1st Ed. Renaissance Law Publishers Ltd., Lagos Nig. 2007) pp. 151-163.
[9] S.M. Cretney and J. Masson Principles of Family Law (5th Ed. Sweet & Maxwell, 1990).
[10] Kasumu and Salascuse, *Nigeria Family Law*, (London: Butterworth's 1966).
[11] Nwogugu E.I. *Family Law in Nigeria*, Heinmann Educational books (Nigeria) plc, (1974).

Adesayan's[12] provided a comprehensive study of laws relating to marriage and divorce in the light of the Matrimonial Causes Decree.[13] It is to his credit that he has in a most painstaking way stated and discussed the various issue involved, and also analyzed them in a way most palatable or suitable to the lawyer and layman alike. However, some of the chapters that were most useful in the book are the chapters dealing with the recognition of foreign matrimonial decrees; the jurisdiction of courts in Nigeria over matrimonial causes, the ground for divorce and the interplay of the various matters which should be used in support of those grounds; the various facets of desertion and the place of that concept under the Decree; the bars to matrimonial petition; the import and legal effect of void and voidable marriages, especially in the context of petition for nullity; the rules of evidence and proof in matrimonial proceeding. Indeed, these issues are discussed in a manner rarely excelled by any contemporary writer on the subject. Despite these facts, however, no shortfalls of the reliefs were discussed.

Onokahs[14] book is arranged into four parts. Part 1 deals with the historical analysis of family law and the courts administering it, and contains Chapters One and Two. Part II deals with marriage contracts and incorporates Chapter Three, Four and Five. Part III is concerned with the termination of marriages and the consequent property relations of the spouses, and therefore contains Chapters Six, Seven, Eight and Nine. The final part which is Part IV is on succession and embodies Chapter Ten, Eleven and Twelve. Furthermore, chapter one deals with concept of pluralism and traces the historical development of the dualistic law of marriage with particular emphasis on traditional marriage norms. Chapter two examines the development and operation of the dual court system from the late 19th century. Chapter Three and Four considers the celebration of marriage under customary law and marriage under the statute respectively. Chapter five covers the contracts of marriage under both customary law and the statute by the same couple- a state of affairs, which has been labeled "double deck" Marriage by the author. Chapter six and seven dealt respectively with the termination of customary law and statutory marriage as well as the custody of the children of the marriages. Chapter eight considers the law on maintenance, settlement and property right of the parties to both customary law, and Act marriage; and lays emphasis on the influence of customary marriage law on the courts in their award of maintenance order under the Acts. Chapter Nine discusses the attitude of the courts in the divorces of "double-deck" marriages. The book attempted a detailed analysis of theoretical controversy surrounding the termination of such marriage contracts. Chapter Ten and Eleven examined testate and intestate succession respectively under the dualistic system. Finally, chapter Twelve dealt with the conflicting rules on legitimacy and legitimization. Much effort was put in by the author to discuss exhaustively the topic contained in the different parts of the book. The book pointed out some of the inherent difficulties in the pluralism of Family Law (the one Statutory, and the other customary), as well as in the dualistic system of court, adjudicating the law on marriages. This work did not examine the pitfalls of these reliefs.

Ernest Ojukwu and Chidi Nelson Ojukwu[15] book in Part V, which is the last part deals with Matrimonial Causes with respect to statutory marriage and embodies Chapter sixteen, which deals with the introduction

[12] Adesayan S.A. *Laws of Matrimonial Causes;* (Ibadan: University Press 1873).
[13] No. 18 of 1970.
[14] Margaret Chinyere Onokah, *Family Law* (Ibadan: Spectrum Books Limited, 2003).
[15] Ernest Ojukwu and Chidi Nelson Ojukwu *Introduction to Civil Procedure* Third ed. (Abuja: Helen Roberts Limited, 2009).

of matrimonial causes, jurisdiction, nullity of void marriages, nullity of voidable marriage, dissolution of statutory marriage, institution of petition for dissolution of marriage, custody of children, maintenance, setting down suit for Trial, Decree Nisi/Decree Absolute, Judicial Separation, Restitution of conjugal right, Jactitation of marriage and finally the service of process with respect to petition for dissolution of marriage under the statute. Moreover this Chapter also contains extract from the Matrimonial Causes Act.[16] A review of this book has clearly highlighted the need for a research work to bring into focus on a critical appraisal of the available matrimonial reliefs under the Matrimonial Causes Act 2004, in Nigeria especially in the aspects of judicial separation, nullity of void and voidable marriages, jactitation of marriage and restitution of conjugal rights.

Dike E.A. and *A.G. Agu*[17] It provides the definition of the term "family" and various types of family. It also engages in a detailed analysis of marriage under customary law, Islamic law and under the Act. In addition, it discussed the incidents of marriage and other relevant topics under Family Law. The Marriage Act and the Matrimonial Causes Act are annexed. A review of this book has shown that there is need for a legal appraisal of the matrimonial reliefs under the Matrimonial Causes Act.
A study of the Marriage Laws in Nigeria cannot be carried out without reference to foreign literature as it is by reviewing some of them that the lapses in our marriage Laws would be identified.
Arthur Phillips and *Henry F. Morris.*[18] Section 1 deals with the customary marriages and contains the study of indigenous marriage law; recognition and application of native law, polygamy and bride price, capacity and consent; formalities of marriage and divorce and Matrimonial Causes. Section II is concerned with Islamic marriage and consists of marriage according to Mohammedan Law. While section III is on statutory marriage and is made up of the option of statutory Marriage; the obligation of Monogamy; capacity to contract statutory marriage; procedure for celebration of statutory marriage; legal consequence of statutory Marriage and Divorce Law and the matter of court Jurisdiction.
Olive M Stone[19] is a comparative account of the law of domestic relation in England and Wales in the last quarter of the twentieth Century. It is made up of ten chapters of 277 pages. The book is exhaustive but not adequate in terms of the grounds for dissolution of marriage under the Matrimonial Causes Act, in Nigeria

Another relevant literature on the issue is the book titled: By F.O. Oho, JCA and K.O. Edu, especially Chapter 10 and 11 dealing on Settlement of Matrimonial Properties upon Divorce: Challenges and Need for Reform in Nigeria and some other common wealth Countries in Africa by Brown E. Umukoro, this book favourably addressed the researcher view in respect to the settlement of matrimonial property upon

16 Cap M, Laws of the Federation of Nigeria and the Matrimonial Causes Rules 1993.
17 E.A. Odike and A.G. Agu *Modern Nigerian Family Law* (Enugu: Rich Field & Frank, Law and Science Publisher Ltd. 2003).
18 Arthur Phillips and Henry F. Morris, *Marriage Laws in Africa*, (London: Oxford University Press: 1991).
19 Olive M. Stone, Family Law (London: The Macmillan Press Ltd. 1977).

divorce.[20] However, the author did not discuss the other available reliefs and their shortcomings under the Matrimonial Causes Act. Some of these shortcomings will be discussed in this dissertation.

The Concept of Marriage

Marriage is a social institution founded on and governed by social and religious norms of society. A graphic exposition of the development of the institution of marriage was given by *Mohammed JSC* when he stated that:

> It (i.e marriage) originated in form of irregular unions. There were marital unions through capture, slavery and purchase. Many of such primitive customs have gradually given way to the accepted form of marriage by agreement[21]

Okumagba, writing on the Urhobo people of Nigeria stated that marriage is a social obligation, which should be carried out by every young man.[22] Confirming the fact that marriage is a social obligation, Professor John Mbiti stated as follows:

> For Africa people, marriage is the focus of existence and a drama in which everyone become an actor or actress and not just a spectator. Therefore, marriage is a duty, a requirement from the corporate society, and a rhythm of life in which everyone must participate … Failure to get married under normal circumstances means that the person concerned has reject society and society rejects him in return.[23]

The learned writer Bromley emphasized that marriage is the ceremony by which a man and woman becomes husband and wife.[24] Most women in Nigeria are more interested in the celebration of statutory marriage under the Act, than the men because of the strictness of the statutory obligation of monogamy as required by the Marriage Act.

Moreover, most men in Nigeria also object to the celebration of marriages under the provisions of the Marriage Act, on the ground that it is an alien institution, involving consequences inimical to customary law marriage in Nigeria. women contract marriages under the Act because they intend to put their marriages wholly under the statute.

Nature of Marriage

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[20] Umukoro B.E. "A Case for the Settlement of Matrimonial Properties upon Divorce; Challenges and need for Reform in Nigeria and some Common Wealth Countries in Africa" in (H.O. Oho & K.O. Edu eds.) *Family Law and Women:* (Arts Masters Publ. Co., 2019).

[21] *Nwachinemelu Okonkwo v Lucy 7 Ors.* (1994) NWLR (pt. 368) 301, p. 346: Akintude Emiola: *The Principles of African Customary Law* (Ogbomoso: Emiola Publisher; 1997) p. 61.

[22] Okumagba: *A Short History of Urhobo* (Aba: Kris and Pat Nigeria; 1981) p. 84.

[23] Mbiti J.S. *African Religions and Philosophy* (Ibadan: Heinemin; 1969) p. 133 Adopted from Dr. Beauty B. Alloh "The Impact of the Matrimonial Causes Act: 2004 on *Customary Law Marriage amongst the Urhobo of Delta State Nigeria* (Unpunished, 2008). P. 17.

[24] P.M. Bromley: *Family Law,* (London: Butter Worth's 1971). Fourth Edition, p. 11.

The word marriage is sometimes used to denote three different situation- the agreement to marry, the act of being married, that is, the ceremony by which a man and a woman become husband and wife and finally the state of being married which is the relationship between a husband and a wife.[25] Different rules apply to each of these.

Marriage under native law and custom in Nigeria does not exist in its essentials as it does under the Act. It is doubtful whether there is any basic identity between marriage under the Act and marriage under customary law to justify the use of a common description. This was highlighted in the South African cases of *Guma v Guma*.

> It is necessary to guard against the assumption that, because the signle term "Marriage" is used to described the conjugal relationships established under both the common law of the country and the native law, the have, indeed so much in common, that each form regularizes sexual union and the status of offspring's, but in other respects the two institutions are fundamentally different in nature and the law governing them.[26]

Similarly in the case of *Rex v Amkeyo*,[27] Robert Hamilton C.J. said;

> In my opinion the use of the word "Marriage", to describe the relationship entered into by an African man with a woman of his tribe according to tribal custom is a misnomer, which has led in the past to a considerable confusion of ideas… the elements of a so called marriage by native custom differs so materially from ordinarily accepted idea of what constitutes a civilized form of marriage that it is difficult to compare the two.

It is necessary to note the following salient points;

(a) According to Vinogradoff[28] it can be that there are certain fundamental ideas, which assert themselves in all forms of human marriage; and these fundamental ideas, as generally understood by both jurists and anthropologists, appears to be inherent in the typical African conception of marriage.

(b) The payment of bride price, which in one form or another is characteristic of marriage in the great majority of African tribes, is not a peculiarly customary institution. It was indeed a feature of the social systems of European peoples in earlier time.[29]

(c) The case of polygamy is different, for it cannot, historically speaking, be ranked among the antecedents of European marriage. This is because, the idea of it has been familiar to the European

[25] Black's Law Dictionary, 8th Ed. West Publishing Co. 2004 p. 992: The New International Webster's Comprehensive Dictionary, 2010 Edition p. 781.
[26] (1919) 4 N.A.C. 220, per C.J. Waner C.M. p. 22.
[27] All E.A; R. (1917) 146.
[28] Sir Paul Vinogradoff, *Outlines of Historical Jurisprudence* (1920), Vol. 1. p. 167.
[29] Arthur Philips and Henry F. Morris *Marriage Law in Africa* (London: Oxford University).

mind through the Old Testament scriptures, and this has perhaps to produce a more tolerant attitude towards customary marriage.

(d) In Africa, the dividing line between marriage and concubinage is not always precisely marked.

(e) Monogamous customary marriage has commonly been regarded by church authorities as a valid "natural" marriage.

Considering the above, it seems legitimate to conclude that customary law marriage in Nigeria has sufficient normative nexus with marriage under the act to warrant the same generic term "marriage" to be applied to it.

The Universality of Marriage

Marriage is a universal institution which is recognized and respected all over the world. As a social institution, marriage is founded on, and governed by social and religious norms of society. Consequently, the sanctity of marriage is a well-accepted principle in the world community.

However, the concept of marriage as a union of persons of opposite sex has faced serious challenges in several countries. In some, same-sex marriage has been legalized while in others substantial legal attributes of marriage have been conferred on cohabiting couples. Socially, Nigeria is grappling with some of these questions. Increasingly concerns have been expressed particularly in religious circles as to threat to the marriage institution. Various approaches have been suggested for dealing with them.

Marriage is a universal institution, which has been in existence from time immemorial. It can be traced as far back as the beginning of creation of man and it is considered to have spiritual, moral and social significance in the society, which is recognized and respected all over the world. Marriage comes into being, as a contract in which a man and a woman become joined as husband and wife. It entails a wide variety of the rights and obligations, which varies with space and time.

This definition of universality of marriage shows clearly that marriage is a contract. A contract is an agreement between persons who are competent, to do or not to do some act. Marriage is a contract which is according to the form prescribed by law, by which a man and a woman who are capable of entering into such contract mutually engage with each other, to live their whole lives or (until divorced) together in a state of union which ought to exists between a husband and wife.

Definition of the Term "Marriage"

In the early colonial context, the term "Marriage" was defined as a "Christian Union between a man and a woman," and the essence of marriage was its performance by an ordained members of a Christian church.[30]

[30] Lona. Laymon, Valid- where Consummated: *The Intersection of Customary Law Marriage and Formal Adjudication,* 10 S. Cal. Interdis L.J. 353.

The California Family Code[31] defined marriage as a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. This section provide further that, consent alone does not constitute marriage. And that consent must be followed by the issuance of a license and solemnization as authorized. The Holy Bible in the book of Genesis[32] state as follows: "There shall a man leave his father and his mother and father and shall cleave unto his wife: and they shall be one flesh."

This is a clear indication of the fact that marriage has been ordained by God himself right from the beginning of creation or from pre-historic times. Black's Law Dictionary[33] defined marriage as a contract, according to the form prescribed by law, by which a man and woman capable of entering into such contract, mutually engage with each other to live their whole lives (or until divorced) together in a state of union which ought to exist between a husband and wife. The word marriage also signifies that act, ceremony or formal procedure by which persons take each other as husband and wife.[34]

According to Alloh in her research work "The impact of Matrimonial Causes Act 2004, on customary law marriage amongst the Urhobo people of Delta State of Nigeria, marriage may be defined. As the union of or a contract between a man and a woman to live as husband and wife, during which period there arises an alliance between the family of the man and the family of the woman, based on a common interest in the marriage and its continuance.[35]

In the case of *Singer v Hara*,[36] marriage was also defined as the legal union of one man and woman as husband and wife. The Encyclopedia of social science,[37] defined marriage as an "unequivocally sanctioned unions which persist, and thus comes to underlie family life. And a slightly more elaborate definition of marriage by Gould[38] presents marriage as denoting "mating arrangement approved in society with special reference to the husband and wide; and also the ceremonies which establish such relationship.

In ordinary usage, marriage includes two distinct ideas: that a man and a woman cohabit, generally with the intention of founding a family, and the fact that the wedding ceremony is so often called a marriage (with or without the addition of the word ceremony) emphasizes the fact that the word "marriage is used not only with two, but with three or more different meanings.[39]

31 Section 300 of the California Family Code.
32 Chapter 2 verse 24.
33 Garner B.A., (ed) *Black's Law Dictionary* (9th Edition) (Thomason West Publishing Co. Ltd. 2011) p. 922.
34 *Ibid.*
35 B.O. Alloh *op. cit.*
36 11 Wash, App. 247, 522, p. 2d 118, 1193.
37 Robert 11 Lowie in the Encyclopedia of the Social Sciences Vol. 10, 1933.
38 Gould and Kolb (eds) A Dictionary of the Social Sciences (London: Sweet & Maxwell, 1991).
39 Peter Schofield in his Article "Reforming the Law of Family Property" (Comments and some Counter-Proposals in Relation to Working Paper No. 42): Vol. 2, *Family Law* (1972), p. 117.

