

THE DESIRABILITY OF UNILATERAL NO-FAULT THEORY AS THE SOLE BASIS FOR DIVORCE OF STATUTORY MARRIAGES IN NIGERIA: A COMPARATIVE SURVEY

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Abstract

Unilateral no-fault divorce principle permits one party to a marriage to terminate the marriage advancing no reason or proof other than that it has broken down irretrievably or that the parties in the marriage are incompatible. Utilising the doctrinal approach; this paper probes into the viability of adopting the unilateral no-fault principle as the sole ground for dissolution of statutory marriages in Nigeria. The paper juxtaposed the provisions of unilateral no-fault divorce in the statutes of the United Kingdom, Australia, and Nigeria in a comparative manner to discover the characteristic similarities and differences in the laws with the aim of articulating and enhancing the principle more adequately. The research finds that issues as to qualification for the applicability of the principle is dependent upon socio-cultural nuances which dictate a state's readiness to adopt the principle.

1. Introduction

Marriage is the bedrock of society;¹ hence marriage celebration and matrimonial causes are strictly regulated by laws,² socio-cultural norms³

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¹O A Uche, 'The Family as the Bedrock for Societal Transformation' <<https://www.academia.edu/6432450/>> accessed 13/09/2021.

²For Australia: the Marriage Act 1961; the Marriage Amendment Act 2004 and the Marriage Amendment (Definition and Religious Freedom) Act, 2017. For the United Kingdom: the Marriage Act; 1949 as amended by Civil Partnership Act 2004; Marriage (Prohibited Degrees of Relationship) Act 1986; Marriage (Enabling) Act 1960; The Marriage Act 1949 (Remedial) Order

and religious practices.⁴ These make for a coherent and well articulated means of dealing with issues of matrimonial reliefs, property settlement, custody of children, maintenance and welfare of spouses and children arising from marriages.

Understanding the rationale for marriage as a legally regulated institution,⁵ and the basis for permitting divorce to end same enhances the development of principles for the sustenance of marriages as well as define the framework for the termination of same where and when necessary as a result of irretrievable breakdown.

The British Empire once had Nigeria⁶ as colony. The implication of this is that the common law⁷ influenced the development of the Nigerian legal system.⁸ With modernity, the *status quo* on issues relating to marriage has continued to evolve.⁹ Whereas, the common law concept of marriage hardly gave room to divorce,¹⁰ modern realities necessitate the continuous

2007; Family Law Reform Act 1987; Marriage (Same Sex Couples) Act 2013; Adoption and Children Act 2002; Children Act 1989; Children and Families Act 2014; Crimes and Courts Act 2013 and Church of England Marriage (Amendment) Measure 2012. For Nigeria; the Marriage Act, Cap M6, LFN 2004 and the Same Sex Marriage (Prohibition) Act 2013.

³DiPietro Law Group, 'The Role of Culture in Marriage and Divorce' [2019] <<https://www.dipietropllc.com/blog/2019/april/the-role-of-culture-in-marriage-and-divorce/>> accessed 13/09/2021.

⁴ L Marks, 'How Does Religion Influence Marriage? Christian, Jewish, Mormon, and Muslim Perspectives' [2005] (38) (1), *Marriage & Family Review*, 85; M. Isa, 'The Effect of Religious Affiliations and Religiosity on Marriage Timing: The Case of Muslims in United Kingdom' <University of Southampton https://www.tandfonline.com/doi/abs/10.1300/J002v38n01_07> accessed 13/09/2021.

⁵E S Scott, 'Social Norms and the Legal Regulation of Marriage,' [2000] <<https://ssrn.com/abstract=224972> or <<http://dx.doi.org/10.2139/ssrn.224972>> accessed 13/09/2021.

⁶British Empire <<https://www.historic-uk.com/HistoryUK/HistoryofBritain/Timeline-Of-The-British-Empire/>> accessed 13/09/2021.

⁷J Ronald and others, 'The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies' [2011] (59) (1) *The American Journal of Comparative Law*, 111.

⁸T Mwinyi and others, 'The Influence of Common Law Advocates and Judges in the *Shari'ah* Adjudication: A Critical Exposition of the Experience in Nigeria and Zanzibar' [2012] (5) *Journal of Law, Policy and Globalization*, 1.

⁹R Majumdar, *Marriage and Modernity Family Values in Colonial Bengal* (Duke University Press, 2009).

¹⁰A Laoye, 'The Evolution of Divorce Law and Practice in Nigeria' <<https://legalnaija.com/the-evolution-of-divorce-law-and/02900951941647681314/>> accessed 13/09/2021.

modification of the *modus operandi*,¹¹ in so much that the no-fault principle has permitted spouses to divorce without establishing wrongdoing.¹² The unilateral no-fault divorce theory¹³ has evolved ostensibly to give a marriage that has broken down irretrievably as a result of irreconcilable differences a speedy as well decent burial¹⁴ without agony to the parties. While the principle of unilateral no-fault divorce is inherent in the matrimonial causes and family law provisions of the laws of Nigeria,¹⁵ a holistic consideration of the provisions of the laws reveals that there are other theories regulating divorce and which also hinder the primacy of the no-fault theory.

Accordingly, calls have been made for the adoption of the no-fault principle as the singular basis for divorce in Nigeria.¹⁶ Attah and Osagie¹⁷ suggest that the no-fault principle ought to be adopted as the sole theory for divorce proceedings in Nigeria. This study sets out to evaluate the fundamental basis that could support or refute the call.

Considering the evolution of dissolution theories in similar jurisdictions, specifically Britain and Australia,¹⁸ the paper attempts to analyse the factors that could support or hinder the unilateral no-fault principle in Nigeria.

