

Jurisprudential Examination of the Polemics of Matrimonial Indissolubility in the Light of Lord Penzance’s ‘Union for Life’ Rule

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Abstract

In the celebrated English case of Hyde v Hyde, Lord Penzance defined marriage to be a voluntary union of one man and one woman for the course of their life and to the exclusion of all others. Contemporary legalists, coming from contrary ideological cultures, have tried to re-understand the meaning of the phrase ‘for the course of their life’. Their case is that marriage is a union merely intended to be indissoluble without more. In this way, matrimonial legislations in almost all jurisdictions have justified/provided for divorce and press to make it available on demand. This paper operates to make a hermeneutical voyage into the Law Lord’s definition of marriage with a view to demonstrating that the phrase “for the course of their life” should be interpreted literally to imply permanence/indissolubility and not otherwise. The methodology employed in this exercise is analysis and deductive approach. It is the finding of this paper that the advocates of dissolubility are confusing the desirable with the ideal, the nurture with the nature, the contingent with the necessary, the accident with substance, the abuse with the use. The paper further finds that the literal understanding of indissolubility is consistent with the letters and spirit of the text and this provides a compelling answer to the question of matrimonial permanence and/or impermanence. All-in-all, the paper recommends a return to the spirit of the text and makes a strong case for legislative conformity in the promotion of stability of marriages worldwide.

Keywords: Indissolubility, Marriage, Union for Life, Lord Penzance.

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Introduction

'Union for life' has featured as the most controversial index in the definition of marriage rendered by Lord Penzance. The result is that modern matrimonial legislations have more or less departed from and abandoned to disuse, the norm of indissolubility suggested by that phrase 'union for life'. By defining marriage in the Christian categories, Lord Penzance has taught that there is a certain commonality of principle discoverable in both Christian and civil marriages. Those foundational principles which in this work are termed the originating jurisprudence apply to both Christian and civil marriages because they correspond to what is real about marriage – '*adequatio intellectus ad rei*'¹ Accordingly, Lord Penzance has considered the practical principle that:

The Church has always been reluctant to identify a distinctly Christian marriage which is different from a civil one; on the contrary, it has felt able to recognise the civil ceremony as a valid marriage precisely because, so the argument ran, civil marriage embodies the same principles of permanence and fidelity which accord with the Christian doctrine.²

This work takes exception to the thinking that civil marriage 'embodies' the same principles as the Christian marriage. It rather defends the position that civil marriage 'ought' to embody the same principles as the Christian marriages. The introduction of the 'ought rule' is necessary to demonstrate the fact that though states in their civil jurisdictions may uphold legal principles inspired by contingency, they ought really to promulgate only such laws that promote the good of the society and which proceed from the natural principles of reason. It is such laws only that can be normative through changing times. Lord Penzance *dictum* is consistent with the above construction. Any understanding of marriage irrespective of its legislative support which is inconsistent with the Law Lord's proposition is arguably to the extent of such inconsistency deficient. Legal divorce in that wise is an aberration with the normative principle of lifelong monogamy and is thus

¹ Truth has been defined by the realist epistemologists as the correspondence of the intellect with what is out there in reality.

² *Hyde v Hyde* (1866) LR IP & D 130

indefensible. The problem today is that the aberration is seriously calling to question the norm itself.³ In what follows, an analytical attempt is made to present the various interpretative models that have ever been advanced to explain the intendment of Lord Penzance's 'Union for Life'.

Models of Interpretation/Implications of 'Union for Life'

The phrase 'Union for Life' as appearing and decisive in the definition of marriage by Lord Penzance is capable of various interpretations. As a matter of fact, jurists, experts in jurisprudence as well as courts have afforded a plethora of interpretative models. Such models proffered can generally be comprised into: Literal Interpretation and Relative (Constructive) Interpretation.

Literal Interpretation Model

Exponents of this model argue that the logic, and grammar of language disclosed in the definition were unanimously unambiguous. In that case, it becomes quite unnecessary to invoke the interpretative device of the golden rule to arrive at its proper construction. The applicable rule of interpretation in the circumstance becomes the literal rule. Accordingly, 'Union for Life' would mean that marriage is an indissoluble union. Indissolubility in relation to marriage implies 'that marriage cannot be dissolved, that is, that divorce is impossible',⁴ or is not an option.