The use of the word "marriage" for the wedding ceremony has resulted in endless fruitless discussions. Argument has raged round the question whether willful refusal to consummate a marriage should be a ground for divorce, rather than of nullity, as at present in Nigerian law.[40]

The argument of making it a ground for divorce rather than nullity is that it is something that occurs after wedding ceremony.[41] On the other hand Lord Denning M.R, has said that: "No-one call a marriage a real marriage when it has not been consummated.[42]
Consummation means the completion of a thing it also means the completion of a marriage by cohabitation (sexual intercourse) between the spouses.[43] *Mozley & Whithley's* Law Dictionary[44] defines consummation as the completion of a thing especially of a marriage by complete sexual intercourse.
Furthermore, marriage is defined as the ceremony or process by which the legal relationship of husband and wife is constituted. The characteristic protestant doctrine holds that marriage is for Christians as well as for none-Christians, essentially a civil contract, the validity of which depends solely on compliance with secular law. The formation of the matrimonial relationship is considered to be among the things that are Caesar's- though without prejudice to the belief that the parties' profession of Christianity may impose upon these certain spiritual obligations, in addition to those which are imposed by the state.[45]
According to the pronouncement contained in the report of the *Lambeth* Conference, 1920, Christian marriage is to be regarded as the marriage of Christians; "that such a marriage can only be made by the mutual consent before witnesses of both parties to an exclusive lifelong union; that in ordinary circumstances in countries where the state has made laws on the subject, (i.e on what constitutes such evidence), it is desirable that the church's blessing does not affect the validity of the marriage, it is the plain duty of all Christians to seek the blessing of the church on their marriages.[46]

An identical definition of a Christian or monogamous marriage is contained in the interpretation Act, where it is defined as:

> A marriage which is recognized by the law of the place where it is celebrated as the voluntary union for life of one man and one woman to the exclusion of all others during the continuance of all others during the continuance of the marriage.[47]

It should be noted that the definition set out above is of the same meaning as the well-known one given by *Lord Penzance* in the celebrated English case off *Hyde v Hyde* and *Woodmansee*[48] where he stated thus:

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40 Section 15(2)(a), MCA, 2004.
41 Warringtom L.J.M. Napier (1915), 184, 192-s in the Court of Appeal said.
42 *Ramsay Fairfax v Ramsay Fairfax* (1956) p. 115, 113.
43 Garner, B.A., (ed) *Black's Law Dictionary,* (9th Edition) (Thomson West Publishing Co. Ltd. 2011) p. 318.
44 Mozley and Whiteley's Law Dictionary (ed) 9th edition) p. 78.
45 Arthur Philips and Henry F. Morris: *Marriage Laws in Africa,* (London: Oxford University Press; 1971), p. 21-22.
46 *Ibid.*
47 Cap 123 Section 18(1) Vol. 8, LFN, 2001.
48 (1963) 1 WLR 13 and 14.

> … I conceive that marriage, as understood in Christendom, may … be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

The above definition of marriage be *Lord Penzance,* which is the classic definition of Marriage in English Law refers to a statutory Marriage. It has been asserted that the definition involves three conditions,[49] namely: it must be voluntary, the marriage must be for life and it must be monogamous. It has been pointed out, that there is a fourth condition implied from all these definitions. The condition is that, the marriage must be between two persons of opposite sex.[50]

This is however subject to the new trend of "gay" couples in the United States of American. This conception of marriage best described marriage in both the southern parts of Nigeria, but however, in some area in Eastern parts of Nigeria, woman to woman marriage is permissible. This situation is different as there is usually no expression of love by woman. The two women are actually wives to the (husband). If a woman has no issue, she can marry another woman for her husband; any issue from such marriage would be regarded as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance. Where there is proof that a custom permits the marriage of a woman to another, such custom must be regarded as repugnant by virtue of the provision of section 18(1) of the Evidence Act 2011,[51] and ought not to be upheld by the court. We shall now discuss the conditions specifically.

The Marriage must be Voluntary and Consensual:
This is a very important condition for the validity of a statutory marriage. Thus, a marriage can be annulled if there was no true consent on the part of one of the parties Section 3(1) of the Matrimonial Causes Act[52] provides that a marriage is void where the consent of either of the parties is not a real consent because: It was obtained by duress or fraud; or that the Party was mistaken as to the identity of the other party, or as to the nature of the ceremony performed; or that party is mentally incapable of understanding the nature of the marriage contract.

The above provisions made it clear that consent is fundamental to marriage under the Act. As marriage is a voluntary union based upon the parties' consent, a marriage without consent initially may also be ratified later by conduct of the party whose consent was initially absent.[53]

The writer will now consider the various situations in which the consent of either of the parties is not regarded as real. One of such situation is when consent is obtained by duress or fraud, one of the parties is induced to enter into a marriage which he or she, ordinarily, would never have contracted, such a

[49] P.M. Bromley, *Family Law*, (4th edition) (London: Butterworth, 1971), p. 12.
[50] B.O. Alloh *op. cit.* at 14.
[51] Section 18 of the Evidence Act Cap 14 LFN 2011.
[52] Cap M7 LFN, 2004.
[53] *Valier v Valier* 1925), 133.

marriage can be annulled. In the case of *Buckland v Buckland,*[54] the petitioner, a youth who was twenty years old, and was resident in Malta, defiled the respondent who was fifteen years old. Although he protested his innocence, he was threatened that if he does not marry the girl, he stood no chance of an acquittal but would probably be sent to prison for a period of up to two years. He nonetheless decided to marry the girl. It was held that the petitioner was entitled to a decree of nullity. Another important case is that of *Cooper v Crane,*[55] where the Respondent had, unknown to the petitioner, obtained a Marriage License. He arranged for the wedding and having abducted her, took her to the church door and threatened to blow her brain out unless she goes into the church and marry him. It was held that the petitioner had not discharged the burden of proving that her will was reached because there is a presumption that the respondent may have compelled the petitioner to marry him without her consent voluntarily given and that in doing so the burden of proof lies upon the party impeaching the validity of the marriage.

Mistake as to the identity of the other Party, or as to the nature of the ceremony performed: Mistake as to the identity of the other Party, or as to the nature of the ceremony performed will invalidate a marriage if the mistake result in one party's failing to marry the individual whom he or she intended to marry. In the case of *C. v C.*[56] the petitioner married the respondent believing that he was a well known boxer called miller. It was held that the marriage was not invalidated by the mistake because she married the very individual she meant to marry.

Moreover, a mistake as to the nature of the ceremony performed will also invalidate marriage. Thus, the marriage will be affected if one of the parties is mistaken as to the nature of the ceremony and did not appreciate that he was contracting a marriage. In the case of *Kelly v Kelly*[57] the parties went through a marriage ceremony in which the wife had a mistaken belief that the ceremony was formal betrothal. There was never cohabitation by the parties. The court held that the mistake of the wife vitiated the consent and as a result, rendered the marriage void. In the earlier case of *C. v C.,*[58] the alleged mistake did not relate to the identity of the man but to his profession (boxer). In the latter case, the mistake concerned the type of form of ceremony.

However, it is important to note that if each appreciate that he or she is going through a form of marriage with the other, no type of mistake apparently can affect the contract.[59] Thus, it has been held that marriage will not be validated by a mistake as to the monogamous or polygamous nature of the union,[60] the other party's fortune[61] the woman's chastity[62] or the recognition of the union by the religious denomination of the parties.

54 (1967) All E.R. 300. 30 p. 28.
55 (1891) 40 W.L.R. 127.
56 (1942) N.Z.L.R. 356. If A becomes engaged to B, whom she has never seen before, by Correspondence, and C Successfully Personate B at the Wedding the Marriage would be voids because A intends to marry B nobody else.
57 (1992) 49 T.L.R. 99.
58 (1949) 2 All E.R. 959, 963.
59 *Kassim v Kassim* (1962) 3 All E.R. 426.
60 Wakefield v Mackey (1807), Hag. Cas. 394, 398.
61 *Moss v Moss* 1897) 13 T.L.R. 4597. Ussher (1912) 2 IR 445.
62 (1953) 2 All E.R. 1411, 1430, C.A.

Consent of a Party who is Mentally Incapable of Understanding the Nature of the Marriage Contract:

The consent of a party who is mentally incapable of understanding the nature of the marriage contract will affect the marriage, if either parties was mentally incapable at the time of the ceremony as to be unable to understand the nature of the contract he/she is entering into. The test to be applied in this instance was formulated by singleton. *L.J.* in the Estate of park[63] thus:

> Was the (person) capable of understanding the nature of contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage, a man must be mentally capable of appreciating that is involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.

The Marriage Must be for Life:

The second condition in the definition of marriage by *Lord Penzance in Hyde v Hyde*[64] is that, the marriage must be for life. *Lord Penzance* was referring to the view traditionally held in Western Europe based on the accepted Christian tradition and culture. This statement does not mean that marriage is indissoluble as divorce by judicial process had been possible in England for over eight years prior to the decision in *Hyde v Hyde.*[65] The decision of the court of appeal in the case of *Nachimson v Nachimson*[66] is that it must be the intention of the parties when they entered into the marriage that it should last for life.
Aniagolu J. (as he then was), defined marriage as follows:

> A voluntary union expressed at the time of contract to be for life but terminable within the period, of one man and one woman, to the exclusion of all others while it las.[67]

He criticized the definition of marriage by *Lord Penzance* on the basis that phrase, "for life" was implicity suggested. It is the researcher's view that the above criticism is correct. However, the definition will be most appropriate if marriage is defined as follows: "A voluntary union between a man and a woman, to the exclusion of all others intended to be for life, but terminable during their life time.[68]

The Marriage Must be Monogamous

63 (1954) p. 112, 127 or (1953) 2 ER. 1411, 1430 (CA).
64 (1963) 1 WLR 13 and 14.
65 (1953) 2 All ER 1411, C.A.
66 (1953) 2 All E.R. 1411, 1430, C.A.
67 This is a Definition given by B.O. Alloh the Researcher's Lecturer at the Delta State University, Abraka, Oleh Campus.
68 *Supra.*

Monogamous marriage, as is the case in most other countries, is a voluntary union for life of one man in and one woman to the exclusion of all others until divorce or death.[69] A number of important questions arise in respect of this definition. The union must be the result of the free consent of the parties. Absence of such consent will vitiate the marriage. Moreover, at every stage in the marriage, only one man and one woman are involved to the exclusion of all others. There may be subsequent consecutive marriages by either party provided that only one partner is involved on each occasion. Furthermore, the union is for life. This means that at the formation of the marriage, the parties must have intended to take each other as husband and wife for life. However, this may be subsequently disrupted by divorce or death of one of the spouses. The interpretation Act, 2003 defines a monogamous marriage as:

A marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.

The third condition involved in the definition of marriage by *Lord Penzance* in the case of *Hyde v Hyde*[70] is that it must be monogamous. This means that neither spouse may celebrate another marriage so long as the original union subsists. Section 47 of the Marriage Act[71] provides that if either of the parties before the death of the other, shall contract another marriage while the marriage remain un-dissolved, the party shall be guilty of bigamy, and liable to punishment for that offence under the Criminal Code.
It is an offence for a party to a valid marriage to contract another marriage, while the former valid marriage is subsisting. Section 370 of the Criminal Code[72] provide as follows:

> Any person who, having a husband and wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, is guilty of a felony, and is liable to imprisonment for seven years.

It is also an offence for a person to contract a marriage under the provision of the Marriage Act being at the time married to another person under customary law.
Section 46 of the Marriage Act[73] provides as follows:

> Whoever contracts a marriage under the provisions of this act, or any modification or re-enactment thereof, in being at the time married in accordance with customary law to any person other than the person, with whom such marriage is contracted, shall be liable to imprisonment for five years.

A criminal offence shall be committed when a person who had already contracted a valid marriage under the provision of the Marriage Act, contracts a marriage under customary law with another person, other

[69] See Hyde v Hyde (1886) L.R.I.P & D 130, 133.
[70] Cap C38 LFN, 2004.
[71] Cap C38 LFN, 2004.
[72] Cap M6 LFN, 2004.
[73] Cap M6 LFN, 2004.

than the person he contracted the marriage under the provisions of the Marriage Act. Section 47 of the Marriage Act[74] provides as follows:

> Whoever, having contracted marriage under this Act, or any modification or re-enactment thereof, or under any enactment repealed by this Act, during the continuance of such a marriage in accordance with customary law, shall be liable to imprisonment for five years.

The writer questions the rationale for two laws prescribing two different penalties (7 years and 5 years imprisonment) for the same offence. Although, the Matrimonial Causes Act did not refer to it as bigamy. It is also important to mention the provision of section 35 of the Marriage Act, which concerns the celebration of customary marriages by persons married under the provision of the Marriage Act.[75] Section 35 of the Marriage Act[76] provides as follows:

> Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage, of contracting a valid marriage under customary law.

Thus, any person married under the Marriage Act lacks the capacity during the continuance of such marriage of contracting another customary law marriage. This point of law was considered in the case of *Onwudinjoh v Onwudinjoh,*[77] where one Jeremiah married Agnes under the provisions of the Marriage Act in 1926, in Makurdi. He subsequently married one *Chinelo* by native law and custom during the lifetime of Agnes. It was held by *Ainley, C.J.* that by reason of section 35 of the Marriage Act, Jeremiah was incapable of contracting a valid marriage under customary law with Chinelo.

However, in the case of *Asiata v Gancallo,*[78] a Yoruba man named *Elese*, was taken to Brazil as a slave. While there, he married *Selia,* an African freed woman, first in accordance with Muslim rites and subsequently in a Christian church. *Elese* later returned with *Selia* to Lagos, where during the lifetime of *Sello* and subsequent to the passing of the Marriage Ordinance 1884, he married *asatu* in accordance with Muslim rites while determine the validity of the marriage to *Asatu,* Griffith, held the subsequent customary law marriage valid on the following grounds:

i. That *Elese's* presence in Brazil was not free, he being taken there as a slave; that Nigeria was not a Christian country and by customary law a man can legally have several wives;
ii. That *Elese* was a bonafide follower of Prophet Mohammed, and as such was legally entitled to marry several wives; and
iii. That *Selia* did not appear to have raised the slightest objection to her husband's subsequent marriage.

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74 *Ibid.*
75 Cap M6 LFN, 2004.
76 Cap M6 LFN, 2004 Laws of the Federation of Nigeria (2004) Cap. M6.
77 (1957) 1 ERNLR 1.
78 (1900) 1 NLR 41.

It is humbly submitted that the decision reached in the case of *Asiata v Goncallo* is no good authority as it is not correct to suggest that because *Elese* was a "bone-fide" Muslim throughout his life, he could not contract a valid monogamous marriage if he so wishes. In such a case, he will not have the right to marry up to four wives even if he had the means to care for them, as he does under Muslim Law. The question is what will he do with his Muslim wives after contracting the monogamous marriage. Muslim law of divorce may apply.

Under customary law in Nigeria, a man is entitled to marry as many wives as he can. The fact that he resides in a foreign country is irrelevant. This fact is supported by the case of a man called *Richard Onobreche's* case, which was published in London times and was well circulated as the man was said to have the right to marry another wife after had contracted a customary law marriage with his first wife. Richard Onobrache's case was a case, where his wife whom he married in Nigeria according to Urhobo customary law and with whom he settled in London sued him on ground that he has no right to marry another woman. It was held by the court that the man has the right to marry another wife as his marriage with the first wife was only celebrated under the Urhobo customary law[79] which is one of the customary law marriages in Nigeria. However, where a man in Nigeria apart from a Muslim man decides to marry under the provision of the Marriage Act,[80] he ceases to have the right to marry more than wife. Thus, a man in Nigeria who marries under the provision of the Marriage Act will commit the offence of bigamy if he "marries" another wife.

Moreover, parties to a statutory marriage in Nigeria, must not have been married to another person under Customary Law, except the customary law marriage is between the same parties. Thus it is provided under Section 33(1) of the Marriage Act[81] provides that:

> No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under the customary law to any person other than the person with whom such marriage is had.

The provision of section 33(1) was considered in the case of *Otiose v Oshodi,*[82] where a wife named *Folashade* petitioned for divorce on the grounds of cruelty and adultery. In this case, the respondent contracted a valid Yoruba Islamic law marriage in 1954 with one *Sikiratu Elemoro,* the named woman in the suit. In 1955, the respondent and the petitioner were married under Yoruba law and custom. It was stated in evidence that the petitioner knew of the 1954 marriage, and that the three of them lived together before the petitioner and the respondent left for England. In 1956, the petitioner and the respondent went through the English form of marriage. The respondent contended that the English marriage of 1956 was a nullity, and that consequently, the petitioner was not entitled to the reliefs sought. It was stated by Caxton-Martins, Ag J, that as the 1956 marriage was not celebrated in Nigeria section 33(1) was not applicable.

[79] Dr. (Mrs) B.O. Alloh, *op. cit.*, at 19.
[80] Cap. M6 LFN, 2004.
[81] Cap. M6 LFN, 2004.
[82] (1963) 2 All NLR 241.