2. Re-evaluating Dissolution of Marriage

Depending on jurisdiction, legal system and recognition; various statutory, legal and customary unions are known as marriage.¹⁹ There was

¹¹National affairs, 'The Evolution of Divorce' <<https://nationalaffairs.com/publications/detail/the-evolution-of-divorce>> accessed 13/09/2021.

¹² J Lehman and S Phelps, 'West's Encyclopedia of American Law' (2nd edn, Detroit: Thomson/Gale, 2005) 257.

¹³M J Horowitz, 'Did Unilateral Divorce Laws and No-Fault Divorce Laws Raise Divorce Rates?' <<https://sites.duke.edu/djepapers/files/2016/10/Horowitz.pdf>> accessed 13/09/2021

¹⁴E I Nwogugu, *Family Law in Nigeria* (3rd edn., Ibadan: HEBN Publishers Plc, 2014); I P Enemo, *Basic Principles of Family Law in Nigeria*, (Ibadan: Spectrum Books Limited, 2008) 155.

¹⁵ Matrimonial Causes Act, s 15.

¹⁶ E Osifunke, 'Ending Divorce without Bitterness: Making a Case for Only No-Fault Divorce under the Nigerian Matrimonial Law' (2001) (11) (6) *International Journal of Humanities and Social Science*, 9 83

¹⁷M Attah and L Osagie; 'Reforming the Irretrievable Breakdown Rule – Historical Perspectives from Common Law Jurisdictions and Lessons for Nigeria' (2020) (11) (1) *NAUJIL*, 29.

¹⁸Australia in British Empire <<https://www.slideshare.net/syedazmi123/australia-in-british-empire>> accessed 13/09/2021.

¹⁹G S Becker, 'A Theory of Marriage: Part I' [1973] (81) (4) *Journal of Political Economy*, <<https://www.journals.uchicago.edu/doi/10.1086/260084>> accessed 13/09/2021; N. A.

no statutory attempt at defining marriage in most common law jurisdictions until recently;²⁰ because it was never in contention that marriage was a union between man and woman (what was always in issue was whether monogamy or polygamy should be the only validly recognised form by statute). The same problem appeared apparent in relation to divorce, the grounds for which were also characteristically hard to establish under the common law. The notion of one man married to one wife for life, apparently influenced by Christian faith defined the *status quo* for common law marriages and remained so for centuries. When divorce was grudgingly permitted, it was under stringent rules that made it as good as impossible to achieve.²¹

Although the liberalisation of divorce laws to permit divorce on no fault basis commenced in the 19th Century,²² the twentieth century drive for modernisation in all spheres of life; especially in the areas of human rights legislation, spousal equality, and liberality in marital contracts redefined stringent rules of divorce and translated or replaced them with *laissez faire* principles, which have been liberally and differently applied, depending on jurisdiction, to indicate that a marital contract can be terminated at will by either of the parties, without advancing any wrongdoing on the part of a spouse to the marriage. This idea spread from Russia²³ to other countries like China, Australia,²⁴ America,²⁵ Britain etc.²⁶

The congenial implication of the principle of the unilateral no-fault divorce on families and the society at large after the dissolution of

Wimalasena, 'An Analytical Study of Definitions of the Term Marriage,' (6) (1) [2016], *International Journal of Humanities and Social Science*, 166

²⁰Marriage (Same Sex Couples) Act 2013, (United Kingdom); Interpretation Act, 1964, s.18 (Nigeria); Same Sex Marriage (Prohibition) Act, 2013 (Nigeria)

²¹ Amanda Foreman, 'The Heartbreaking History of Divorce' <[https://www.smithsonianmag.com/history/...](https://www.smithsonianmag.com/history/)> accessed 08/02/2022.

²²R. Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge University Press. 1988) 200–201.

²³S C Jill, 'And Then There Was None,' (2010) <https://www.abajournal.com/magazine/article/and_then_there_was_none> accessed 08/08/2021; D.M. Bolas, 'No-Fault Divorce: Born in the Soviet Union?' (1975) *J. Fam. L.* 14.

²⁴Australia, Family Law Act, 1975, s 48.

²⁵H H Kay, 'Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath' (1987) (56), *University of Cincinnati Law Review*, 1.

²⁶G C Wright and D M Stetson, 'The Impact of No-Fault Divorce Law Reform on Divorce in American States' (1978) (40) (3) *Journal of Marriage and Family*, 575–80.

marriage has hardly been an issue for research enquiry;²⁷ and thus taken for granted by statutes adopting it as the sole basis for establishing irretrievable break down of a marriage.²⁸ The primary challenge created by this lacuna is that whereas, it has been advocated bountifully that states should legislate towards unilateral divorce theories, there has been no fundamental assessment of its impact on families.

It is relevant and within the context of this paper to enquire into significant questions such as: (a) Does the adoption of unilateral no-fault divorce principle solve the problem of post divorce trauma, guilt and stigmatisation in the spouses, children or family members? (b) What is the communal appropriateness of adopting unilateral no-fault divorce theory as the singular principle for divorce under statutes and (c) What are the socio-cultural implications of the unilateral divorce theory on family values, sustainability of marriages and societal view of marriage?

The resolution of the questions proffered above would help in determining the implication of unilateral no-fault divorce on marital expectation and performance in a multi-ethnic and religiously diverse society like Nigeria.

This paper, with the central aim of assessing and evaluating the efficacy of the unilateral no-fault divorce theory in providing speedy disposal of matrimonial causes, and its relevance in solving post dissolution of marriage stigma, trauma and bitterness seeks to determine the functional implications of the unilateral no-fault divorce theory, and the various implications of statutory provisions relating to divorce in Nigeria, comparing same with the selected jurisdictions. The paper identifies the nexus between unilateral no-fault divorce principle and the sustainability of marriages.