Those who insist on the literal interpretation, who for convenience, we shall prefer to designate as 'the literal school', make reference to the context of the definition and to its ancestral formula. In this wise, they hold to the vindication of history. In their thinking, since Lord Penzance started with a Christian bias, one cannot correctly understand him without the Christian context. The history of indissoluble marriage actually dates before the case of *Hyde v Hyde*,⁵ as it took shape from the patristic formulation of seminal Christian teachings on marriage. Accordingly, in Christendom, two historical jurisprudential views are discernible, 'those of the fathers of the church who taught that divorce was wrong and the schoolmen of Western part of Christendom who...in the twelfth and thirteenth centuries,...asserted that it was

³ P Symes, 'Indissolubility and the Clean Break' (1985) Vol 48 *The Modern Law Review* 54.

⁴ *Ibid.*, p. 56.

⁵ *Supra*.

impossible.’⁶ From this background which is precisely Christian, two other ideas of literal indissolubility arises. The first is that a validly celebrated and consummated marriage cannot be dissolved but can concede of judicial separation; the second is that a validly celebrated and consummated marriage cannot be dissolved and cannot concede even of judicial separation.

The Church of England inherited Indissolubility at the time of Reformation from the Medieval Church,⁷ which taught and practiced absolute indissolubility of marriages validly celebrated and ratified, *Ratum et Consumatum*, with provisions made only for ‘judicial separations.’ Indeed, McGregor, a strong advocate of literal interpretation of ‘Union for Life’ in his *The History of Obligation to Maintain*, recognises that there was a time in the early law when the Church of England and the State upheld *divorce a vinculo matrimonii*.⁸ He however quickly observes that:

The Church of Rome, treating marriage as indissoluble abolished divorce in this sense. Thereafter, the ecclesiastical courts granted in the case of a validly contracted marriage, only a more limited form of relief...they might pass sentence of divorce *a mensa et thoro*. This had the effect of a modern judicial separation. It relieved the spouses of the obligation to live together – to share board and bed – but preserved intact the marriage tie.⁹

This work makes the inference that it is this sense of ‘Union for Life’ that Lord Penzance was referring to when he observed that ‘marriage is a union for life’. *A fortiori*, what the Judge Ordinary observed *ex orbita* in the case of *Hyde v Hyde*¹⁰, reinforces this position. He noted that ‘it is necessary to define what is meant by ‘marriage’. In Christendom, it means the union of two people who promise to go through life alone with one another. It does not

⁶ Symes citing E Schillebeeckx in Symes, *art cit.*, p. 57.

⁷ *Ibid.*

⁸ This properly understood means complete and absolute divorce which dissolves the bond of marriage making the parties available for a legitimate marriage again.

⁹ McGregor, Appendix 5 to the Report of the Committee on One – Parent families 1974
Finer Report Cmnd 5629, cited in 48 Modern Law Report, *art cit.*, pp. 56-57.

¹⁰ *Supra*

mean the same thing in Utah....' What is more, Minnie Lee, responding to the argument of those opposed to a literal interpretation and thus thinking that such stuff of understanding could not have been contemplated by the *dictum* of Lord Penzance, makes a persuasive analogy to the effect that:

What is termed in jurisprudence the common law, falls sometimes heavily in individual cases; but for that reason would we do away with it altogether? The law of the indissoluble tie of marriage does, we admit, fall heavily upon some, yea, many lives; should we therefore infer God's dictation to be erring, and practice the human law opposing his own? Supposing in some instance, a life to be made happier, even better; would that compensate for the abolishment of a law upon which rests the general happiness of domestic society – nay, upon which rests society itself? Better than few should suffer than that anarchy prevail. Better than all should understand the marriage bond to be indissoluble but by death, that it may be assumed carefully and solemnly as a life – affair of the utmost moment, and not entered into with thoughtless levity as a bargain that may be broken tomorrow.¹¹

The foregoing construction of 'Union for Life' over and above having a Christian foundation is all the more persuasive as it accords with the principles of Natural Law, and defended by every Christian epistemology. Hence, among the principal exponents of 'till death do us part',¹² are Thomas

¹¹ MM Lee, 'The Law of Indissolubility tie of Marriage' available at <http://www.freefictionbooks.org/books/h/12136-huberts-wife-by-minnie-mary-lee?start=92>huberts'swife accessed on 22 February 2013.