He held obiter that if the petitioner and respondent had married in Nigeria under the Marriage Act. A caveat would have been successfully lodged as the 1954 marriage.[83]

And on the basis of the reasoning in *Asiata v Goncallo*[84] he concluded that as the respondent had not renounced his faith as a follower of the holy prophet Mohammed, the 1954 Marriage was still subsisting, and that the English marriage was therefore a nullity.

In *R. v Princewell,*[85] the accused contracted marriage under the provisions of the Marriage Act as a Christian. He later became a Muslim and then celebrated another marriage according to Muslim Law with another woman while the first marriage was still subsisting. The court held that, the second marriage with another woman was void and the accused was sentenced to one-year imprisonment with hard labour for committing the offence of bigamy.

The Marriage Must Involve Two Persons of the Opposite Sex:
The fourth condition inherent in the definition of marriage in the case of *Hyde v Hyde* by *Lord Penzance* is that, the marriage must involve two persons of opposite sex: This means that, the marriage must involve a man and a woman. Thus, in the case of *Corbett v Corbett*[86] *Ormrod J.* held that: "a marriage which was celebrated between the parties in September 1963 was void."

The problem of sex change by surgical operation was considered. In that case, the petitioner was a man and the Respondent was a person who had undergone a surgical operation for the removal of "his" male genital organs and their replacement with artificial female organs.

After listening to the medical evidence, the learned judge (who is also a qualified Medical Practitioner) considered the evidence and came to the conclusion that a person's biological sex is fixed at birth and cannot subsequently be changed by artificial means. As a result, the respondent, who was male at birth, was not a woman. The learned judge observed that:[87]

> The question then becomes, what is meant by the word "woman" in the context of a Marriage, for I am, not concerned to Determine the "legal Sex" of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my Judgment, be biological, for even the most extreme degree of transsexualnalise in male severe hormones, which can exist in a person with male chromosomes, male gonads and male genital cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place,

83 *Ibid.*
84 *Ibid* at p. 24.
85 (1963) N.N.L.R. 54.
86 (1970) 2 ALL E.R. 33.
87 *Ibid* p. 27.

> the first three of the doctor's criteria, i.e. the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly and ignore any operative intervention. The real difficulties of course will occur if these three criteria are not congruent… My conclusion, therefore, is that the respondent is not a woman for the purpose of marriage but is a biological male and has been so since birth.

However a decision was reached by the Supreme Court of New Jersey (Appellate Division) in the case of *M.T. v J.T.*[88] In that case, the wife filed a complaint for support and maintenance. In the husband's defence, he pleaded that, their marriage was void because the wife was a male. The court disagreed with the conclusion reached in Corbett's case and observed that:[89]

> Our departure from Corbett thesis is not a matter of semantics. It stems from a fundamentally different understanding of what is meant by sex for marital purposes. The English court apparently felt that sex and gender were disparate phenomena. In a given case there may, of course be such difference. A pre-operative transsexual is an example of that kind of disharmony, and most experts would be classified according to biological criteria. The evidence and authority, which we have examined however, show that a person's sex or sexuality embraces an individual's gender, emotional sense of sexual identity and character, Indeed, it has been observed that the "psychological sex of an individual," while not serviceable for all purpose, is practical realistic and humane. It went on to emphasize that:[90] The English court believed we feel incorrectly, that an anatomical change of genitals in the case of trans-sexual cannot affect her true sex." Its conclusion was rooted in the premise that "True sex", was required to be ascertained even for marital purposes by biological criteria. In the case of a trans-sexual following surgery, however, according to expert testimony presented here, the dual tests of anatomy and gender are more significant. On this evidential demonstration, therefore we are impelled to the conclusion that for marital purposes of the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psychological sex, then identity by sex must be governed by the congruence of these standards.

In the case of *A v C.*,[91] a transsexual had his birth certificate altered in Wisconsin as provided by law then married an elderly Kansas man. When the man died, his son from a previous marriage contested the validity of the marriage, arguing that his stepmother was actually a man. The Kansas Court of Appeal

88 (1976) 255 A. 2d. 20.
89 *Ibid* at p. 28.
90 *Ibid.*
91 (1991) Family Law Quarterly, Vol. 35, No. 4, at p. 605.

refused to give full weight and credit to the Wisconsin birth certificate but found there was a question of fact as to sex of the person on the date of the wedding. The Kansas Supreme Court affirmed and found the marriage absolutely void under Kansas statutes as a marriage between two men. Moreover, an Ohio trial court decision was affirmed after it has refused to allow a cohabiting lesbian couple to change their last names, to their surname on the ground that the name changed would contravene the state's public policy marriage.[92] It is also pertinent to not the new tangled trend of "gay" marriage in some part of America. Equally, noteworthy is lack of uniformity and consistency in the judgment of different courts on the same issue.

Type of Marriage in Nigeria

According to Dr. (Mrs.) B.O. Alloh. The researcher's family law lecturer at the faculty of Law, Delta State University Abraka, Oleh Campus there are three forms or types of marriage recognized by law in Nigeria they are:

(a) Marriage according to the various types of customary law
(b) The Muslim Nikai
(c) Marriage under the provision of the Marriage Act.

However, Author Philips[93] is of the view that there are two types of marriage namely monogamous and polygamous types of marriages. These two differ fundamentally in character and incident. It is important to keep this dualism in view in every consideration of the marriage laws in Nigeria, in order to avoid any confusion. In every case concerning marriage, the lawyer in Nigeria has in the first instance to determine the type of marriage involved in orde to enable him apply the appropriate law to determine the incidents.

Monogamous Marriage

Monogamous Marriage is the marriage which *Lord Penzance* in the case of *Hyde v Hyde*[94] defined as; "The voluntary union for life of one man and one woman to the exclusion of all others." There are three aspects of this definition which deserve further elaboration.

In the first place, the marriage must be a voluntary union. Thus, there must be free consent of both parties to the union. The absence of genuine consent will vitiate the agreement. Second, the marriage should be a union for life. This does not imply that the union should be indissoluble. The cardinal requirement is that at the time of contracting the marriage the parties intend that is should be for life unless dissolved earlier by process prescribed by law. Thus, in the case of *Nachimson v Nachimson*,[95] it was held that, a Russian marriage which according to the local law could be dissolved by mutual consent or at the will of one of the parties with merely formal conditions of official registration was in fact a union for life and a monogamous marriage. Third, is must be a union of one man and one woman to the exclusion of all others.

92 In re Bicknell, 2001 W.L. 121147 (Ohio App: Fb. 12, 2001).
93 (1991) Family Law Quarterly, Vol. 35, Num. 4 p. 605.
94 (1886) L.R.I.P. & D. 130, 133.
95 (1930) All ER p. 217.

The marriage must, therefore, be monogamous as it does not admit marriage to more than one wife during the subsistence of the marriage.

According to Interpretation Act, 1964,[96] a monogamous marriage is a;

> Marriage which is recognized by law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all other during the continuance of the marriage.

The law which governs the celebration and incidents of monogamous marriage in Nigeria are found principally in the Marriage Act,[97] and the Matrimonial Causes Act.[98]

Presently, there is a tendency for the same persons in the southern states of Nigeria to be first married under Native Law and Custom and thereafter contract marriage under the Act. There is nothing unlawful in this as much as it is the same couple who went through both forms of marriage. The legal implication of this, however, is that the marriage would become monogamous.[99] Where a man who is married under the Act contracts another marriage with another woman under customary law during the subsistence of the first marriage, the second marriage is invalid and the man is liable to imprisonment for five years.[100] The crucial difference between marriage under the provisions of the Marriage Act and other types of marriages, which includes Marriage under Customary Law and Islamic Law, is that marriage under the act is monogamous in form, while under the later form is polygamous.[101]

However, in the case of *Agbo v Udo.*[102] The Supreme Court while interpreting a similar provision in the Marriage Ordinance of Nigeria ruled that the absence of consent did not invalidate a marriage under the Act already celebrated under the ordinance as the woman was already married under customary law. A marriage under the provision of the Marriage Act may be celebrated after obtaining the Registrar's certificate,[103] or a minister's license,[104] after the issuance of the certificate, a marriage may be celebrated either by a recognized religion minister in a licensed place of worship in the presence of two witnesses in his office with open doors. After due celebration of the marriage under the provisions of the Marriage Act, the parties becomes husbands and wife in the same sense as is understood in English Law.

Polygamous Marriage

A polygamous marriage may be defined as a union for life of one man with one or several wives. Its essential characteristic is the capacity of the man to take as many wives as he pleases. The mere fact that at a given moment a man has only one wife does not affect the character of the marriage so long as his

96 Section 18 LFN, No. 1 of 1964.
97 Cap. M6 LFN, 2004.
98 Cap. M7 LFN, 2004.
99 *Jadesimi v Okotie Eboh* (1996) n2 S.C.N.J. 1.
100 Section 47 Marriage Act Cap. 218, LFN, 1999, *Awodudu v Awodudu* (1979) 2 LRN 339 and *Towoeni v Towoeni* (2002) FWLR (pt. 122) 170, 189 section 370 Criminal Code Cap. Laws of Defunct Bendel State.
101 K.O Edu "Toward Sustainable Advancement in the Succession Rights of the Nigeria Woman a Review" vol. 2, No. 1 Delsu Law Review, 2006, p. 91.
102 (1047) 18 NLR 152.
103 Section 11 of Marriage Act Cap M6 LFN, 2004.
104 *Ibid,* Section 13 and section 29.

capacity of marrying more wives is retained. Generally, there is no limit to the number of wives a husband could take under the polygamous system. This invariably depends on his influence.[105]

The fact that there may be plurality of wives does not affect the basic premises that the polygamous marriage is usually intended to last for life. However, under the Islamic Law which is also customary law a man may take not more than four wives. Under Islamic Law, which is also a Customary Law in Nigeria, a man may not take more than four wives. Sometimes there are reported incidences of child marriages which were often contracted without the consent of the girl, the modern trend and practice is to obtain the consent of both parties to the union.

Polygamous marriage in Nigeria is a customary law institution. Therefore, the character and incidents of that system are governed by customary law. There is no single uniform system of customary law prevailing throughout Nigeria. The term customary law marriage is the union of a man and a woman or women as husband and wife or wives, during which period there arises an alliance between the two families based on a common interest in the marriage and its continuance. Customary marriages are potentially polygamous. It is for this reason, that a man is entitled to marry more than one wife if he so desires or wishes. However, a woman is prohibited from marrying more than one husband at the same time. An exception to this general rule is polyandry more than one husband at the same time. An exception to this general rule is polyandry practiced by the ancient people of Mongolia, *Malabar or Himalayas*[106] Customary marriage involves a social re-arrangement, which is regarded as an alliance between the families of the parties to the marriage. Thus, *Rattray* stated that:

> It is perhaps almost a platitude to state that marriage in Ashanti is not so much a contract between the groups of individuals who they represent.[107]

Similarly in *Yaotey v Quay*,[108] the High Court of Ghana described customary marriage as follows:

> Now, one peculiar characteristic of our system of marriage which distinguishes it from the system of marriage in Europe and other places is that it is not just a union of "this man" and this woman; it is a union of the "the family of this man, and the family of this woman.

The essential requirement of a valid Customary Marriage in Nigeria generally may thus be summarized: as including, the consent of the bride and her family, the payment of the bride price by the husband or on behalf and its acceptance by the bride's family the excursion of the bride to the husband's home and the agreement by the man and the woman to live together as husband and wife. Islamic Law Marriage in Nigeria possesses most of the features of customary law marriages.

Thus, Muslim Law is regarded as Customary Law in Nigeria. Aguda has made an incisive study of the common features of Muslim Law and Customary Law Marriages.[109] Mohammedan Marriages in Nigeria

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105 *Ibid*, Section 27.
106 Dr. (Mrs) Beauty Oboraghware Alloh, *op. cit., p. 14.*
107 R.S. Rattray: *Ashanti Law and Constitution*, (Accra: Rich Field Law Pub: 1929), p. 26.
108 (1961) GLR p. 73 at p. 579.
109 Aguda T.A. and Adi I (Eds) *The Marriage Laws of Nigeria*, (Lagos: The Nigeria Institute of Advanced Legal Studies; 1981) pp. 60 – 127.

are also essentially polygamous. Thus, a Muslim wife, if required submits to the regime of a polygamous household.

Although the husband's right of polygamy is subject to four wives, limit prescribed by Sharia Law, there seems to be a tendency in some Muslim Communities in Nigeria to circumvent this rule by classifying additional women as concubines, or by divorcing older wives and relegating them to the position of pensioners. Such practices are reported, for example from among the Nupe in Nigeria.[110]

Definition of the Terms

Reconciliation

Reconciliation according to the Black's Law Dictionary means:[111]

> Restoration of harmony between persons or things that had been in conflict, it went further to state that in the context of Family Law Reconciliation means voluntary resumption of matrimonial harmony or full marital relations between spouses after separation or after the dismissal of a divorce petition in a court.

According the researcher reconciliation is a process of resolving a disagreement or argument between two or more persons.

It has always been the attitude of courts of competent Jurisdiction dealing with cases under the Matrimonial Causes Act 2004, to try as much as possible to effect reconciliation between spouses whose marriages are at the verge of irretrievable breakdown. For this reason no admission made by a spouse, in the course of reconciliation in a divorce case (or other civil cases) is admissible as relevant in evidence, if it is made on condition that evidence of it be not given or in circumstances from which the court may infer that parties agreed that evidence of it shall not be given.[112]

Moreover, where a court hears a petition for divorce under the Matrimonial Causes Act 2004, it usually gives room for reconciliation and inquires whether there are prospects of reconciliation between parties.[113] As provided for in the Matrimonial Causes Act 2004.

> It shall be the duty of the court in which a matrimonial causes has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so) and if at any time it appears to the judge constitute the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such

110 Arthur Philips & Henry F.S. Morris: *Marriage Laws in Africa,* (London: Oxford University Press, 1971), p. 131.
111 Harner, B.A., (ed) *Black's Law Dictionary* (9th Op. Cit., at 14.
112 Section 26 Evidence Act LFN Cap 18, 2011.
113 *Blunt v Blunt* (1943) AC 517 and Section 11 MCA 2004.

> a reconciliation the Judge may do all or any of the following, that is to say he may.[114]

It is duty of courts to encourage reconciliation as sparingly grant divorce petitions. Section 11 of the Matrimonial Causes Act 2004 has made it legally obligatory for a court of competent jurisdiction before whom a divorce petition is brought to afford parties the opportunity to reconcile or nominate an experienced or well-trained marriage conciliator, mediator or counselor or any suitable person to endeavor with the consent of parties to effect reconciliation.

The Matrimonial Cause Act 2004 allows at least a 14 days' adjournment to enable a reconciliatory effort yield fruits.

Void and Voidable Marriage

According to Lord Green in the case of *De Reneville v De Reneville*

> A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessary of any decree annulling it: a voidable marriage is one the will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.[115]

According to of Dr. (Mrs.) B.O Alloh:

> A marriage is void if to all intents and purposes the parties thereto are regarded as not having been married i.e a marriage that has never been in existence, such a marriage is said to be void ab initio and the parties thereto have never acquired the states of husband and wife.[116]

While a voidable marriage was defined by her (Dr, (Mrs.) B.O. Allo):

> As a marriage which is treated as valid but owing to some defects of either of the parties to the marriage may be voided i.e marriage that is good while subsisting by maybe annulled at the instance of some existing defects.[117]

However, the researcher's definition of a void marriage means a marriage that was never in existence that is such a marriage is void ab initio and the parties hereto are deemed in law to have not acquired the statute as husband and wife. While a voidable marriage is one that is good while subsisting, but may be annulled at the instance of either of the parties owning to some existing defects in the marriage.

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114 Section 11 MCA 2004.
115 *De Reneville v De Reneville* (1949) p. 100 at p. iii, (CA)
116 Dr. (Mrs.) B.O. Alloh Law Lecturer at the Faculty of Law, Delta State University, Abraka
117 *Ibid* p. 37.

Judicial Separation

Judicial separation is a separation of husband and wife by a decree of court, less complete than an absolute divorce. In fact, it is a limited divorce. Such separation has the effect to last as long as making the wife a single woman for all legal purpose except that she cannot marry again.

Similarly, the husband though separated from his wife is not by a judicial separation empowered to marry again. Judicial Separation is also referred to as a "Divorce a mensa et thon" which means partial or qualified divorce by which the parties were separated and allowed or ordered to live apart but remained technically married.[118]

The decree of Judicial separation is a creation of statute law, its prime purpose is to relieve the petitioner from the duty of cohabitation with the Respondent. However, this action is brought instead of an action for divorce because he/she hope for a future reconciliation with the party or because his/her religion forbids divorce. Moreover, Judicial Separation is preferred because it deprives the parties of the freedom that divorce gives as divorce enable the parties to remarry but judicial separate does not. With respect of Judicial Separation, there is always hope for reconciliation.[119]

Restitution of Conjugal Rights

A petition for the restitution of conjugal rights is made on the grounds that the respondent without a reasonable cause has refused to cohabit and render conjugal right to the petitioner.