This approach is suitable because, hardly has unilateral divorce been studied through comparative analysis in relation to Nigeria; it is often taken for granted that its practice is universally congruous. Through comparative study, the various modifications can be easily juxtaposed for

²⁷ L Hoehn-Velasco and J Penglase 'The Impact of No-Fault Unilateral Divorce Laws on Divorce Rates in Mexico' (2021) (70) (1) *Economic Development and Cultural Change*, 203.

²⁸Baskerville S 'Divorce and the State' <www.academia.edu/es/39885443/How_No_Fault_Divorce_Empowers_the_State> accessed 08/08/2021; Ingleby R, 'Matrimonial Breakdown and the Legal Process: the Limitations of No-Fault Divorce' <<https://www.academia.edu/62914705/Matrimonial..>> accessed 08/08/2021; Cáceres-Delpiano J and Giolito E, 'The Impact of Unilateral Divorce on Crime' <https://www.academia.edu/603658/The_impact_of_unilateral_divorce_on_crime> accessed 08/08/2021

effective analysis, thereby providing a better and balanced view of the principle that could enhance reforms in family law.

The study adopts the doctrinal method, which is essentially about the examination and discussion of legal doctrines, legal principles and legal propositions, in conducting the present research.²⁹ The choice of this mode of research is justified on the basis of the nature of the research topic which seeks to make a comparative analysis of the doctrine of unilateral divorce, which will involve statutory analysis and case law evaluations.

3. Understanding the Concepts of Marriage and Divorce

The concept of marriage as a legal theory is amorphous; even when it is confined to socio-cultural nuances, it retains that definitive structure. The best way to define marriage is to relate it to the legal system, cultural boundaries or religious creed to which it is applied.

At common law, marriage was initially conceived as the union between one man and one woman for life and to the exclusion of all others;³⁰ but eventually viewed as a union between one man and one woman to the exclusion of all others. This definition typifies monogamous marriage and influenced the meaning and understanding of statutory marriage in Nigeria.³¹ Essentially, the definition also determined principles relating to marriage and family law within the other jurisdictions in the survey³² until the later part of the twentieth century, when various socio-cultural practices and liberal sexual orientations began to gain universal acceptance in countries where monogamy was hitherto prevalent. These have led to the redefinition of marriage in such jurisdictions, including the United Kingdom and Australia, simply as the union between two consenting adults.³³

The modified common law definition of marriage as the union of one man and one woman to the exclusion of all others has continued to be the

²⁹C Wigwe, *Legal Research Methodology and Practice* (Lagos: Princeton & Associates Publishing Co, Ltd., 2019) 155-156.

³⁰Lord Penzance's *obiter dictum* in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, relying on the earlier decision of the House of Lords in *Warrender v Warrender* [1984] UKHL 1, (1835) 2 Cl. & F. 488 at 532; S Poulter, 'The Definition of Marriage in English Law,' [1979] (42) (4), *The Modern Law Review*, 409 <JSTOR, www.jstor.org/stable/1094962> accessed 28/07/2021

³¹ Same Sex Marriage (Prohibition) Act, 2013, ss 3, 7.

³² Britain and Australia.

³³Amendment (Definition and Religious Freedom) Act, 2017, s.3 (Australia); Marriage (Same Sex Couples) Act 2013, s.1 (United Kingdom).

standard definition of monogamous or statutory marriage in Nigeria.³⁴ However, under customary law, prevalent in Nigeria, polygamy is acceptable, both under indigenous customary law and Islamic customary law, but does not fall within the scope of this work.

However, monogamous marriage as understood in the context of the Nigerian socio-cultural consciousness is a complicated concept.³⁵ The form and nature of legitimisation of matrimony is such that monogamy is still subject in most instances to cultural validation that sees the couple conducting two marriages one under statute, and the other, to fulfil the dictates of custom and tradition.³⁶

Divorce as the legal dissolution or annulment of marriage became accessible to the public in England in the mid 19th Century,³⁷ when it became possible for the courts to dissolve marriages and terminate the legal duties and responsibilities inherent in it between the parties. Since then, the principles upon which it may be granted has continued to evolve. Owing to the earlier rigours in securing divorce by couples, theories were developed to justify the grant of divorce.³⁸ These theories are broadly categorised into the fault and no-fault theories.

The no fault theory of divorce signifies divorce granted in instances where there is no need to prove fault on the side of either party to the marriage.³⁹

³⁴(n 31).

³⁵ HD Seibel, 'Changing Patterns of Marriage and the Family in Nigeria, 1963-1982' (1988) 96-108, <

<https://www.researchgate.net/publication/266199902>> accessed 13/02/2022; I.N.E. Worugji, O. U Nduke, and IP Endeley 'The Dissolution of 'Double Deck' Marriage in Nigeria,' (2019) (33) (1) *International Journal of Law, Policy and the Family*, 123–138, <<https://doi.org/10.1093/lawfam/eby020>> accessed 13/02/2022; G.T. Olajide, 'Double-Decker Marriage in Nigeria (Issues, Problems and Solutions), <<https://www.unilorin.edu.ng/studproj/law/0640ia136.pdf>> accessed 13/02/2022.

³⁶AA Ikujuni, 'Legal Implication of Double-Decker Marriage in Nigeria,' (2021), <<https://ir.oauife.edu.ng/handle/123456789/7705>> accessed 13/02/2022

³⁷S Gilmore and L Glennon, *Hayes & Williams' Family Law* (6th edn Oxford University Press, 2018)

³⁸ A Varzaneh and others, 'A Theoretical Framework of Divorcing Couples Experience,' (2016) (6) *Journal of Research and Health*, 352-372 < <https://www.researchgate.net/profile/Abolfazl...> > accessed 13/02/2022; BC Feeney, and JK Monin, 'An Attachment-theoretical Perspective on Divorce,' (2008), in J. Cassidy and PR Shaver, *Handbook of Attachment, Second Edition: Theory, Research, and Clinical Applications*, (The Guilford Press, 2008), <https://www.researchgate.net/publication/232452605_An_attachment-theoretical...> accessed 13/02/2022

³⁹Martina D'Avino, 'No Fault' Divorce – What Does It Mean and what are Potential Pitfalls of the New Divorce Procedure? < <https://www.tmfamilylaw.co.uk/2021/12/no-fault...> > accessed 13/02/2022

It is further categorised into the mutual/consensual no-fault and the unilateral no-fault. The mutual divorce theory simply indicates that the consent of the other party is required for the divorce to be granted, while the unilateral divorce theory does not require that consent.⁴⁰

4. Theoretical framework

This research work is in the field of family law, and as such, the legal theories relevant to the study are the naturalist law theory, the positivist school and the realist school,⁴¹ which theories shall be used in situating the thesis of this paper.

The growth of family as a unit in the society is generally traced to natural considerations of raising children, establishing a home and relationship bond.⁴² These have been encouraged by appeal to religious beliefs and ultimately, God as the originator of marriage.⁴³ Natural law theorists view law as universal appeal to what is just, moral and right; and hence played significant role in the development of laws on divorce. Aquinas⁴⁴ relates it to divine providence, hence establishing its nexus with religion and ultimately, God. His theory of the indissolubility of marriage influenced common law early restrictions on divorce.⁴⁵

Grotius,⁴⁶ Locke,⁴⁷ and Finnis⁴⁸ all contributed to this school. It was through the input of this school that the early rules on divorce crystallised,⁴⁹ especially the early no-divorce rule.

⁴⁰Belgium, Canada, United States, New Zealand

⁴¹ C C Wigwe, *Jurisprudence and Legal Theory* (Accra: Readwide Publishers, 2011).

⁴² C Safilios-rothschild, 'The Role of the Family in Development,' <<https://pubmed.ncbi.nlm.nih.gov/12310344/>>; Ashley Brown, 'What Is the Importance of Family in Modern Society?' <<https://www.betterhelp.com/advice/family/what-is->> accessed 13/02/2022

⁴³ B Ajayi, 'God, The Originator of Marriage: Understanding Divine Enablement to Choose Rightly,' <<https://centrendl.org/blog/god-the-originator-of-marriage>> accessed 13/02/2022

⁴⁴M Dimmock and A Fisher, *Aquinas's Natural Law Theory* (Cambridge: Open Book Publishers, 2017); W Siebenmorgen, 'What Does Saint Thomas Aquinas Say about Marriage?' <<https://catholiccitizens.org/views/71126/saint-thomas-aquinas-say-arriage/#:~:text=Besides%20the%20divine%20authority%20sus taining%20this%20command%2C%20logic,Aquinas%20is%20eminently%20qualified%20to%20explain%20these%20truths>> accessed 13/09/2021

⁴⁵T Aquinas, *Summa Theologica*, written from 1265–1274, translated by Fathers of the English Dominican Province, Cincinnati, OH: Benziger Brothers, 1947, <*Summa Theologica* available online> accessed 13/09/2021

⁴⁶J Dunn and I Harris (eds.), *Grotius*, (vols. 1–2, Cheltenham: Edward Elgar Publishing, 1997); Y Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press 1993); H. Hamilton, Jr., *Hugo Grotius: the Father of the Modern Science of International Law* (New York: Oxford University Press, 1917); C Anton-Hermann, 'Hugo Grotius

Whereas, the natural law school contributions towards divorce laws is to seek for the preservation of marriages and de-emphasis divorce; the positivists' view is that law is the command of the sovereign for social engineering and for which purpose, morality and law fused by the naturalists must be separated. Bentham⁵⁰ as well as Austin;⁵¹ presented views in this line; and their theories necessitates the liberation of divorce matters from essentially religious considerations and institutions, and which influenced the modern theories of divorce.

Kelson⁵² views law as a system of norms accepted by the society to be binding, in which case, if the society accepts divorce as right, then the

and the Scholastic Natural Law Tradition' [1943] (17) (2), *New Scholasticism*, 101, S Darwall, 'Grotius at the Creation of Modern Moral Philosophy' [2012] (94) (3), *Archiv Für Geschichte Der Philosophie*, < 296–325. doi:10.1515/agph-2012-0013> accessed 13/09/2021; J Rousseau, *The Social Contract* (Amsterdam, 1762)

⁴⁷P Abrams (ed.), *John Locke, Two Tracts of Government*, (Cambridge: Cambridge University Press, 1967) R. Ashcraft (ed.), *Locke's The Two Treatises of Civil Government*, (London: Routledge, 1987) J Bennett, *Locke, Berkeley, Hume: Central Themes*, (Oxford: Oxford University Press 1971) V Chappell, *Essays on Early Modern Philosophy, John Locke—Theory of Knowledge* (London: Garland Publishing, Inc., 1992); V Chappell, *The Cambridge Companion to Locke* (Cambridge: Cambridge University Press, 1994); J. Dunn, *The Political Thought of John Locke*, (Cambridge: Cambridge University Press, 1969); J Farr, 'Locke, Natural Law and New World Slavery,' 2008 (36) (4), *Political Theory*, <495–522. doi:10.1177/0090591708317899> accessed 13/09/2021

⁴⁸J Finnis, *Natural Law and Natural Rights*, (Oxford: Clarendon Press, 1980); H Lauterpacht, 'The Grotian Tradition in International Law,' [1946] (28) *The British Yearbook of International Law*, 1

⁴⁹FB Brennan, 'The Natural Law, The Marriage Bond, and Divorce' [1955] (24(1), *Fordham Law Review*, 83, <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?...> · PDF file> accessed 13/09/2021