A court to which a petition of restitution of conjugal rights has been brought shall not make decree unless it is satisfied that the petitioner sincerely desires conjugal rights to be rendered by the petitioner, and is willing in turn to render conjugal rights to the respondent. Also the petitioner must have made a written request for cohabitation in a conciliatory language to the respondent before commencement of the proceedings, except there are special circumstances that make it unnecessary to make request.[120]

Where the decree is made at the instance of the husband, he must provide a home to enable the respondent comply with the order. A decree of restitution of conjugal rights, where granted cannot be enforced by attachment.

Jactitation of Marriage

Under section 52 of the Matrimonial Causes Act,[121] a petition for jactitation of marriage is brought where the petitioner asserted that a marriage has taken place between the petitioner and the respondent. However, the court has discretion whether or not to grant the petition. A petition for jactitation of marriage is in form 60. The petition, shall state the time and places at which the respondent is alleged to have boasted or asserted that a marriage had taken place between the parties and the particulars of such boastings and assertions, and the fact that the petitioner has not acquiesced in the alleged boasting or assertion.[122]

118 *Ibid.*
119 *Ibid.*
120 Section 42(2) of MCA 2004.
121 *Ibid.*
122 Order 22 rule 2 and 3 of the MCR 2004.

Ancillary Reliefs

Maintenance and Financial Reliefs

According to the Black's Law Dictionary, Maintenance can be defined as:

> Financial support given by one person to another, usually paid as a result of legal separation or divorce. Maintenance may end after a specified time or upon the death, cohabitation or remarriage of the receiving party.[123]

It is the act of providing for children or other persons in a position of dependence with food, clothing and other necessaries and a Maintenance order is that which the court may make in favour of a wife whose husband neglected to maintain. It is the supplying of the necessaries of life. Maintenance includes such items as reasonable or necessary e.g transportation automobiles expenses medical and drug expenses, utility and household expenses. According to the researcher maintenance is the money that somebody must pay regularly to their former wife, husband or partner especially when they have had children together.

Under the common law, it was the husband's duty and obligation to maintain the wife during marriage and this obligation was formally established. However, the husband obligation terminates with the dissolution of the marriage under the common law. But statutory provisions prescribes for maintenance both during and after the proceedings for divorce.[124]

Custody

According to the Black's Law Dictionary:

> Custody is an arrangement intended to protect a child from abuse, neglect or danger whereby the child is placed in the safety, care and control of either of his parents or foster family after divorce.[125]

The term custody is to take control of a thing or person, it is the keeping, guarding, care or security of a thing. Custody in a family law means the care control and maintenance of a child award by a court to a responsible adult. According to the researcher custody is the legal right or duty take care of somebody especially children.

Custody involves two elements, Legal Custody (decision making authority) and physical custody (care giving authority) and the award of custody usually grants both rights. A court may grant, divided custody by which each parents has exclusive physical custody and full control of and responsibility for the child part of the time with visitation rights in the other parent. While in some other cases, the court may order joint custody by which both parents share the responsibility for and authority over the child at all times; although one parent may exercise parental physical control.[126]

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123 Garner, B.A., (ed) *Black's Law Dictionary* (9th ed.) (St. Paul MN: West Publishing Company Limited 2009) p. 1039.
124 Section 70, MCA 2004.
125 *Black's Law Dictionary* 9th Edition, 2009 Bryan A. Garner p. 441.
126 Nwogugu, E.I., *Familu Law in Nigeria* (3rd ed.) p. 264.

Joint custody involves joint legal custody and joint physical custody. There can also be award of a temporary custody to any of the parties pending the outcome of a separation or divorce action. The court is conferred with wide discretion in matters concerning the custody, guardianship, welfare, advancement or education of children of a marriage.

According to the Matrimonial Causes Act 2004, the law is that in proceeding with respect to the custody, guardianship welfare, advancement or education of children of a marriage, the court shall regard the interest of those children as the paramount consideration and subject thereto the court shall make such order n respect of those matter as it thinks proper.[127] In proceedings for the custody of children, the interest of the children must receive paramount consideration. In fact the condition precedent is the welfare of the child.

Settlement

According to the Black's Law Dictionary:

> Settlement means to provide for one or more beneficiaries usually members of the Settlor's family in a way that differs from what other beneficiaries will receive as heirs under statutes of descent and distribution.[128]

According to the researcher settlement this is an official or legal agreement that ends an argument between two people or a group of people or the conditions or a document stating the conditions, on which money or property is given to somebody in a marriage or divorce.

The power of court in proceedings with respect to settlement of property is provided in Section 72, of the Matrimonial Causes Act 2004, which states as follows:

> The court may in proceedings under this Act, by order require the parties to the marriage, or either of them to make for the benefit of all or any of the parties to, and the children of the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just as equitable in the circumstances of the case.[129]

Dissolution of Marriage

Dissolution of marriage is the act of bringing marriage to an end i.e the termination of marriage. When we talk of dissolution of marriage we are talking of divorce, this is because divorce is the legal dissolution of a marriage by a court.

Divorce is also termed dissolution of marriage. The term divorce imparts a dissolution of the marriage relation between husband and wife i.e a complete severance of the tie by which the parties where united

[127] Section 70 MCA 2004.
[128] *Black's Law Dictionary* 9th edition, 2009 Bryan A. Garner p. 1496.
[129] Section 72 of the MCA 2004.

as husband and wife.[130] According to the researcher divorce or dissolution of marriage is the legal ending of a marriage. It is also the legal action that ends the marriage relationship of spouses before the death of either of them.

The Matrimonial Causes Act provides for dissolution of marriage; however, the said Act provides for are prerequisites for dissolution of marriage in Nigeria. In the case of *Amobi v Nzegwu*[131] where a man purportedly remarried another woman where his divorce petition had only been made Decree *nissi*[132], the said marriage was held to be invalid. It is therefore imperative to understand what needs to be proved and at what stage a marriage can be said to have been terminated. It is only when this is properly ascertained and appropriated that a woman and her children can claim right accruable to them because of the divorce. It would be difficult to protect the rights of a woman who is in a void marriage or a marriage in which her husband did not have single status at the point of her marriage to him. Divorce is one of the principal reliefs under the Matrimonial causes Act, 1970 in Nigeria.

The grounds upon which a court may be called upon to find nullity of marriage are as provided in s.3 and s.5 of the Matrimonial Causes Act while the grounds upon which a court may be called upon to dissolve a marriage is provided for in s.15 of the matrimonial causes Act and they are both different and disparate in content and application.

In *Oghoyone v Oghoyone,*[133] a marriage between the appellant and one Wilhemina Agatha Huyssodin, a Dutch national was conducted. While this marriage was still subsisting, the Appellant purported to marry the respondent on the 9th of April, 1994 at the Lagos city Hall. There were no children of the marriage. The Appellant and the respondent had a flourishing business of selling used cars imported from abroad. The respondent commenced divorce proceedings against her husband at the Ikeja High Court. After hearing the matter and upon due consideration of the facts, the court declared the marriage null and void and held that the property of the respondent be divided into two equal parts for the benefit of both the appellant and the respondent. On appeal the court of appeal upheld the judgement of the High Court.

LEGAL APPRAISAL OF THE AVAILABLE MATRIMONIAL REMEDIES/ RELIEFS UNDER THE MATRIMONIAL CAUSES ACT

Meaning of Matrimonial Reliefs

Matrimonial Reliefs can be defined as basically different solutions available to a person who is a party to a frustrated marriage and who intends to out of a marriage that has broken down irretrievably. Though marriage is meant to be for life there are several instances where a party thereto or both parties may

[130] Dr. (Mrs.) B.O. Alloh Law Lecturer at the Faculty of Law, Delta State University, Abraka and this quote is an extract from her 2017/2018 Session unpublishing class room lecture note, p. 24.
[131] (2005) 12 NWCR (PE 938) 120
[132]This is the first decree in the dissolution of marriage after which a decree absolute would be made after three months
[133] (2010) 3 NWLR(PT.1182) p.586

approach the court for a relief which may have a lasting impact on the marriage when granted. Then a case or a petition is brought before a court the relief to be granted depends on the facts and circumstances of the case and before the relief is granted the court must first ensure that it has jurisdiction and the parties are domiciled in Nigeria.

Types of Reliefs under the Matrimonial Causes Act

There are different types of reliefs that may be applied for under the Matrimonial Causes Act and they are: (a) Reconciliation (b) Dissolution of marriage (c) Nullity of a void marriage (d) Nullity of a voidable marriage (e) Restitution of conjugal (f) Jactitation of marriage (g0 Judicial separation (h) Maintenance (i) Custody and (j) Settlement

3.3 Reconciliation

The Matrimonial Causes Act imposed a duty on a court in which a Matrimonial Action has been instituted to give consideration from time to time, in all appropriate cases, to the possibility of reconciliation between the parties to the marriage.[134] If at any time it appears to the Judge from the facts of the case or from the attitude of the parties that there is a reasonable possibility of reconciliation the Judge may adjourn the proceedings to enable the parties take steps of initiation of reconciliation.

According to section 11 of the Matrimonial Causes Act the following steps required of a Judge to encourage initiation of reconciliation:

i. The Judge should adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs.[135]
ii. The Judge may with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper with a view to effecting or reconciliation.[136]
iii. If not less than fourteen days after an adjournment under subsection (1) of the Section has taken place either of the parties to the marriage requests that the hearing be proceeded with the Judge shall resume the hearing or the proceedings may be dealt with by another judge, as the case may require as soon as practicable.[137]

According to Order 2 of the Matrimonial Causes Rules 2004, every petition for divorce or Judicial Separation instituted by a Counsel on behalf of his Client must contain a certificate in the appropriate form personally signed by the counsel, attesting that he brought the relevant provisions of the Matrimonial Causes Act 2004 on reconciliation to the notice of his Client and that he provided his client reasonable guidance affecting reconciliation before the petition for divorce was filed. The absence of this certificate invalidates the petition.[138]

The researcher is however of the view that the provision of Section 11 of the Matrimonial Causes Act on reconciliation are grossly inadequate in view of the fact that if serious matrimonial discord arises, the spouses are supposed to have the opportunity to attempt a reconciliation proceeding in the form of an

134 Section 11 MCA 2004.
135 *Ibid.*
136 *Ibid.*
137 *Ibid.*
138 Order 2, MCA 2004.

alternative dispute resolution board established for matrimonial cases. This all important board is conspicuously absent in both the Matrimonial Causes Act and the Marriage Act.

Dissolution of Marriage

The only ground known to the law on the dissolution of marriage is on the ground that the marriage has irretrievably broken down.[139] Every other thing is facts which support the ground that the marriage has broken down irretrievably.

Before a marriage can be dissolved by the court, the parties must have been married for a minimum of two years before the institution of the petition[140] any petition brought within two years of the marriage must be brought with the leave of the court. This rule, however, does not relate to matters specified in Section 15(2)(a) or (b) or Section (16)(1)(a) of the Act[141] which are:

i. willful and persistent refusal to consummate the marriage
ii. Adultery and the petitioner finds it intolerable to live with the Respondent
iii. The Respondent has committed rape, sodomy or bestiality
iv. The institution of proceedings for a decree of dissolution of marriage by way of cross proceedings

The rationale of this rule is generally to deter people from not only rushing into ill advised marriage but also to prevent them from rushing out of the marriage as soon as they discover that their marriage was not what they expected.

The Court in granting leave to file the petition must be persuaded that failure not to grant such leave will cause exceptional hardship on the applicant or exceptional depravity on the other party and in considering same the facts of each case are considered as well as the interest of the children if any or any means of reconciling both parties.[142] An application for leave to file the petition before the stipulated period is made exparts and the affidavit must state the instances of exceptional hardship or exceptional depravity suffered by the party, the facts that the petitioner intends to rely on, children of the marriage if any and other facts as stated in Order IV, Rules 2, of the Matrimonial Causes Act.

As earlier stated, there is only one known ground in law for the petition of dissolution of marriage to be granted and that is, the ground that the marriage has broken down irretrievably. The ground for divorce is however supported with several facts listed under the Act which includes:[143]

1. **Willful and Persistent Refusal to Consummate Marriage:** for a petition to be brought under this fact the key word is "willful and persistent refusal: to consummate the marriage up to the

[139] Section 15 MCA, *Harriman v Harriman* (1989) 5 NWLR (pt. 119) 6 CA.
[140] Section 30(1) MCA, 2004.
[141] Section 30(2) MCA, 2004.
[142] Section 30(3)(4) MCA, 2004.
[143] Section 15(2) MCA, 2004.

commencement of the hearing of the petition.[144] Thus once a single act of intercourse has occurred after the marriage, this fact cannot be applied.

2. **Adultery and Intolerability:** for a marriage to be dissolved on this ground there must be proof of adultery and the petitioner must find it intolerable to live with it. Thus adultery alone cannot be a ground for divorce. The commission of adultery is a matter of fact which must be proved to the satisfaction of the court,[145] mere familiarity of the person alleged to be the adulterer is not sufficient as there must be proof of penetration. The court may also draw its conclusion from exceptional suspicious circumstances as in *Adeyemi v Adeyemi*[146] where the husband upon gaining access to his wife room upon several banging n the door, found the respondent and the co-respondent inside the dark room, with the Respondent sitting on the bed with a wrapper tied loosely on her and the co-respondent shirt not properly tucked into her trousers.

   On the issue of intolerability, whether the petitioner finds it intolerable to live with the respondent is a question of fact and the test is subjective rather than objectives,[147] the court has to therefore consider the petitioners feeling. For a decree to be granted on this basis, the person with which the Respondent had committed the adultery must be joined as a co-respondent, if however, the name of the person is unknown to the petitioner at the time of the filing the petition, the suit shall not be set down for trial unless the court has made an order dispending with the naming of the persons.[148]

3. **Behaviour of the respondent that the petitioner cannot Reasonable be expected to live with:** where the Respondent has behaved in a way that the petitioner cannot reasonably be expected to live with, the petitioner can bring an action for the dissolution of the marriage. The acts complained of may be a single act or multiple acts, the key word there is the fact that the petitioner cannot reasonably be expected to live with it. Such behavior could include physical violence, excessive drinking of alcohol, the constant keeping of late nights, bad temper and anger issues, gambling etc. the particular fact involve a mixture of subjective and objectives facts. The text is objective because the court must decide whether the petitioner can reasonably be expected to live with the Respondent and subjective because it relates to whether the particular petitioner can be reasonably be expected to live with it.[149]

   The Matrimonial Causes Act provides for certain behaviours which will satisfy the court to grant a decree of dissolution, they include rape, sodomy or bestiality committed by the Respondent, habitual drunkard, taking of hard drugs, conviction of a crime, intentional infliction of grievous harm or hurt on the petitioner etc.[150] The list of behaviours is not exclusive as such several other acts not listed can be ground if sufficiently proved.

144 Section 21 MCA, *Ololele v Ololele* CCHCJ/12/72, 119.
145 Section 82 MCA, 2004.
146 (1969) WNLR 6.
147 *Cleary v Cleary* (1974) 1 WLR 73.
148 Section 32 MCA, 2004.
149 Order XI Rule 4 MCA 2004.
150 *Ash v Ash* (1972) 1 All ER 582.

4. **Desertion:** where the petitioner has been deserted for a continuous period of at least one year immediately preceding the petition, the court can grant a decree of dissolution. Desertion in this regard is not separate living with the mutual understanding of both parties but where one spouse separates 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 other spouse.[151] For desertion to take place, the following must be present viz de facto separation of the parties (bringing an end of cohabitation by severing all marital obligations), *animust deserendi* (intention to withdraw from cohabitation permanently), lack of just causes for the withdrawal from cohabitation and the absence of consent of the deserted spouse. The period of desertion must be a continuous period of a year or more.

5. **Parties living apart:** The Matrimonial Causes Act by Section 15(2) (e) & (f) provides for two instances where parties living apart may constitute a fact that a marriage has broken down irretrievably. The first instance is where the parties have lived apart for a continuous period of two years before the proceedings and the respondent does not object to a decree being granted, while the second instance is where the parties have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

In both instance, the parties must have lived apart for the period stipulated without a break in between the period. The underlying factor of living apart must also be present and is the same test as stipulated in that of desertion which is physically living apart and such intention to remain apart must be present. Also in deciding which is physically living apart and such intention to remain apart must be present. Also in deciding that the marriage has broken down on this fact, the Respondent to the action must not object to the petition been brought.