⁵⁰JH Burns and others, *The Collected Works of Jeremy Bentham*, (London: Athlone Press; Oxford: Clarendon Press, 1968) D Armitage, 'Globalizing Jeremy Bentham,' [2011] (32) (1), *History of Political Thought*, 63

⁵¹W Rumble (ed.), *John Austin, the Province of Jurisprudence Determined*, (Cambridge: Cambridge University Press, 1995); JH Burns and HLA Hart (eds.), *Bentham, Jeremy, 1789, An Introduction to the Principles of Morals and Legislation*, (Oxford: Oxford University Press, 1996); DF Norton and M J Norton (eds.), *David Hume, 1739, A Treatise of Human Nature*, (Oxford: Oxford University Press, 2000); H Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence,' [1941] (55), *Harvard Law Review*, 44; B. Leiter, *Naturalizing Jurisprudence*, (Oxford: Oxford University Press, 2007); M Lobban, *The Common Law and English Jurisprudence 1760–1850*, (Oxford: Clarendon Press, 1991); J S Mill, [1863] (118) 'Austin on Jurisprudence,' *Edinburgh Review*, 439; R N Moles, *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition*, (Oxford: Basil Blackwell, 1987); W E Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution*, (London: Athlone Press, 1985)

⁵²H Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence,' [1941] (55), *Harvard Law Review*, 44

legal system must recognise it as such. For example, Hasson's⁵³ findings that "the vast majority of study participants strongly favoured the introduction of a no-fault framework" in the United Kingdom (UK) informed the amendments passed to base the UK Act wholly on the no fault principle.⁵⁴ The first of such amendments was under the 1996 Family Law Act of the UK, but the portion relating to divorce never came into operation, owing to the long protocol for mediation there under and was eventually repealed.⁵⁵ The public outcry resulting from the case of *Owens v Owens*,⁵⁶ in England against the UK Act's provision relating to divorce⁵⁷ led to the passage of the Divorce, Dissolution and Separation Act 2020.⁵⁸

This subjective cultural empiricism is progressive and appears to be process oriented as it tends to rely on societal values and accepted norms as the primal basis for evolution in law rather than rely solely on comparative dependency.

In addition, legal realism has also helped in no little way in shaping what divorce law is. Holmes⁵⁹ had argued through a combination of the analytical and sociological schools that law is what the judge says it is.⁶⁰ In the case of *Miller Smith v Miller Smith*,⁶¹ the English Court of Appeal had observed that there is a further need for parliamentary reform of the law relating to divorce to find justification for change in the law.⁶²

⁵³E Hasson, 'Wedded to 'Fault': The Legal Regulation of Divorce and Relationship Breakdown,' [2006] (2) *Legal Studies*, 267

⁵⁴Family Law Act 1996, pt 2.

⁵⁵Repealed by the Children and Family Act, 2014, s. 18. Also, M Welstead and S Edwards, *Family Law* (4th edn Oxford University Press, 2013); House of Commons Library Briefing Paper, No. 01409, 09/04/2019, <<https://commonslibrary.parliament.uk/research-briefings/sn01409/>> accessed 04/08/2021

⁵⁶[2018] UKSC 41.

⁵⁷BBC News, Tini Owens loses Supreme Court divorce fight, 25th July 2008, <<https://www.bbc.com/news/uk-england-hereford-worcester-44949856>> accessed 04/08/2021.

⁵⁸<<https://www.legislation.gov.uk/ukpga/2020/11/contents/enacted>> accessed 04/03/2022.

⁵⁹O W Holmes, (1881) *The Common Law*. Cambridge (Mass.: Harvard Univ. Press. 1963); HC Shriver (ed), *The Judicial Opinions of Oliver Wendell Holmes*, (Buffalo, N Y: 1940).

⁶⁰Elliot Aruldoss, 'The Law Is What The Judge Says It Is' <<https://elliotaruldoss.blogspot.com/2012/04/law-is-what-judge-says-it-is.html>> accessed 13/02/2022; Ustice Evelyn V Keyes and Angela W. Spoede, 'Why The Law Is Not Just What Judges Say It Is' <appellatelawyerhba.org/why-the-law-is-not-just-what-judges-say-it-is> accessed 13/02/2022.

⁶¹[2009] EWCA Civ 1297, [2010] 1 FLR 1402.

⁶²*Ibid.*

5. Fault versus No-Fault Theory

Several authors have written in respect of divorce theories. The contention has been based on which is the preferable principle between the fault theory and the no-fault divorce principle.⁶³ While the fault based theory is essentially related to conservatism influenced by Christian religious concept;⁶⁴ the no-fault principle is much related to neo-liberalism which tends to deemphasise the necessity of marriage if not its significance.⁶⁵

Okolo⁶⁶ notes that the fault theory came under criticisms for generating bitterness and rancour between parties to a marriage, and also because establishing the faults may lead to financial as well as emotional trauma for the parties; psychological damage to the children, family and friends.⁶⁷ It was to circumvent this challenge that the irretrievable breakdown theory⁶⁸ was devised to bypass the need to establish fault, guilt or innocence of a partner. Accordingly, once the marriage has broken down irretrievably, it can be given a decent burial⁶⁹ without bitterness.⁷⁰

Wright⁷¹ argues that a fault based divorce law creates hostility between the parties. He posits that “where the evidence for irretrievable breakdown of the marriage had been supported by facts relating to the respondent’s behaviour, this did appear, in some cases, to lead to an

⁶³Sumit Kumar Suman, ‘No Fault Theory of Divorce’ <<https://www.lawctopus.com/academike/fault-theory-divorce>> accessed 06/03/2022.

⁶⁴A C Liefbroer and A J Rijken, ‘The Association between Christianity and Marriage Attitudes in Europe: Does Religious Context Matter?’ (2019) (35) (3) *European Sociological Review*, 363 <<https://academic.oup.com/esr/article/35/3/363/5423839>> accessed 04/08/2021; The Holy Bible, Mathew 19:4, Ephesians 4:31 (King James Version).

⁶⁵A L Alstott, ‘Neoliberalism in U.S. Family Law: Negative Liberty and Laissez- Faire Markets in the Minimal State,’ (2014) (77) (4) *Law and Contemporary Problems*, 25.

⁶⁶U C N Okolo, ‘The Concept of Unilateral Divorce in Nigeria: Reviewing *Bibilari v Bibilari*’ (2013) (6) *Law and Policy Review*, 1.

⁶⁷G Wright and D M Stetson, ‘The Impact of No-Fault Divorce Law Reform on Divorce in American States’ (1978) (40) (3) *Journal of Marriage and the Family*, 575.

⁶⁸Shahsi Bhushan Ojha and Shushant Dabral, ‘The Concept of Irretrievable Breakdown of Marriage: A Study,’ (2018) (6) (2), *International Journal of Creative Research Thoughts (IJCRT)* 613 <<https://ijcrt.org/papers/IJCRT1813156.pdf>> accessed 06/03/2022.

⁶⁹Kusum; ‘Irretrievable Breakdown of Marriage: A Ground for Divorce;’ (1978) (20) (2) *Journal of the Indian Law Institute*, 288 <*STOR*, www.jstor.org/stable/43950531> accessed 04/08/2021.

⁷⁰I P Enemo, *Basic Principles of Family Law in Nigeria* (Ibadan: Spectrum Books Limited, 2008) 155.

⁷¹K Wright, ‘The Divorce Process: A View from the Other Side of the Desk,’ (2006) (93) *Child and Family Law Quarterly Review*, 106.

increase in hostility.” According to Walker,⁷² “if the divorce law cannot save marriages, it must concentrate on its other objectives, to dissolve marriages as painlessly and with as few negative consequences as possible.” Vinney suggests that the implementation of a no-fault based divorce would minimise the risk of bitterness, distress and humiliation.⁷³ There has also been effort at justification of the no fault principle based on positive statistical improvement in the value of human rights of spouses in abusive relationships. A report suggests that no-fault divorce reduces divorce rate.⁷⁴ The report also asserts that no permanent effect of no-fault divorce laws on divorce rates is cognisable.⁷⁵ Coontz buttresses this assertion by claiming a statistical reduction in divorce rate following the introduction of no-fault theory for divorce.⁷⁶

The notion that no-fault divorce principle is preferable is not without contention.⁷⁷ Baskerville⁷⁸ has argued that as flamboyantly stress-free and rancour free as the no fault principle appears or is projected by the advocates to look; it portends inherent dangers, limitations and fallibilities.⁷⁹ This is akin to the view of Wardle,⁸⁰ who posits that there are indeed fault in some divorce proceedings, and failure to recognise fault where it does exist will not only create confusion, but would limit the ability to improve on the quality and potentials of marriages by acknowledging faults and dealing with them. The argument is further reinforced by the fact that there appears to be no other developed area of

⁷²J Walker, ‘Divorce –Whose Fault? Is the Law Commission Getting it Right?’ (1991) *Family Law Review*, 234-235.

⁷³J Vinney, ‘The Modern Divorce,’ (2011) 125, < <http://etheses.dur.ac.uk/3405> > accessed 16/07/2021.

⁷⁴S Coontz, ‘Divorce, No-Fault Style,’ (2010) *the New York Times*, < <https://www.nytimes.com/2010/06/17/opinion/17coontz.html> > accessed 06/03/2022.

⁷⁵*Ibid.*

⁷⁶*Ibid.*

⁷⁷S N Katz, ‘Historical Perspective and Current Trends in the Legal Process of Divorce,’ (1994) (4) (1) *Children and Divorce*, 44–62; N S Katz, J Eekelaar and M Maclean, ‘Cross Currents: Family Law and Policy in the United States and England,’ (Oxford University Press, 2000) 351–352.

⁷⁸S Baskerville, ‘No-Fault Divorce is Harmful,’ in W, Mike (ed.), *Divorce, Opposing Viewpoints*, (Detroit: Greenhaven Press, 2009); S. Baskerville, ‘The No-Blame Game: Why No-Fault Divorce is our Most Dangerous Social Experiment,’ (2005) (23) (3) *Crisis*, 14; D W Allen, ‘An Economic Assessment of Same-sex Marriage Laws,’ (2005) (29) (3) *Harvard Journal of Law & Public Policy*, 950.

⁷⁹*Ibid.*

⁸⁰L Wardle, ‘Divorce Reform at the Turn of the Millennium: Certainties and Possibilities’ (2000) (33) *Family Law Review* LQ, 783.

law where fault and causation is ignored in proffering legal solutions; most especially when contractual obligations are in issue, and most apposite is the argument that marriage is not only a union, but also a contract.⁸¹

Sclater,⁸² on the premise that the no fault theory is more like a bar denying the innocent party where indeed there is a fault from being exonerated by a truly judicial process, posits that “for many, the notion of fault or attributing blame to one party and exonerating the other, is what the legal system should be about, it is what ensures that justice is not only done but seen to be done.”

The contention of Bainham⁸³ that “the spotlight in England has been very much on divorce but if we look at wider issues of family law it quickly becomes apparent that fault continues to play a significant, albeit declining part in legal outcomes across the whole spectrum of family disputes,” supports the notion that fault ordinarily plays a role in divorce cases, and should not be overlooked.