It has been argued whether or not such non-objection relates to a positive act or negative conduct like silence and non-participation in the proceeding. While the court are agreed on positive acts the view of the court on negative acts divided,[152] for instance in *Ibeawuchi v Ibeawuchi,*[153] where the petitioner sought the dissolution of marriage on the fact of two years separation, the respondent did not file an answer nor appeared in court, the court refused to grant the application on the ground that there may be many reasons why the respondent may decide not to contest or object to the petition. However in *Aderinwale v Aderinwale,*[154] the court held that the marriage has broken down irretrievably on the fact that the parties have lived apart for two years though the Respondent did not file an answer nor appeared in court.

6. Presumption of Death: A marriage may be held to have broken down irretrievably on the ground that the other party to the marriage has been absent from the petitioner for such time and in such

[151] Section 16 MCA 2004.
[152] Country Hills Attorney's and Solicitors, Analysis of the Matrimonial Reliefs under the Matrimonial Causes Act and its effect on a Marriage <https://countryhillattorneys.com.ng> accessed on 2nd April 2019.
[153] *Ikwenobe v Ikwenobe* (2004) 1 LHCR (pt. 4-5).
[154] (1973) 3 SLR 56.

circumstances as to provide reasonable grounds for presuming that he or she is dead.[155] The burden of proof is on the petitioner to show that nothing has happened within seven years period as to give him or her cause to believe that the Respondent is alive. This may be established by proof of the Respondent continuous absence for the seven years period immediately before the petition.

The above are the facts upon which the court will hold that a marriage has broken down irretrievable. However, the court may refuse to grant a decree either on its own discretion or based on the absolute bars to the decree which include:

1. Condonation: forgiveness of a spouse who has committed matrimonial misconduct and reinstatement of the spouse.
2. Connivance: where the petitioner has consented, encouraged or willfully contributed to the commission of the misconduct on which a petition for divorce is based.
3. Collusion: an agreement between parties to procure the initiation of a suit for divorce with intent to cause a perversion of justice.

Nullity of Marriage

In a petition for nullity of a marriage, the petitioner is seeking to establish that the marriage is not in existence or is invalid due to certain factors, unlike a petition for dissolution which recognizes a valid marriage.

A petition for nullity of marriage could be in respect to a voiding marriage or voidable marriage. A petition for void marriage challenges the existence of the marriage ab-initio and the fact that the parties never acquired the status of husband and wife, whereas avoidable marriage is a valid marriage while still subsisting but may be annulled by one or both parties owing to some existing defect.

In instances of void marriage, a decree of the court is not needed because the parties never obtained the status of husband and wife, however, such decree may be necessary to allay doubts as to the status of the parties and to declare the existing fact that there was never a marriage. Also, a marriage void ab initio cannot be approbated by the conducts of the parties and any person can bring the action.

For a decree of nullity on voidable marriage, a party to the marriage cannot on his own accord bring the marriage to an end, the marriage can only be annulled by a court of competent jurisdiction and for such petition to be heard, only a party to the marriage can bring the action, this is because, until it is annulled, the marriage remains valid. The court may also refuse to grant the decree where a party by the conduct forfeits the right to challenge the validity of the marriage.

There are certain grounds upon which a marriage can be void or voidable and it is thus imperative to discuss each ground.

[155] Section 15(2)(h) MCA 2004.

Void Marriage

Section 3 Matrimonial Causes Act states five grounds upon which a marriage celebrated may be void ab initio. They are;

1. **Existing Lawful Marriage:** where either of the parties to the marriage is at the time of the celebration lawfully married to another person other than the party with whom the purported marriage was celebrated, such marriage is null and void. The existing marriage could be of any form either statutory, traditionally or Islamic.[156] It also includes a marriage celebrated by either party under foreign marriage law.
2. **Prohibited Degree of Affinity and Consanguinity:** marriages celebrated within the prohibited degrees of affinity and consanguinity under the Act is void.[157] Consanguinity relates to blood relationship while affinity refers to persons related through marriage.
3. **Formal Invalidity:** A marriage is void if it fails to comply with the law of the place where the marriage took place (lex loci celebrations) as regards the form of solemnization of the marriage. In Nigeria, a marriage will be void for the form if both parties knowingly and willfully acquiesce in its celebration under four instances. The key word is both parties "knowingly and willfully" doing so, this implies the mental state of the parties and the fact that they both had knowledge of the defect but still went ahead with it. The four instances upon which a marriage will be void for form include;

i. Place of marriage: Under the Marriage Act, the place of celebration of a marriage could be the registrar office,[158] licensed place of worship[159] or a place.
ii. prescribed by a special license.[160] A marriage celebrated in any place other than these places is void ab initio.
iii. Celebration under a false name by either or both parties.
iv. Celebration without a certificate or special license under Section 13: Before a marriage can be celebrated under the Act, the parties must have taken the steps prescribed under the Act to get a certificate or special license which includes notice of marriage, publication of marriage[161]
v. Marriage not celebrated by a minister of religion or a registrar of marriage.

Thus where the parties celebrate a marriage knowing that any of the above four facts stated above is in existence such marriage will be void for formalities.

Lack of real Consent:

For a marriage to be in existence, the parties must have first consented to the marriage and where such is absent, the marriage will be void. In most cases, it usually not lacks consent per se, but cases, where

156 Section 33 and 35 Marriage Act p. 2004 Cap. M6 or Section 3(1)(a) MCA 2004.
157 Section 2(2) MCA 2004.
158 Section 3(1)(c) MCA 2004 or Section 27 Marriage Act, 2004.
159 Section 6 of the Marriage Act, 2004.
160 Section 13 Marriage act, 2004.
161 Section 10 Marriage Act, 2004.

consent is given but such consent, is not true or real in the legal sense. There are certain factors that could lead to a consent gotten to be declared void, they include;

i. Duress or fraud:[162] where consent is obtained by duress, it simply means that it was obtained under compulsion as to affect the mental state of the party whose consent is in question i.e the act of duress must have created a state of fear or apprehension which prevented that party from freely consenting to the marriage. Consent is obtained by fraud where some or a dishonest misrepresentation was made by a party to the marriage and which misrepresentation led to the purported consent of the party. Where consent is obtained by fraud, the marriage will be annulled not because of the fraud but because of the absence of consent.
ii. Mistake: for a marriage to be annulled on the basis of mistake, it has to be a mistake as to the identity of the other party or nature of ceremony to be performed.[163] Where it relates to the status of the individual married the marriage cannot be annulled.
iii. Party is mentally incapable of understanding the nature of the marriage contract; a consent given by a party will be declared void where such party is mentally incapable of understanding the nature of the marriage contract he or she entered into. And for such incapacity to be qualified it must be such that was there at the time of the celebration of the marriage.
4. **Marriageable Age:** A marriage will be declared void by the court where either of the party is at the time of the marriage of marriageable age.[164] The Marriage Act and the Matrimonial Causes Act did not stipulate marriageable age. Arguments have however been canvassed that marriageable age is twenty-one, this is based on the provision of Section 18 Marriage Act, which provides that either party to a marriage not be a widower or a widow and is under twenty-one of years, the written consent of the father or mother (if father is dead or absent) must be attached to the marriage affidavit. However, Section 21 of the Child Right act makes marriage contracted by a person under the age of eighteen years null and void.

The above factors are the instances where a marriage celebrated will be void ab initio and its effect on the parties is that their status never changed ab initio due to the celebration as such celebration was never recognized in law.

Voidable Marriage

As stated earlier, a voidable marriage is a valid marriage until declared invalid by the court upon an application by either of the party to the marriage. Section 5 of the Matrimonial Causes Act provides the instances upon which a marriage can be declared voidable and they are:

1. **Incapacity to Consummate the Marriage:** Where either of the party is incapable of consummating the marriage, the marriage will be declared voidable. Incapacity in this regard must have existed at the date of the marriage and also at the date of hearing to find a decree of voidable

[162] Section 3(d)(i) Marriage Act, 2004.
[163] *Supra* 3 (d)(ii)
[164] *Supra* 3(e)(ii)

marriage.[165] Also, such incapacity must be incurable for a decree to be granted. The party suffering from the incapacity cannot bring this application to expect the party was not aware of the existence of the incapacity at the time of the marriage.[166]

2. **A Party is of Unsound Mind, Mentally defective or Subject to the Recurrent Attack of Insanity or Epilepsy:** A marriage will be declared voidable if either of the party is at the time of the marriage of unsound mind, mentally defective insane or epileptic. What amounts to mentally defective as defined in section 5(2) MCA[167] as a person who owing to an arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, requires oversight care or control for its own protection or for the protection of others and is by reason of that fact unfitted for the responsibilities of marriage. The burden of proving that any of these factors were in existence at the time of celebration of marriage and at the time of hearing rests on the person asserting its existence. Also, a decree will not be grated by the court at the instance of the person suffering from the ailment.
3. **Venereal Disease:** Whereas at the time of celebration and hearing of the case either of the party to the marriage suffers from a venereal disease which is communicable, the court will grant a decree of nullity, however, such application cannot be brought by the person who suffers from it.
4. **Wife Impregnated by a Person other than her Husband:** If as at the time of celebration of the marriage, the wife was pregnant for a person other than the husband, the husband can bring an action for nullity of the marriage

Though the above grounds are the grounds for nullity of voidable marriage there are some restrictions imposed by the law to the grounds especially on Section 5(a) (b-d).[168] the restrictions are complementary to the rules already discussed and include:

i. The petitioner must have been ignorant of the fact constituting the grounds as at the time of the celebration of the marriage
ii. The petition must have been filed not later than 12 months after the date of the marriage.
iii. Marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the existence of the facts constituting the grounds.

The rationale for the above restriction is to ensure that he who comes to equity must come with clean hands as for where the petitioner was aware of the defect but still choose to stay, he cannot then turn around to change the status already conferred on him. Also where the petition is brought later than a year after the celebration of the marriage, it is presumed that the petitioner has accepted the facts.

Restitution of Conjugal Rights

This is a corollary to the relief of judicial separation and is usually sought by a party where the spouses have been separated and one of them requests the court to resume cohabitation with the petitioner. As noted earlier, the essence of a decree of judicial separation is to cease cohabitation of both parties, which

[165] *S. v S.* (1956) p. 1.
[166] Section 35(a) MCA, 2004.
[167] MCA, 2004.
[168] Section 5(a) (b-d) MCA, 2004.

is a prerequisite of marriage. Once the decree is granted, a party to the marriage, who seeks to cohabit with the other can be held liable for trespass or if the husband chooses to have sexual intercourse without her consent for rape. In order to avert been held liable for rape or trespass, an order of the court is needed to compel the other party to perform his conjugal rights.

Conjugal rights can simple by defined as sexual rights or intimacy which arises as a result of a marriage relationship. Thus where cohabitation has ceased and one party is anxious to resume normal married life, this action can be brought. The grounds upon which the decree may be sought is that the parties to the marriage, whether or not they have at any time cohabited, are not cohabiting and that without just cause or excuse, the party against whom the decree is sought refuses t cohabit with and render conjugal right to the petitioner. A petition for a decree of restitution of marriage is brought in accordance with Form 7 of the Rules and the petition must state the last date of cohabitation between the parties and the circumstances in which cohabitation ceased.[169]

The court has the discretion to grant such decree and it cannot be grated except the court is satisfied that the petitioner sincerely desires conjugal rights to be rendered to the respondent and is willing to render same to the respondent. Also, there must have been a written request made to the respondent for cohabitation, which must be expressed in a conciliatory language before the institution of the proceedings or special circumstances necessitated the need for the proceedings, notwithstanding the fact that a written request was not made.[170]

The purport of this provision is to show the sincerity of the petitioner. In *Ejiofor v Ejiofor,*[171] the respondent petitioned for a decree of restitution of conjugal rights and ancillary reliefs. The appellant cross-petitioned for divorce on the ground that the marriage has broken down irretrievably. The trial judge dismissed the cross-petition ad granted the prayer for restitution of conjugal rights. However, on appeal, the Court of appeal held that section 49 of the MCA laid down statutory condition precedent to the grant of a decree of restitution of conjugal rights and such conditions mandatory. As the trial judge did not consider the conditions before he granted the decree to the respondent, his action was an error in law and the appeal was allowed.

The court may refuse to grant the decree of restitution of conjugal rights where there is in existence a defence or cause refusing to resume cohabitation. A decree when grated cannot be enforceable by attachment.[172] Upon grant of the decree of restitution of conjugal rights, the petitioner is to as soon as possible give the respondent notice of the home to resume cohabitation in accordance with the rules of court or provisions made.[173]

Jactitation of Marriage

169 *Order v Rule* 25 MCA, 2004.
170 *Supra*, Section 49 MCA, 2004.
171 Suit No. FCA/B/42/78. Court of appeal, Benin Judicial Division, May 17 1979 (unreported).
172 Section 51 MCA, 2004.
173 Section 50 Order XVII, Rule 3 MCA, 2004.

A petition for a decree of Jactitation of marriage may be based on the ground that the respondent has falsely boasted and persistently asserted that a marriage has taken place between the respondent and the petitioner.[174] The essence of this decree is to put a stop to such falsehood and malicious allegation.
In bringing an action for a decree of Jactitation of marriage, the petition is brought in accordance with Form 60 of the rules and the content of the petition is as follows;

i. It must state the dates, times and places at which the respon
ii. dent is alleged to have boasted and asserted that a marriage had taken place between the petitioner and the respondent.
ii. The particulars of the assertions and boasting
iii. Whether or not the petitioner is married to the respondent and whether or not he has acquiesced himself or herself in the alleged boasting or assertions.[175]

In granting this decree the court has the absolute discretion to grant or not to grant the same. The court in exercising its discretion considers several factors which must be compelling and notorious and must show that refusal to grant such decree may be a siege to the petitioner getting married in future (if not married) or affect other areas of his life.

However, a petition of this sort is usually rare, even though it is rampant seeing persons who are not legally married by any of the known means of marriage referring to themselves as husband and wife, most times, when such issues arise, the party may caution the other party mildly or jokingly and that ends the matter. Hence a condition precedent for bringing this kind of application is the fact that the petitioner has not condoled such representation at any time as of where such is done, the action will be dismissed.

Judicial separation
Another form of matrimonial relief that can be granted by the court is a decree of Judicial Separation. A decree of judicial separation is brought on the ground that the marriage has irretrievably broken down and must be supported with one or more of the facts listed in Section 15(2) of the MCA, Also, facts listed in sundry sections of Section 18-32 of the Matrimonial Causes Act 2004, in relation to the dissolution of marriage also applies to parties seeking the relief of judicial separation.[176] In bringing an application for a decree of judicial separation, the petition must be in accordance with Form 6 of the Rules.[177] The defences applicable to a petition for dissolution of marriage also applies.

The effect of a decree of judicial separation, when granted by the court, is to relieve the petitioner from the obligation to cohabit with the other party to the marriage while the decree remains in operation.[178] The decree, however, does not have an effect on the marriage, status, rights and obligations of the parties to the marriage as the marriage is still valid and in existence, and parties for all intent and purposes remain,

174 Section 52 Cap. M7 MCA, 2004.
175 *Order* XXII Rule 2 MCA, 2004.
176 Section 39-40 MCA, 2004.
177 *Order v Rule* 23 MCA, 2004.
178 Section 41 MCA, 2004.

husband and wife, what is just affected in the marriage is the right to cohabit as all antecedents arising from a marriage still remains.

While the decree is still in force, either party to the marriage may sue the other party in contract or tort. It a spouse dies intestate in respect of any property during the period the decree was in force, the property shall devolve as if that party had survived the other party to the marriage, its effects being that the other party will not be entitled to the rights of a spouse on the intestacy of the deceased spouse.[179] Also, where a husband fails to pay maintenance ordered to be paid to his wife, he will be liable for necessaries supplied to her, this is because upon maintenance ordered the obligation of the husband to maintain his wife even when they are living apart is not abrogated by the decree of judicial separation.[180]

The fact that the court has granted a decree of judicial separation does not mean that the court has been barred from granting a decree of dissolution if brought by any of the party. It rather strengthens the fact of the case for dissolutions. The court may treat the decree of judicial separation as sufficient proof of facts constituting the ground on which that decree was made.[181]

Where the parties voluntarily resume cohabitation after the grant of the decree of judicial separation, either party may apply for an order discharging the decree and the court shall, if both parties consent to the order, or if the court is otherwise satisfied that the parties have voluntarily resumed cohabitation, make an order discharging the decree accordingly.[182]

The term *Judicial Separation* was introduced by the English Matrimonial Causes Act of 1857 as a substitute for the old ecclesiastical decree of divorce *a mensa et thoro*[183] which prior thereto was granted by the ecclesiastical courts.[184] The decree was so called because it was a sentence of the court made upon proof of adultery or cruelty, suspending the duty of cohabitation in the interest of the innocent party, but the marriage *vinculum* remains unaffected. In its form and in its intent, the decree certainly looked to a reconciliation of the parties and upon the happening of this, the decree with or without such provision became *functus.*[185]

In the view of Lord Buckmaster, "judicial separation, which has been the subject of much learned and mighty censure, is nothing but enforcing through the order of the court an arrangement which the parties could – were they willing – equally effect for themselves, it merely makes in the form and with the force of a decree and arrangement for the parties to live apart."[186]

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179 Section 42(2) MCA, 2004.
180 *Jabre v Jabre* (1999) 3 NWLR (pt. 596) 606.
181 Section 44 MCA, 2004.
182 Section 45 MCA, 2004.
183 F.J. Bernard, Divorce from table and bed, LL.M Lagos, Department of Private Law, University of Ado-Ekiti.
184 *Ibid.*
185 The Law and Practice Relating to Divorce and Other Matrimonial Causes in Canada, 2nd ed. 1964 Burroughs and Company Ltd.
186 *Hyman v Hyman* (1929) A.C. 601.