Further resistance to the no-fault principle has been voiced on the ground that it allows a party at fault to obtain a divorce in which alimony,⁸⁴ maintenance and property division would definitely be determined without a consideration by the judge of the facts, behaviour and circumstances that led to the break-up of the marriage.⁸⁵

There are also research surveys that claim an increment in divorce rate.⁸⁶ Allen,⁸⁷ based on a research survey maintained that the adoption of no-fault divorce theory led to a six-fold increase in divorce in just a period of two years; increased rate of women entering the workforce; increment in

⁸¹Elizabeth S Scott, ‘Marriage as Relational Contract Columbia Law School’ (1998) (84) (7) *Virginia Law Review* 1226, < <https://scholarship.law.columbia.edu/cgi/view>> accessed 06/03/2022

⁸²A Bainham, ‘Men and Women Behaving Badly: Is Fault Dead in English Family Law?’ (2001) (21) (2) *Oxford Journal of Legal Studies*, 232.

⁸³*Ibid.*, 218.

⁸⁴Cheryl Howell, ‘The Role of Fault in Alimony’ < <https://civil.sog.unc.edu/the-role-of-fault-in-alimony>> accessed 06/03/2022.

⁸⁵‘The National Organization for Women-NYS Opposes No-Fault Divorce,’ signed by Marcia A. Pappas, President NOW-NYS, Inc, <http://www.nownys.org/leg_memos_2010/no_fault_divorce.pdf>

⁸⁶D Allen, ‘An Economic Assessment of Same-Sex Marriage Laws,’ (2006) (29) (3) *Harvard Journal of Law & Public Policy*, 949-980

⁸⁷*Ibid.*

wok hours leading to feminisation of poverty and increment of the age at which people married.⁸⁸

Whatever these indicators for or against suggest, this paper considers the unilateral no-fault principle as relative to Nigeria.

6. Comparative Experience

The UK Matrimonial Causes Act of 1973 (MCA, UK) made provision for divorce on the sole ground that the marriage has broken down irretrievably.⁸⁹ However, the factual grounds constituting irretrievability could either be fault related or no fault. The grounds that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; and that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition are all fault related. The fact that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (referred to as “two years’ separation”) and the respondent consents to a decree being granted; and the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (referred to as “five years’ separation”)⁹⁰ are both no-fault basis. While the later is consensual, the later is unilateral. The last two of the five grounds established the consensual no-fault and the unilateral no-fault theories. However, even the unilateral no-fault theory under that law is still subject to court inquiring ‘so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.’ The implication of this is that where the ground is that the parties have lived apart for a period of five years, facts are still relevant to establish ‘living apart’ as well as the period of time lived apart⁹¹ for the no-fault divorce to be granted. The responsibility to determine this is vested in the court,⁹² who must be satisfied by evidence presented before it in that regard.

This position in the UK is similar to that of Nigeria, whereby the grounds upon which divorce is granted under section 15 therein is solely that the

⁸⁸ *Ibid.*

⁸⁹ MCA, UK, s 1.

⁹⁰ *Ibid*, s 2(a)-(e).

⁹¹ *Ibid*, s 3.

⁹² *Ibid*, s 4.

marriage has broken down irretrievably.⁹³ There are eight grounds that could constitute factual grounds upon which the marriage would be said to have broken down irretrievably.⁹⁴ The fault based factual basis are where the respondent has wilfully and persistently refused to consummate the marriage; has committed adultery since the marriage and the petitioner finds it intolerable to live with him/her; has since the marriage behaved in such a way that the petitioner cannot reasonably be expected to live with him/her; the other party to the marriage has, for a period of not less than one year, failed to comply with a decree or restitution of conjugal rights made under the Act and the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition. The factual basis that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted; the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition; and the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead are all no-fault related. While the first is consensual no-fault, the second is unilateral no-fault and the third is circumstantial no-fault. As stated under the UK position, the Nigerian position is also that the judge has the responsibility to determine irretrievable break down.

Whereas the position under the Australian law is also similar as to the sole ground for divorcee being irretrievable break down of the marriage,⁹⁵ the Australian law abolished the fault based divorce principle in totality and went further to establish an irrefutable presumption that a marriage is broken down irretrievably once the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order. However, the law still permits the presentation of facts when it states that a divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.⁹⁶

Under the laws as seen, there is still latitude allowed the court in establishing irretrievable break down. One must also admit that what the no-fault principle does is to take away the need to prove fault and does not extend to

⁹³ MCA Nigeria, s 15(1).

⁹⁴ *Ibid*, s 15 (2) (a-h).

⁹⁵ Family Law Act, s 48.

⁹⁶ *Ibid*, s 48(3).

removing the possibility of reconciliation. Again, a cardinal objective of the no-fault theory, where it is the only factual ground for establishing divorce is to protect the privacy of the parties to a marriage in a manner that they determine the relationships between them and not the judge, thereby allowing a party the liberty to decide his or her relationship by himself or herself. Whether this objective is totally achieved or rather not subjective is another issue.

Under the UK Divorce, Dissolution and Separation Act, 2020, which comes into operation in April 2022, section 1 of the Matrimonial Causes Act 1973 is amended to permit either or both parties to a marriage to apply to the court for an order (a “divorce order”) which dissolves the marriage on the ground that the marriage has broken down irretrievably. Such an application must be accompanied by a statement by the applicant or applicants that the marriage has broken down irretrievably. The statement must be taken by the court to be conclusive evidence that the marriage has broken down irretrievably, and based upon which the divorce order must be made. Where that application is by one party, confirmation from the other party for the continuation of the process is necessary. A party may not give confirmation for the purposes of this subsection before the end of the period of 20 weeks from the start of proceedings. This new UK law is to all intents a legislation approving the no-fault theory as the sole factual basis for divorce.

7. Conclusion

A comparative study of the no-fault principle in the three jurisdictions appear to establish that the law is very much concerned with the preservation of families hence, a time within which a divorce petition cannot be presented is given. In addition, as could be seen in the laws, what the no fault principle seek to eradicate is the necessity of proving fault of a party to the marriage, the determination by the court of irretrievable break down rather than the parties to the marriage and not necessarily compromising matrimonial integrity.