As easy as this decree and its effect may seem, it appears there are other in roads into in by which a party may employ the decree to frustrate the other party to his or her own advantage and create a situation that is not only outside the contemplation of the law but which results contrary to the intendment of the law.[187]

Reasons for the Prayer for Judicial Separation

Most petitioners resort to application for judicial separation instead of divorce because they have the hope of reconciliation. In the case of *Lawoye v Lawoye*[188] the wife who petitioned for judicial separation was not prepared to consider the dissolution of the marriage because according to her, "if our troubles were happily settled, we could still live together as man and wife." In the view of the Lord Chancellor of England in 1996 "notwithstanding that the relationship has broken down irretrievably, and was seen as such at that time, living apart in the conditions that had been arranged might demonstrate to the parties that they were better off [as] they were before. Having a separation order would preclude their entering into any other marriage relationship – they might have other relationship but not marriage. Therefore it was possible that people in that situation might well be able to reconcile after a while."[189]

Another reason some petitioners go for judicial separation rather than divorce is simply because of religious reasons. It is common knowledge that some religious organisations do not admit of divorce[190] and the members knowing that their marriage is collapsing would not want to be out of their religious affiliations. In the course of introducing the family Law Act of 1996 in England, the Lord Chancellor explained that one of the reasons for retaining separation order in the new law was that 'for religious or conscientious objections, some people would not wish to have a divorce.' He further said "I wish to keep open every possibility of accommodating every form of religious belief that exists in relation to this matter".[191]

Thirdly and more serious is the fact that some petitioners especially wives want it simply out of spite. This is common where the respondent has committed adultery and there is the possibility of a marriage between the respondent and the cited party. The wife here deprives the respondent of the freedom which divorce will give him to marry the co-respondent. In the case of *Adeseye v Adeseye*[192] the husband petitioned for divorce on the ground of cruelty, while the wife cross-petitioned for judicial separation on the grounds of the husband's adultery and cruelty. *Adefarasin J.* (as he then was) ruled that the wife had established the charges of adultery and cruelty in her cross-petition but came against the difficulty of what decree to make because; in his view there is no future for the marriage.

The court observed that the probable reason why the wife wanted a decree of judicial separation was "because she does not want him to be free to marry Modupe Marquis with whom he is now living."

187 Sagay I.E. *Nigerian Family Law: Principles Cases Statutes and Commentaries* (Malthouse Press 1999).
188 (1944) N.L.R. 941.
189 Hansard, 11th January 1996 Vol. 568 No. 24 Col. 299.
190 It is common knowledge that the Catholic Church is very Critical of Divorce. The Church holds Matrimony as a holy estate.
191 Hansard 11th January 1996 Vol. 568 No. 24 Col. 299.
192 Unreported High Court of Lagos State Judgment, 20 February 1970 or Bernard F.J. Judicial Separation: When a relief becomes a burden <https://www.academia.edu> accessed on the 24 May 2019.

Accordingly, the decree was granted. The learned judge lamented that the court cannot substitute for a petition a decree which it considers appropriate, there being no alternative but to make the order which the respondent/cross-petition asked for.

Faced with the same problem, Hill J. said in *Blanchard v Blanchard;*[193]

> Following my practice, I asked the petitioner why she sought judicial separation and not divorce. She was quite frank about it… that reason was this: the other woman had ruined her home and she did not want her husband to marry that woman. In these circumstances, I greatly regret that the decree gives me no power to decree dissolution.

In the mind of the researcher this is a most unfortunate situation. If a marriage has 'died', then it should be buried and the parties free to live their separate independent lives. A situation where people are neither married nor unmarried does not make for healthy society. As Sir F. Jeune said in *Johnson v Johnson.*[194]

> It is a terrible thing that people should be going about the world neither married not unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery

By the categorization of the Matrimonial Causes Act[195] the provisions of Part II of the Act within which the provisions on judicial separation fall are headed 'Matrimnial Relief". Thus the law supposes that along with dissolution of marriage, restitution of conjugal rights, and jactitation of marriage, a decree of judicial separation is a relief. But who is to be relieved and to what extent? Without going over what has been pointed out in the course of this dissertation, judicial separation only serves as a relief when looking at the overall picture from the viewpoint of the court, the marriage can still be saved. In other words, it serves as a relief where there is hope for the marriage. In instances where it is clear that the marriage has broken down irretrievably and what remains is an empty legal shell, the courts should not be blinded by the letter of the law. After all, the law was made for man. Such marriages should be laid to rest and the parties allowed to live their lives without any unwholesome attachment to a union that is virtually non-existent and to which neither party has any real attachment.

One issue that comes to mind is this: while a decree of judicial separation is in force, the law presumes that the marriage in itself is not affected even though the parties are separated, if a party goes to have extra marital affairs, is the other party entitled to any damages for adultery from the cited party? Is there any moral justification for a party, for instance a woman who has left the home to challenge the husband for adultery while the decree of judicial separation was no? or is the decree meant to punish a party?

In the view of the researcher, a decree of judicial separation made by any court based on the petition of any party to the marriage where it is clear that the marriage no longer exists in reality, is to say the least a

193 (1928) 44 T.L.R. 313.
194 *Johnson v Johnson* (1905) p. 193.
195 MCA, 2004.

bondage and never a relief. The researcher therefore recommend that the decree must have a fixed duration. For example if the decree is granted say for a year, the decree should automatically graduate to a divorce if at the expiration of the period the condition of the union has not improved. Since the law allows a discharge of the decree upon the voluntary resumption of cohabitation. Thus where the parties refuse to resume after the period fixed, then the broken-down marriage should be allowed to rest in peace and the parties allowed to go on with their individual lives.

Finally, it is a suggestion of the researcher that there is a need for amendments in the law. Provision should be made to allow a court where the marriage has broken down irretrievably to decree outright dissolution and not judicial separation being what the petitioner asked for. The court is not established to give effect to the desire of any one party at the expense of true and total justice. The courts should have the latitude to look at all the circumstances of each case and reach equitable conclusions.

The old system must give into the realities of the present. Laws are not made without regard for the people and the environment. The decree itself seems no longer relevant to the present day. Few people exercise recourse to it in the Nigerian courts. While the remedy may still be retained, it is imperative that the form and effect be modified to reflect the philosophy of the irretrievable breakdown concept.

ANCILLARY RELIEFS

These reliefs are Secondary reliefs available under the Matrimonial Causes Act. And they are contained in Part IV of the Matrimonial Causes Act 2004 which deals with the making of orders for maintenance, Custody and Settlements. Under this part of the Act, the High Court is empowered with Jurisdiction to make various orders in respect of the husband, wife and children of the marriage. Before going further to know the meaning and nature of these orders and circumstances in which they are made or may be made, it is important to know the parties in respect of the whom they may be made.[196]
The above mentioned reliefs could be made in respect of the following persons:

1. A party to a marriage: Section 69 of the Matrimonial Causes Act provides for the making of ancillary orders in respect of a party to the marriage or a marriage. Under Section 69, of the Matrimonial Causes Act, marriage is defined to include a purported marriage that is void, but does not include one entered into according to Muslim rite or under Customary Law. That is an ancillary order which can be made in favour of parties (husband, wife and children) of a void, Voidable and Valid Marriage.
2. Ancillary order may also be made in respect of the children of the marriage. Section 69 of the Matrimonial Causes Act 2004 defines the children of the marriage as:
    a. Any child adopted since the marriage by the husband and wife or by either of them with the consent of the other".
    b. Any child of the husband and wife born before the marriage, whether legitimated by marriage or not; and

[196] S.A. Adesanya, "Financial Relief Under the Matrimonial Causes Decree" *Nigeria Lawyer's Quarterly* Vol. 6 (1972) 70.

c. "Any child of either husband or wife (including and illegitimate child of either of them and a child adopted by either of them) if at the relevant time, the child was ordinarily a member of the household of the husband and wife, so however that a child of the husband and wife (including a child born before the marriage, whether legitimated by the marriage or not) who has been adopted by another person or other person shall be deemed not to be a child of the marriage[197]

From the above definition in Section 69 of the Matrimonial Causes Act 2004, any child can be considered to be a child of a marriage, whether adopted by both the husband and wife or either of them at the consent of the other, a child given birth to before the marriage by the husband and wife or either of them legitimate or not. Illegitimate child of either of the parties, if it is shown that the child at the relevant time was ordinarily a member of the household of the husband and wife. However the meaning of children of the marriage as stated in Section 69 of the Matrimonial Causes Act 2004 does not cover children of the husband and wife that have already been adopted by another person or persons.
Whether a child is a member of the household of the spouses is a question of fact, to be determined in each case.[198]

Maintenance
Maintenance is one of the ancillary reliefs available to parties who seek dissolution of marriage in Nigeria. The word maintenance has several connotations. It could be said to be '*the act of maintaining, the state of being maintained, support; something that maintains, the upkeep of property or equipment ; an officious or unlawful intermeddling in a legal suit by assisting either party with means to carry it on'.*[199]

However maintenance has a different connotation in the realm of matrimonial causes and that is the perspective that is the calling of this work.

What is Maintenance?
In the case of *Doherty v Doherty*[200] the court defining maintenance and distinguishing between it and alimony held;

> Alimony is a financial provision made by a husband and is claimable by the wife while the marriage still subsists, including the intention period between decrees nissi and absolute. Maintenance On the other hand is a provision made by a man to his former wife after dissolution of the marriage. A claim for both maintenance and alimony is incredible….

[197] Section 69 and 114(1) MCA, 2004.
[198] *May v May* (1961) 2 FLR 383, 386.
[199] Merriam- Webster's offline dictionary
[200] [2010] All FWLR (pt 519) p.1147

Maintenance therefore refers to all the provision, both monetary and otherwise which a party is entitled to get from spouse upon dissolution of marriage. It usually flows from a husband to a wife in most cases. Maintenance as earlier mentioned in Chapter two can be defined as the act of providing for children or other persons in a position of dependence with food, clothing and other necessaries for the sustenance of life. A maintenance order is one which the court may make in favor of a wife whose husband neglect to maintain. It is a financial support given by one person to another usually paid as a result of a legal separation or divorce. It means the furnishing by one person to another for his/her support of the means of living or food, clothing, shelter etc particularly where a legal relation of the parties is such that one is bound to support the other as between father and child or husband and wife.

Under the common law, it was the husband's duty and obligation to maintain his wife and his minor children during the marriage and even after the marriage has be dissolved especially when there is a court order to that effect. However Section 70 of the Matrimonial Causes Act, has reviewed the common law position. Under that Section either the husband or the wife can successfully claim for maintenance from either party.

Section 70 of the Matrimonial Causes Act 2004 states as follows:

> Subject to this Section the court may in proceedings with respect to the maintenance of the party to a marriage or of children of the marriage other than proceedings for an order for maintenance pending the disposal of proceedings make such order as it thinks proper having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstance.[201]

Subject to this section and to rules of court, the court may in proceedings for an order for Maintenance of a party to a marriage or of children to the marriage, pending the disposal of proceedings make such order as it thinks proper having regard to the means, earnings, capacity and conduct of the parties to the marriage and all other relevant circumstance.

Section 70 of the Matrimonial Causes Act, effected three important changes in the law relating to maintenance. For the first time equal right is conferred on the husband and wife to seek for maintenance from each other. It eliminated the confusion in the use of the term alimony and maintenances. Thirdly, the old rule which required the court to grant to the wife one third of the joint income of the parties as maintenance has also been done away with.[202]

In *Olu-Ibukun v Olu-Ibukun,*[203] the Court after quoting Section 70(1) of the Matrimonial Causes Act 1974, Stated that not only have the above provisions done away with the confusing terminologies of "alimony" and Maintenance by using the word "maintenance" even when alimony in the conventional sense is

[201] Section 70 MCA, 2004.
[202] Nwogugu, E.I. *Family Law in Nigeria* (3rd ed) p. 256.
[203] (1974) 1 All NLR (pt. 1) 51.

intended, they have also presumably done away with the rule concerning one fifth of the joint income for the wife … and have substituted same for a more realistic yardstick.[204]

Also in the case of *Nakanda v Nakanda*,[205] *Ademola J.C.A.* held, that under the Matrimonial Causes Act 1970[206] the position of the husband and wife were assimilated and either of them is entitled to maintenance from the other provided the conditions stipulated, in section 70 of the Matrimonial Causes Act 2004, are taken into consideration. In the case aforementioned, the Court of Appeal laid down comprehensive guidelines regarding what courts should or should not take into consideration when making an order for financial relief and any other type of maintenance order they are:

1. The means of the parties.
2. The earning capacities of the parties
3. The conduct of the parties
4. all other relevant circumstances.

The court is bound by the provision of Section 70 of the Matrimonial Causes Act 2004, in awarding maintenance and are also bound to take the above mentioned factors into consideration.[207]
In England where our laws are obviously copied from, the court had ordered wives to pay maintenance to their husband's following the provisions of Section 23 and 24 of the English M Matrimonial Causes Act 1965, which is similar to the provisions of our Matrimonial Causes Act. In the case of *Calderbank v Calderbank*,[208] the husband successfully petitioned for divorce and also asked for maintenance when the wife who was quite affluent supporting the family out of her income and who the owner of the matrimonial home deserted her husband to live with another man. The court ordered the wife to pay her husband a large sum of 10,000 pounds out of the sale of the Matrimonial hone in addition to the fact the wife was responsible for the maintenance and education of the children of the marriage. The court of Appeal upheld this decision and confirmed that under the English Act, whether it is the wife or husband seeking financial provision, the factors to be taken into account applied to both parties equally.

The Attitude of the Nigerian Courts Towards Section 70(1) of the Matrimonial Causes Act
However, the former law that the husband is the only person to whom the wife should look to for maintenance for herself and her children still appears to influence the thinking of Nigerian courts. Thus in the case of *Oni v Oni*,[209] *Johnson J.* referred to the duty of the husband at common law to maintain the wife as if it was still applicable in Nigeria without any reference to the provisions of Section 70 of the Matrimonial Causes Act 2004:

[204] *Ibid.*
[205] Unreported C.A. Suit No. CA/L/1991 81.
[206] MCA, (1970).
[207] Section 70 MCA, 2004.
[208] (1075) 3 WLR 556.
[209] Suit No M/52/70 (Unreported) High Court of Western State Ibadan 1971.

In most decision, the assumption throughout is that the husband is duty bound to maintain the wife. In *Erhahon v Erhahon,*[210] the court of Appeal stated that:

> A man has a common law duty to maintain his wife and such a wife then has a right to be maintained, the right of a wife to maintenance against her husband is not contractual in nature, the husband is obliged to maintain his wife and may be law be compelled to fund her necessaries as meat, drink, cloths etc suitable to her husband's estate or circumstances.[211]

It is trite, that for a law to be said to be a good law that law must be in the interest of the people for which it is enacted to regulate, a good law must be reasonable and it must express the will and culture of the people. The Section 70 of the Matrimonial Causes Act 2004 was obviously copied from a society where it is working for them because its their culture. The Section 70 of the Matrimonial Causes Act 2004 cannot work for us because it doesn't reflect our cultural sensitivity neither does it reflect the will of the people that it is meant to regulate. It is a known fact that Nigeria is a patriarchal society where it is belied that the man is the head of the family, irrespective of who pays the bills. So where a marriage has broken down irretrievably, it will be hard for the man to seek the relief of maintenance from the wife. Because that will be tantamount to puppet to the man subjecting himself to the odium and cultural shame of being referred to as a puppet who is spoon fed by his wife he is supposed to make provision for and also looking at the attitude of the court towards the Section 70 of the Act it will be right to say, that idea of a wife providing maintenance for her husband after the dissolution of their marriage is not working and it is not going to work in Nigeria.

The researcher therefore advice that Section 70 of the Matrimonial Causes Act should be amended to reflect the will and cultural values of Nigerians.

Custody

Custody of children is one of the rights a woman may be entitled to upon divorce in Nigeria and these right needs to be safeguarded. When parents end their relationship, determining who gets the children is one of the most important decisions they will have to make. The court with jurisdiction in the divorce proceedings will also usually determine child custody arrangement in situations where parent(s) fail to decide on it[212]. If the parents have children together while married, they would usually have joint custody and their rights are equal over that child. However, in situations where the parents are unable to reach a custody agreement, the court must help to determine what is best for the child. In some instances, the court might order a psychological examination of one or both parents. This is referred to as parenting evaluation. Parenting evaluation is a formal investigation to assess the level of each parent's parenting skills to determine which is best suited for the care of the child[213]. It has been said that when parents separate or

[210] (1997) 6 NWLR (pt. 510) at 667.
[211] (1997) 6 NWLR Pt. 510 at 667.
[212] Jo-Ann Braverman, P.C *Introduction to child custody : A Guide for parents*(ND), retrieved fromwww.lawfirms.com/resources/child-custody-basics/intoduction.htm (accessed on the 02/04/2017)
[213] Op. cit

get divorced, it is the children that feel the impact the most, therefore children must be properly catered for in the event of a divorce.[214]

Custody[215] may be actual or constructive in the sense of having power and control over the person. Under the Divorce Act of Canada, 1985, it is defined to mean the ability to make daily and major decisions about the child and where the child lives[216]. According to Van Heerden, custody is that portion of parental authority which pertains to the day to day welfare and wellbeing of children.[217] Custody is the care of a person or thing, generally under court orders, or the state of being held by force[218], it is also seen as the control and supervision of the daily life and person of the child. In the case of *Alabi vs. Alabi*[219] the court held inter alia that:

> Custody of a child connotes not only the control of the child, but carries with it the concomitant implication of the preservation and adequate care of the child's personality, physically, mentally and morally. In other words, this responsibility includes his/her needs in terms of food, shelter, clothing and the like

Custody in family law means the care, control and maintenance of a child award by a court to a responsible adult.[220]
Although, divorce is stressful enough even more painful is the determination of custody of the children of the marriage as children are not assets and cannot be divided. During divorce, children who have already been affected by the divorce are further impacted by a custody battle. The court and lawyers are always in constant battle to determine which parents would be the better custodian parent.

Section 71(1) of the Matrimonial Causes Act 2004 provides that in proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interest of the children of the marriage as a paramount consideration and subject thereto, the court shall make such order in respect of those matters as "it thinks proper."[221]

[214] A.T. Akujobi, 'Children and the Nigerian Law: Problems and Prospects', vol.2, No.1 DLR 2006, 126
[215]Shirley T. Kennedy, Mississippi College School of Law retrieved from https://www.msbar.org/.../gal-disc-3-mississippi-law..stody-and-visitation.pdf (accessed on 3/05/2017)
[216]Centre for public legal education Alberta "Child custody and parenting" retrieved from www.albertacourts.a b.ca/fjs/education.php (accessed on the 02/04/2017)
[217]Chief family Advocate & Anor v. G, 2003 (2) SA 599 (W) 601 Para. I retrieved from www.justice.gov.za/hague/caselaw/2003 Hague : Case law (accessed on the 11/04/2017)
[218] www.yourdictionary .com/custody (accessed 03/04/17)
[219] (2008) ALL FWLR PT 418 PG 257 Ratio 9
[220] E.I. Nwogugu, *Family Law in Nigeria* (3rd ed) p. 264.
[221] Section 71, MCA 1987.

In proceedings for the custody of children, the interest of the children must receive paramount consideration.[222] Infact, the condition precedent is the welfare of the child.[223] The following are the factors provided by the court to be considered as relevant when deciding what is in the interest of the child;

1. The degree of familiarity between the child and each of the parties respectively.
2. The income and position in life of each of the parties respectively
3. The amount of affection between the child and each of the parties
4. The respective accommodation of the parties
5. The arrangement made by the parties for the education of the children
6. The fact that one of the parties is now with a third party as man and wife, and the third party may not welcome the presence of the child.
7. The fact that the children should not be separated but as much possible be allowed to live and grow together.
8. The fact that custody of infants or children of tender years should normally be awarded to the mother, unless there are other considerations or factors which makes this undesirable or impossible
9. The fact that one of the parties is too young and may wish to remarry and the child may become an impediment to that party.[224]

All these factors were considered by the Supreme Court in the case of *Theresa Williams v Rasheed William.*[225] On the meaning and implication of custody, *Obaseki JSC* in the case of *William v William*[226] adopted the following as the necessary intendment of our law as contained in section 71 of the Matrimonial Causes Act.[227]

1. Where in proceedings before any court, the custody or upbringing of a minor is in question, the court in deciding the question shall regard the welfare of the minor as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father in respect to such custody is superior to that of the mother or the claim of the mother is superior to that of the father.
2. In regard to the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable by either with the other.
3. Nor is there necessarily rule that a mother has a paramount claim as against other relations at any rate where the father is alive and supporting the application of those relation.
4. The welfare of the infant although the first and paramount consideration is not the sole consideration and the conduct of the parties is a matter to take into account.

222 Karibi Whyte J.S.C. (as he then was) in *Williams v Williams* (1982) 2 NWLR (pt. 54) p. 66
223 *Ibid.*
224 *Ibid.*
225 *Ibid.*
226 *Ibid.*
227 Section 71 MCA, 2004.

5. The adultery of a party is not necessarily reason for depriving that party of custody unless the circumstances of the adultery makes it undesirable.
6. All the circumstances must be considered.
7. The fact and advantage of brotherhood and sister must also be considered when there is more than one child of the family and it is proposed to give custody of one child to one person and another to different person.
8. There is no settled rule that a child of tender age or years should remain in the custody of the mother, but obviously the care and supervision that a mother who is not out at work can give to the little children is an important factor.
9. In dealing with the question of custody and or access, the court will have regard to the particular circumstances of each case always bearing in mind that the benefit and interest of the child is the paramount consideration and not the punishment of a spouse for misconduct.

It is pertinent to note that in considering what is in the interest of child, the court does not concern itself with matters like who, as between the parties is responsible for the breakdown of the marriage which has necessitated the proceedings for custody while exercising its discretion for grant of custody, the court does not award custody to one party as a favour to that party or as a punishment for the other party, who in the opinion of the court had conducted himself or herself badly. Whatever decision the court has arrived at must be for the interest of the child.[228] This is because the conduct of parents should not be a punishment to the child. An adulterous mother may be a mother in taking care of a child,[229] the child's welfare remains the major concentration.

Belgore, J.S.C. in the case of *Odogwu v Odogwu*[230] pointed out that the:

> Welfare of a child is not the material provision in the house of good clothes, air conditioners, television, all gadgets normally associated with the middle class, it is more of the happiness of the child and his psychological development.

In Philipines, Article 213 of the family Code of the Philipines[231] states: In case of separation of the parents, parental authority shall be exercised by the parent designated by the court … no child under seven years of age shall be separated from the mother unless the court finds compelling reasons to order otherwise. The law also provide that illegitimate children shall be under the parental authority of their mother. The rule is that children older than seven years old are allowed to state their preference that is whether they intend to stay with the mother or the father. However, while such choice or preference is given respect by the courts, the courts are not bound by such preferences. The court will still have to exercise its discretion by disregarding the child's preference should the parents chosen being found to be unfit. Decision of custody of children are always open to adjustment as the circumstances may warrant, that is the interest of the child is always paramount.

[228] *Williams v Williams* (1987) All NLR 253.
[229] *Lodele v Lodele* Suit No. 1/189/79 High Court of Ibadan January 23, 1980 (Unreported).
[230] (1992) 2 NWLR (pt. 225) 539, 589 – 590.
[231] Custody in Philippine Law <https://www.manilatimes.net> accessed on 5 April, 2019.

Finally, it is worthy of note that in custody matter generally, the court has wide discretion to grant custody to any of the parties but in doing this consideration is highly given to the interest of the child which is very paramount that is in custody matters the interest or welfare of the child is paramount.

Types of Custody

There are many different types of custody, the list is non-exhaustive. This is probably due to the fact that in determining custody in most jurisdictions, it is the interest of the child that is of paramount consideration. Therefore, the court would determine who gets custody by who is best suited for the care and welfare of the child, and the courts are not bound to restrict who is entitled to custody to only the biological parents. The pre-eminent consideration in determining what type of custody to order is the paramount interest of the child or children of the marriage. It is therefore important to understand the various types of custody in order to understand which of them would best safeguard the interest of the child or children and by extension the divorced wife. A few custodial arrangements are highlighted below.

Sole custody[232]:

It is also called sole legal custody. It involves a situation where one parent makes all the decisions for the child; with the other parent having little or no access to the child. However, it must be noted that this type of custody is only granted in exceptional circumstances. For example, when a child is abused or neglected by a parent or such a parent is a lunatic and would constitute danger and risk to the child. Although, even in such circumstances the other parent will mostly likely be entitled to supervised visits. What the court usually takes into consideration is the best interest of the child. Sole custody would be granted if it can be shown that one parent is unfit to be a parent; often due to finance, drug or alcohol problems. Also if it can be shown that one parent has taken to living with a new partner, and that new partner is deemed unfit to care for the child then sole physical custody may be awarded to the parent best suited. The court may in deserving cases, not losing sight of safeguarding the rights of the child or children of the marriage, even vary custodial arrangements where the court deems it fit to so do.

Joint Custody[233]:

This is one of the most common arrangements between parents. The parent with physical custody of the child has the power and authority to make day to day decisions for the children but major decisions such as medical treatment, school to attend etc. must be made by both parents jointly. Where the parent with physical custody of the child deliberately leaves the other parent out of major decision making in the life of a child when there is an existing order of joint custody, the party so deprived can approach the court to seek redress. One of the advantages of joint custody for the children is that they get to remain in contact with both of their parents and continue their relationships on both sides. In addition, it also has the advantage of placing an equal load on both parents in terms of the burdens of raising the child. However, one major disadvantage of joint custody is that children subject to this arrangement would usually be taken back and forth; as they have to spend time with both parents differently and if this is not properly managed

[232] ibid
[233] ibid

it may affect the child's stability emotionally, educationally and in other ways. Further, it can become expensive to keep two homes for a child as the parents who had to keep one home would now be inclined to keep two homes for the child. This would naturally tell on the finances of the parents in certain cases and this has a boomerang effect on provision for the child. This type of custody would better safe guard the rights of the child and also cater for the interest of the parents better than sole custody in normal circumstances where a parent is not a threat to the wellbeing of the child.

Split custody

This occurs when there is more than one child. Here the children are split between the parents and each parent is responsible for the children in their care, and the other parent has access[234].

Custody by the State through its welfare or Probation officers

In situations where a child is abandoned, subjected to abuse by the parents, and/or where the parents are addicted to drugs, the state through its welfare or probation officers can take custody and approach the court for an order of contribution for maintenance of the child from the parents[235]

Grandparent Visitation and Custody[236]

Courts in every jurisdiction consider the "best interests of the child" when granting custody to parent(s) and/or grandparent(s). If a grandparent can show that a parent is abusive, unfit or incompetent, courts are far more willing to grant permissive/temporary and in some cases permanent rights to grandparents if it is in the best interest of the child.

Physical Custody

In this case, the courts award only physical care to a parent. In such a case the child remains physically with only one parent, but this does not temper with the other parents rights to visitation. What is significant here is that the child is to remain physically with one parent but the other parent can take part in the decision making with respect to the child of the marriage.

Bird nest custody

In this type of custody, the children live in one house; while their parents move in and out around them[237] .this type of custody is an American invention[238]. It has the apparent advantages of providing stability for the children of the marriage and granting them the benefits of having both parents care and love. It is submitted that this kind of custody will be more beneficial to the child and the mother in deserving cases

[234] Ibid

[235] Children and young people's law of Rivers State with similar provisions in the Child Right Law of Delta State

[236] Thomson Reuters , '*Factors Considered for Grandparent Visitation and custody'*, retrieved from http://family.findlaw.com/child-custody/factors-considered-for-grandparent-visitation-and-custody.html (accessed on the 15/04/2017)

[237] Radhika Sanghani, '*Bird nest custody: The smart way to divorce'* The Telegraph*,* 7 February 2016, retrieved from http://www.telegraph.co.uk/women/family/birds-nest-custody-the-smart-new-way-to-divorce/ accessed at June, 15, 2017

[238] Ibid

Who is entitled to Custody

S. 71 of the MCA provides for custody of children. It provides for who may be entitled to custody in S.71 (3) and (4) MCA. Although, it is not expressly stated it can be gleaned from the subsections that the parents of the child or children are entitled to custody as well as third parties if it is desirable to do so.

Guiding principles in the award of Custody

In custody proceedings, the interest of the children in question is the paramount consideration in the determination of who among the parents should be granted custody. In this regard Section 71 (1) MCA[239] provided as follows:

In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper

A similar provision is contained in the child right Act[240] which provides that

> In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration[241].

The provisions of S.71 MCA make the paramount interest of the children the guiding principle in the Award of custody. The phrase is largely omnibus and undefined by the Act. Case law has however, provided a working definition of what the court shall hold as constituting the paramount interest of the child or children of the marriage. The above position has also enjoyed judicial pronouncement in the case of *Obajimi v Obajimi*[242] the court held that:

> Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether, from any point of view, the claim of the father in respect of such custody or upbringing is superior to that of the mother or the claim of the mother is superior to that of the father.

The court however went on to hold that:

> The welfare of the minor, although the first and paramount consideration, is not the sole consideration, and the conduct of the parties is a matter to be taken into

[239] Section 71 of the Matrimonial Causes Act
[240] Section 1 of the Child Right Act
[241] Article 4 of the African charter on the rights and welfare of the child
[242] (2012) ALL FWLR(PT 649)P. 1173 Ratio 7

> account. In other words, before making an order for custody, the trial court must take into paramount consideration the interest and welfare of the children as well as the conduct of the father and the mother and their respective resources, comportment and total bio data"

Also in the case of *Odusote v. Odusote*[243] the court held inter alia that:

> By the provisions of section 71(1) Matrimonial Causes Act, the court in determining the issue of custody, should regard the interests of the children as the paramount consideration. Interests of the children would include their welfare, education, security and overall well-being and development. Therefore, the welfare of the children is the prime consideration in the determination of who should be granted custody. Except the conduct of a wife is morally reprehensible, it is better in an estranged marriage, for the child of the marriage, more so if that child is a girl and of a tender age, to be left in the care and custody of the wife. Although, there is no rule of law which says that a female child or a child of tender age should remain in the custody of the mother when a marriage is dissolved, it cannot also be seriously disputed, sentiments apart, that children who are female and in their growing or formative years are better cared for and looked after by their mother except the contrary is shown by credible evidence. It is generally presumed that such children would be happier and more at peace because of the closeness and intimacy, which breeds affection and familiarity with the mother, who most of the times, is there for them. So in custody proceedings, unless it is abundantly clear that the mother suffers from exceptional moral misconduct, infectious diseases, insanity, lack of reasonable means or is cruel to the children, etc, children of tender age, male or female are ordinarily better off in terms of welfare and upbringing, with their mothers. There may be few exceptions which are definitely far apart where the father may be better than some mothers in the upbringing of the children, but the preponderance of cases tilt in favour of women. There is always that rebuttable presumption in favour of the mother in the consideration of the custody of the children of a dissolved or broken down marriage. In the instant case, where the appellant failed to establish that the respondent was unfit to care for the children, the trial court rightly awarded custody of the children to her.

In *Williams v Williams*[244] the court explained further what is meant by the welfare of a child. It held that the welfare of a child consists of a number of factors; to wit, the emotional attachment of the child to a particular parent, and the adequacy of the facilities that will be available to the child such as educational, religious or other opportunities for a proper upbringing of the child. It held further that it is imperative to assess all these factors because, in dealing with issues of custody the court is dealing with the lives of

[243] (2013) ALL FWLR PT 668 PG 875 Ratio 8
[244] {1987} 2 N.W.L.R. P.66

human beings and so it may not be restricted by strict formulae. Therefore, the court must of necessity consider all relevant factors that will ultimately enhance the interest of the child and make it of paramount consideration in so doing. It went on to define paramount consideration as 'pre-eminent and superior consideration'.

E.I. Nwogugu[245] has also outlined several factors that the courts have taken into account in determining who gets custody of the child or children of the marriage. It is submitted that these factors are imperative for the furtherance of the rights of the child or children of the marriage and even the parties to the marriage.