Nonetheless, it could also be asserted that the removal of fault is largely based on societal approval of what could constitute fault or stress to the parties. It must be conceded that although monogamous marriages in Nigeria shares the same legislative root with what is obtainable in the UK and Australia, the socio-cultural backgrounds in these different societies have continued to play the major role in determining changes introduced in divorce laws and models.⁹⁷

⁹⁷B Stevenson, ‘The Impact of Divorce Laws on Marriage-Specific Capital,’ (2007) (25)(1) *Journal of Labour Economics*, 75–94; Shahram abdol rahimi, Ali reza shakarbigi, Ghoobad Naderi,

Australia for example, has long introduced into her law the no-fault principle under the Family Law Act of 1975; the hybrid model continued to hold sway in UK until social demands forced the law to change recently.

Two issues illustrate what determines the appropriate or preferred model in Nigeria. First is the nature of monogamous marriages in Nigeria. Preferences for customary adherence to traditionally determined standards and patterns for validity of marriages set prerequisites that validate monogamous marriages as far as socio-cultural standards would permit. Though the requirements for validity of monogamous marriages are determined and regulated by statutes; in most instances, monogamous marriages are celebrated both under the Act and in compliance with custom, thereby creating the so-called *double-decker* marriages.⁹⁸ The implications are more complicated than what could be summarily subsumed under a universal divorce theory where issues of divorce arise. Beyond the challenge encountered through plurality of customs, a divorce under the Act may not necessarily lead to cessation of marital relationship, or the determination of post dissolution relationship as stipulated by statute.

This fact becomes detrimental to the adoption of any model that does not give room to the traditional as well as socio-cultural preferences prevalent within the society. Double-decker marriages are a source of complexities and peculiarities that defines a limit to the adoption of a singular principle of divorce such as no-fault.⁹⁹

The second challenge is that purportedly monogamous marriages under the Act may not necessarily be celebrated as a form but rather, a process to provide legitimacy and recognition, sometime for official reasons, for a marriage wholly conducted under customary standards and norms.¹⁰⁰

The basic determination of whether a fault or no fault model is preferable is therefore not a dictate of the position of the law in similar jurisdictions, but a function of the interrelationship between law, custom, religion and social preferences.

'Phenomena Effects of Divorce on Families and Society' (2012) (2)(5) *Journal of Basic and Applied Scientific Research*, <textroad.com/pdf/JBASR/J. Basic. Appl. Sci. Res., 2.> accessed 06/03/2022

⁹⁸Francis Ibekwe Allagoa, 'Concept of Double Decker Marriage in Nigeria' <www.academia.edu/42993238/Concept_of_Double_Decker_Marriage_in_Nigeria> accessed 06/03/2022; Chima Umezutuike, 'The Concept of Double-Decker Marriage in Nigeria', <omezchambers.com/...of-double-decker-marriages-in...> accessed 06/03/2022.

⁹⁹S M Olokooba, 'Analysis of Legal Issues Involved in the Termination of "Double-Decker" Marriage under Nigeria Law,' (2002-2010) *Nigerian Current Law Review*, 194.

¹⁰⁰E F Ijalana, 'A Critical Appraisal of the Concept of Double-Decker Marriage under the Nigerian Family Law' (2021) (12) *Beijing Law Review* 1163-1178; Grace Okoro, 'Double Deck Marriages,' <https://www.academia.edu/10197380/DOUBLE_DECK_MARRIAGES> accessed 04/08/2021.

The attribution of fault to enforce morality is prevalent in conservative and religious societies and therefore also constitutes a major factor to reckon with. An overview of the two principles therefore, surely shows that each has its advantages and disadvantages. However, it seems certain that the hybrid model does not hinder the parties from determining what system is most suitable for them.

Conclusively therefore, the theoretical basis for evaluating what is preferable and practicable, within a society is dictated by social-moral nuances to which the law is responsive. Whereas, there is increasing reliance on the unilateral no-fault divorce principle, social acceptability of the theory is necessary to make it desirable. Within Nigeria, there still remain some challenges in regard to its tendencies to increase the rate of divorce whether perceptive or empirical.¹⁰¹ Its potential to make a marriage survival dependent on one party to the marriage alone¹⁰² raises moral questions still relevant within the Nigerian society and make its adoption as the sole basis for divorce a question of societal preference.¹⁰³

While some countries like Australia¹⁰⁴ adopted the no-fault theory to the exclusion of the fault or matrimonial offence theory,¹⁰⁵ others adopted a hybrid of the two. To this second group falls the Nigerian Act;¹⁰⁶ and England¹⁰⁷ until lately.¹⁰⁸

Whereas it appears that the body of literature in favour of no-fault theory generally approached the theoretical preference from the view point of what is advantageous to the parties to a marriage and not necessarily the social implications on the concept of marriage; children upbringing and cultural differences, most certainly, the desirability of the no-fault principle depends on the issues canvassed above and the peculiarities of each legal system.

¹⁰¹Divorce Statistics, <<https://www.wf-lawyers.com/divorce-statistics-and-facts/>> accessed 04/08/2021

¹⁰²L. Friedberg: 'Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data' (1998) (88) (3), *American Economic Review*, 608.

¹⁰³Often used in the United States, H Jacob, '*Silent Revolution, the Transformation of Divorce Law in the United States*' (The University of Chicago, 1988) 5.

¹⁰⁴The previous provision under section 28 Matrimonial Causes Act 1959 of Australia adopted the hybrid

¹⁰⁵Also, New Zealand, Family Proceedings Act, 1980, s 39.

¹⁰⁶Matrimonial Causes Act, s 15.

¹⁰⁷United Kingdom, Matrimonial Causes Act 1973, s 1.

¹⁰⁸Divorce, Dissolution and Separation Act, 2020.