Settlement of Properties

It is important to note that all properties can be settled in matrimonial proceedings through divorce. It is only property that the parties or the child or children of the marriage are entitled that may be settled as provided for in S.72 (1) MCA. It is an aphorism that property that is not marital property cannot be the subject of a settlement of property between the parties. For instance if a man owned an estate before he marries his wife unless the wife does substantial appreciation by development of the said estate it cannot be regarded as matrimonial property that can be shared. In *Igwemoh v Igwemoh*[246], the court found that the two twin bedroom flats of the appellant situated at Rumuigbo, Port-Harcourt was solely acquired by the appellant and therefore should be exclusively for his use and not settled in favour of the respondent.
S.72 (2) MCA specifically provides that such settlement of property must be done in a manner that is fair and just, the court must "make such order as the court considers just an equitable.[247] This provision leaves a lot of discretion in the domain of the judge. It enables the judge exercise wide discretionary powers which can be deleterious to the rights of a divorced wife and her children if not property curtailed. The main concern of the court should be considerations of what is just and equitable in respect of the property which may be settled.[248] Furthermore, in determining how much property will be settled in favour of the parties and the child or children of the marriage, it is doubtful whether the court would settle property in possession of one party for the benefit of the other party who has more property,[249] otherwise the court may not be seen as acting in accordance with justice and equity if it vests more property on a party that already has more to the detriment of the party that has less.

It is important to note that either party to the marriage may apply for settlement of property under the Act.[250] It is doubtful if a child can maintain action against his parents for settlement of property in his/her favour. This is because the child is not a party to the proceedings in divorce proceedings and a construction of S.72 does not lend itself to the presumption that a child may sue or become a party for the purpose of settlement of property in a divorce proceeding. It is submitted that this is not a just and equitable position for the child or children of the marriage and it may negatively affect the rights of the child or children of

[245] E.I Nwogugu op.cit pp. 253-257`
[246] [2015] All FWLR (pt 801) P.1554 at 1561, ratio 7
[247] S.72(2)MCA, *Akinbuwa v Akinbuwa* (1998) 7 NWLR (pt 559) 661 *Nwanya Nwanya* (1987) 3 NWLR (PT.62) 697
[248] E.I Nwogugu, "family law in Nigeria" revised edn (Ibadan : HEBN publishers plc, 2011) p.259
[249] Ibid.
[250] S.72 MCA; ASK Nigeria, "settlement of property in Divorce proceedings in Nigeria retrieved from askNigeria.com.ng/topic/246/settlement-of-property-in-divorce-proceedings-in-nigeria

the marriage. It should be noted also that where there is going to be application for settlement of property it has to be done either in the petition for divorce or in the Answer to the petition, otherwise the court may deem it as an afterthought. In *Ayangbayi v. Ayangbayi*,[251] the wife-respondent's prayer for settlement of property was not contained in her answer although it was subsequently raised by her counsel. The court held that she was not entitled to settlement of property as her application was only an afterthought from the ingenuity of her counsel. The court may also exercise its discretion in the settlement of property in divorce proceedings even where the main claim is held to be void by the court. In *Oghoyone v Oghoyone*[252] the appellant married one Willhemina Agatha Huyssodin, a Dutch national and while that marriage was still subsisting he went ahead to marry the respondent. The respondent petitioned to the court to hold that the marriage between her and the petitioner was void *ab initio*. The court granted her application and declared the marriage between the parties void. The other issue was the fact that they had acquired property together. The court still went ahead to settle the property, which was their marital home, and ordered that the marital home be sold and the proceeds shared between the parties.

Property settlement generally involves the property obtained by couple either before marriage or after marriage. However, more focus is placed on properties that was acquired during the marriage rather than before marriage.

The power of court in proceedings with respect to settlement of property is provided in Section 72, of the Matrimonial Causes Act, which states as follows;

> The court may in proceedings under this Act, by order require the parties to the marriage, or either of them to make for the benefit of all or any of the parties to, and the children of the marriage, such a settlement of property to which the parties are, or either or them is, entitled (whether in possession or reversion) as the court considers just as equitable in the circumstances of the case.[253]

In any matrimonial proceedings, the court may require the parties to the marriage or one of them to make settlement of property owned in possession of reversion, as the court considers just and equitable in the circumstances, for the benefit of both parties to the marriage or one of them and the children of the marriage.[254]

The property to be settled must be owned by one or both spouses. There is also no restriction on the type of property which may be settled. It could be real or personal property but does not seem to include mere payment of money by one spouse to another. But a partnership owned solely by both spouses has been considered property which may by settled.[255]

[251] (1979) H.C.L.L.R.I (cited in M.C Onokah, "family Law"(Ibadan: spectrum books limited, 2007) p.267)
[252] [2010] ALL FWLR (pt. 543) p.1844 at pp. 1849, 1850, ratio 9
[253] Section 72 MCA, 2004.
[254] *Ibid.*
[255] *Anderson v Anderson* (1972) 19 FLR 480.

The court may order only such settlement of property as it considers just and equitable in the circumstances of the case. Thus, the main concern of the court should be considerations of justice and equity in respect of the property which may be settled.[256] In determining the extent of property to be settled the court will consider all the circumstances of the particular case including the fortunes of the parties and family responsibilities. It is unlikely that a spouse may be ordered to make a settlement for the benefit of the parties and their children unless his or her property greatly exceeds that of the other spouse. The courts have a free hand to decide, in the light of justice and equity, what interest to vast in either of the spouses or the children of the marriage.[257]

The Court of appeal in *Akinbuwa v Akinbuwa*[258] approved as fair, just and equitable the order of the trial court for the settlement of movable and immovable properties of the husband and his wife and children on the dissolution of their marriage.[259] The order also required the husband to execute documents of title in respect of the real property settled in favour of the wife.[260] Who was to bear responsibility for all repairs and hand over the keys to the property in question to the Registrar of the High court and to continue to be responsible for the mortgage debt in respect of the said property. On the other hand in *Mueller v Mueller,*[261] the property in dispute on the dissolution of the marriage was found to be jointly owned by the parties. The Court of Appeal shared the property equitable between them.[262]
From the above cases it is clear that the courts in exercising its discretion of what is just and equitable have power to allocate financial resources or settle property at the instance and for the benefit of the parties and the children of the marriage. Under section 72 of the Matrimonial Causes Act. The application for settlement of properties is usually made by a claim in the petition for divorce or in the answer to the petition. This section provides in effect that the court can make any order it deems just and equitable in the allocation and settlement of the property, unless there are exceptional circumstances, children above 21 years cannot be beneficiaries of the settlement of property or maintenance.[263] However, there is no provision under Nigerian law regarding factors for the exercise of the court's power to allocate resources and settlement of property, the courts under Section 72 of the Matrimonial Causes Act, is to consider what is just and equitable in the circumstances of each case. In practice, the court will look at the following:

1. The time the property was acquired (it must have been acquired during the subsistence of the marriage or payment for it must have been concluded during the marriage).
2. Whether the property was acquired jointly.
3. The contribution of the parties to the property.

256 *Ibid.*
257 *Ibid.*
258 (1998) 7 NWLR (pt. 559) 661 at p. 664 – 667.
259 *Ibid.*
260 *Akinbuwa v Akinbuwa* (1998) 7 NWLR (pt. 559) at p. 664 – 667.
261 (2006) 6 NWLR (pt. 977) 627 at 644 – 645.
262 *Ibid.*
263 Efe Etomi & Elvis Asia *family Law in Nigeria: An Overview* <https://ukpracficallaw.Themsonreuters.com> accessed on 1st May 2019.

4. The conduct of the parties.
5. The age and position of the children.[264]

Though contribution has been a major consideration, this practice has no sound basis in the law. The law expressly provides that the property for settlement can either belong to one or both parties as contained in Section 72(1) of the Matrimonial Causes Act.

The Attitude of Nigerian Courts Towards the Settlement of Matrimonial Properties:
Nigerian courts more often than not share properties in a marriage to the benefit of men, who usually have higher income. This is because the court insists on contribution as the basis for division. The court has decided that direct financial contribution to the purchase price of a matrimonial home or to the repayment of the mortgage must be proved before joint property can be inferred *Essien v Essien,*[265] in this case the Court of Appeal restated the decision of the Supreme Court in *Adaku Amadi v Edward Nwosu.*[266] Ands accordingly refused the appellant's case on the basis that she did not prove her contribution.

In the case of *Oghoyone v Oghoyone,*[267] the court held that the respondent was entitled to joint interest because both parties contributed to the property. From the above cases it is clear that the position of the court most of the time on settlement of property is based on contributory factor.

However, some courts have decided otherwise that contribution by a party does not necessarily have to be in the nature of a cash outlay for the purchase or development of the property. For example, contribution can be by way of moral and/or financial contribution to the business of the other party where the property is acquired with the profits of the business *Ibeabuchi v Ibeabuchi.*[268]

From the above decisions of different courts in Nigeria and the law on the settlement of properties upon divorce it is clear that a party to a marriage that has broken down irretrievably must show or establish title to part or all of the property or substantial contribution towards the acquisition of the property or family assets before the party can lay claim to that property. Therefore, a party must show that she has contributed physically or financially to the acquisition of the family property before she can be entitled to the property. The researcher is highly of the view that this law on settlement of property upon divorce in Nigeria is grossly unfair especially to a woman who has been contributing to the marriage in many other ways that cannot be quantify. The Matrimonial Causes Act should be amended to make provision for uniformity in the modus of settlement of Matrimonial property upon divorce.

Duty of Court in settlement of property in matrimonial cases

264 *Ibid*.
265 (2009) 9 NWLR (pt. 1146) 306, 331 – 332.
266 (1992) 6 SCNJ 59.
267 (2010) 3 NWLR (pt. 1182) 564.
268 (2016) LPELR-41268.

The duty of a court called upon to make ancillary orders is to make a proper appraisal and evaluation of the evidence before it. In the case of *Doherty v Doherty*[269] the appellant and the respondent having been married for thirty-five years got their marriage dissolved on the petition of the husband respondent. However, the appellant cross-petitioned for maintenance and settlement of property in her favour at the trial court. At the conclusion of the trial, Judgment was given by the court partly in favour of the appellant to the extent that the court gave her the respondents three bedroom flat at Ijaiye, Jakande estate Lagos but dismissed her claim for maintenance, access to collect her belongings from their matrimonial home at No 75 Rasaq, Balogun street, Surulere and to be allowed to stay and reside at their matrimonial home. The appellant was dissatisfied with the judgement of the trial court and appealed against it. The Court of Appeal upheld the decision of the trial court and held inter-alia that,

> the trial court has a primary duty to appraise and evaluate the evidence adduced before it and in settlement of property in matrimonial causes do so from the evidence so adduced, equitably considering the entire surrounding circumstances as settlement of property is based on what the court considers just and equitable in the circumstances of the case

The court cannot go beyond the evidence adduced during the hearing. It is the duty of the court to confine itself to the evidence adduced by the parties and evaluate same. The court cannot base its judgement on assumptions or sentiments relying on extraneous considerations. In the case of *Igwemoh v Igwemoh*[270] the court held that it is not the business of the court to go into speculations because speculations is just an unfortunate frolic and would only lead the court to act or decide in an arbitrary manner. It held further that a court should not decide cases on conjectures and speculations as courts of law are courts of law and facts. In this case although no evidence was adduced before the court as to the suitability of the wife to remarry, the court awarded maintenance and settled property on the assumption that the wife would be too old to remarry. The court held this to be wrong and merely speculative.

The other paramount duty of the court is to ensure that whatsoever orders it makes under S.72MCA is "just and equitable" the determination of what is just and equitable is at the discretion of the court and the appellant who requires the appellate court to hold that the judgement of the lower court was not just and equitable bears the burden of proof that the settlement of property made by the lower court was not just and equitable.[271]It should be noted that the court has power to make any just and equitable order regarding the application of the whole or part of any property covered by an ante-nuptial or a postal-nuptial settlement which is done for the benefit of the parties, or either of them and the children of the marriage as provided under S.72(2) MCA.[272] Pre-nuptial settlement refers to such settlement done by the parties in anticipation of their marriage while post nuptial agreement is "settlement upon the husband in the character of husband or in the wife in the character of wife or upon both in the character of husband and

[269] [2010] All FWLR (pt 519) p.1145 at 1149(ratio 3)
[270] (supra p.1559 ratio 4
[271] Doherty v Doherty (supra) Akinbuwa v Akinbuwa (supra)
[272] E.I Nwogugu op.cit. p.260

wife.[273] It should be noted that prenuptial agreements mean the same thing as pre-nuptial settlements and they are a veritable source of safeguards for the rights of women and children. For post-nuptial settlement what is important is that the settlement is for the benefit of one or both of the parties even if it was done by a third party, also it must have been done for their benefit as spouses and in references to their marriage.

Settlement of property in favour of the children of the marriage

By virtue of S.72 MCA a child is entitled to settlement of property just like a husband and wife. However S.72 MCA derogates from a child's right to settlement of property. It provides thus:

> The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of the opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

This provision removes a child who is twenty-one years and above from the application of section 72(1) and 72(2) (MCA). It is submitted that this ought not to be so as settlement of property in most cases envisages a more permanent source of income. A child above twenty-one should be more entitled to settlement of property because it is usually as from that age the child has more serious responsibilities like raising his own family and setting up a business and investments. The provision of maintenance seems more appropriate for a child under twenty-one years of age, because at that age what a child would probably need is mere sustenance. It is submitted that there does not need to be special circumstances for a child who is twenty-one years or above to enjoy the benefit of settlement of property in matrimonial proceedings. The provisions of S.72(3) MCA will not adequately secure the right of a child especially in circumstances where the child is viewed by the parent who has more means as being loyal to the parent with lesser means, because such a parent may by will decide not to bequeath property to such a child even after the parents demise. The provisions of s.72 MCA are good provision that should protect the right of a divorced wife and her children if it's properly applied. However, it is submitted that judicial attitudes have not favoured women and children in Nigerian with respect to settlement of property upon divorce.

CONCLUSION

Summary

In concluding this study, it is pertinent to summarize all that was discussed. Thus, the introductory aspect of this study discussed the background to the study, the aim of the study which is an appraisal of the matrimonial reliefs under the Matrimonial Causes Act, the short falls in some of these reliefs were also discussed, the statement of the problem was also discussed in chapter one of this work. The methodology of this study was discussed to the doctrinal method of research, wherein the sources were primary and secondary sources.

[273] Ibid

The focus of this research work is on the Statutory Marriage and the reliefs available under the Matrimonial Causes Act to spouse of a statutory marriage in the event of dispute or where the marriage has broken down irretrievably. The high court by virtue of the law has the original jurisdiction to preside over matters relating to marriage under the Act and matter relating to reliefs available under the Matrimonial Causes Act. In this research work we have been able to legally examine and appraise the available matrimonial reliefs under the Matrimonial Causes Act. We have also concentrated in highlighting the shortfalls and unjust features of some of these reliefs like the relief of Reconciliation, Maintenance, Judicial Separation and Settlement. It is hoped that the law reforms commission would as a matter of urgency put machinery in place for a wholesome amendment of some of these reliefs highlighted under the Matrimonial Causes Act.

Observations/ Findings

a. In the course of this research work, it was observed that there are various penalties provided for the offence of bigamy. Section 46 and 47 of the Marriage Act Cap M6 prescribes 5 years imprisonment to a party that is guilty of such offence. In line with the same offence, section 370 of the Criminal Code Cap C 38 prescribes 7 years jail term.

b. It was also observed that the Marriage Act and Matrimonial Causes Act have no provision for a digitalised system/ data / records for the registration of all forms of marriage in Nigeria.

c. In addition, it was also observed in the course of this research work that judicial separation as one of the reliefs, made by courts of competent jurisdiction based on a petition, were it is clear that the Marriage no longer exist in reality, its never a relief.

Recommendations

a. The researcher frowns against the idea of two laws prescribing two different penalties (7 years and 5 years imprisonment) for the same offence. The laws should be amended to make provision for uniformity in the administration of section 47 and section 370 of the Marriage Act Cap M6 and the Criminal Code Cap C38, respectively.

b. The Matrimonial Causes Act / The Marriage Act should be amended to include a digitalised system for the registration of all types of marriage in Nigeria.

c. The Matrimonial Causes Act / Marriage Act should be amended to make provision for a statutory time limit (one year) for the relief of judicial separation.

Contribution to Knowledge.

This work has contributed to knowledge in the following ways;

a. The study has revealed the inadequacy of the provision of the Matrimonial Causes Act in respect of a digitalised system of registration of marriage in Nigeria.

b. The study has established that a statutory time limit for the relief of judicial separation should be seen to be considered for divorce after a period of one year.

c. The study has further shown that sections 47 and 370 of the Marriage Act Cap M6 and the Criminal Code Cap C38 should be amended to make uniform provisions.

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