¹² This is the literal interpretation of Union for Life and which is declared at every Christian wedding at the exchange of consent viz: I x., take you as my wife/husband. I promise to be true to you in good times and in bad, in sickness and in health. I will love you and honour you all the days of my life. *Usoro Emume Sacramenti Asaa Na Ekperega, Ngozi Ndiozoga maka ndi Ukochukwu na ndi Uka Katolic* (Nkpor: Dona Chucks Publishers, 1998).

Aquinas and a plethora of other Christian Canonists, philosophers and theologians. Particularly, Thomas Aquinas argued that no form of dissolubility of marriages will be consistent with the essential properties of marriage which includes – proper propagation of human race and the education of the children. He rests the substance of his argument on the Natural Law School of Jurisprudence.¹³ In that sense, marriage is considered to be intrinsically indissoluble. It is also extrinsically indissoluble, meaning that it cannot be dissolved by any authority higher than the contracting parties, not even the civil authority.¹⁴ Principles of Natural Law are universally applicable, immutable (though dynamic) and indispensable. Sequel to this, to dispense with the element of indissolubility of marriage, which is discoverable through the light of reason, the Literal School of Interpretation, reasons, is simply to engage in a voyage of nothingness and contradiction. Such a process, *ab initio*, is vitiated.

Reputable anthropological studies of cultures have re-affirmed the claim that such elements like permanence and heterosexuality are among the commonalities in marriage even in preliterate cultures¹⁵, being as it were tertiary conclusions from the natural law¹⁶. Browning in his essay, *Natural Law Theory of Marriage* argues that no other interpretation could be valid for 'Union for Life' used in the case of *Hyde v Hyde*¹⁷ except an understanding in terms of actual and perennial indissolubility. He observes that:

Exclusive and enduring monogamous marriages, furthermore, are the best way to

¹³ This School of Jurisprudence upholds that, God created man with a human nature present in all men; that human conduct is controlled or dictated by the nature of man under the control of reason and is certainly independent of any form of intervention including legislation; that it is the responsibility of the state through positive legislation to acknowledge the existence and immutability of natural law and to ensure that all positive laws conform to natural laws. I Akomolede, *Introduction to Jurisprudence and Legal Theory* (Lagos: Niyak Print & Law Publications, 2008) pp. 25-26.

¹⁴ A Lehmkuhl, 'Divorce in Moral Theology' available at <http://www.newadvent.org/eathen/05054c.htm> accessed on 1st March, 2013.

¹⁵ G Grisez *et al* 'Living a Christian life: Marriage, Sexual Acts and Family life' available at <http://www.twotlj.org/G-2-9-A.html#Note60> accessed on 19th September 2014

¹⁶ Among the Ogoni's, there is for instance a higher order form of marriage reserved for those who opt for it namely Rafia marriage. This type of marriage till today is indissoluble. And this is known to all before the contract is entered into.

¹⁷ *Supra*

ensure that men and women are treated with equal dignity and respect, and that husbands and wives, parents and children provide each other with mutual support and protection throughout their lifetimes. If husbands could just walk away from their wives... once they have produced children, if wives could just walk away from their husbands if they become injured or impotent, if children could just abandon their families once they had been emancipated from their childhood homes, or if parents could ignore their emancipated children even when they have great need, too many parties would be left vulnerable and dependent on the charity of others. The natural law thus inclines humans to remain bounded to their marriages and families, and to care for their natural kin throughout their lives, even at ample personal sacrifice.¹⁸

Below is a summary of the argument of those who defined the literal school on 'Marriage for Life'.

If the definition of marriage provided in the celebrated case of *Hyde v Hyde*¹⁹ is an extension of Christian Jurisprudence of marriage and if the Christian law on marriage is an extemporization of the natural law, then, it can also be argued that Lord Penzance's claim that marriage is a 'Union for Life' is a radical construction of the natural law and is drawn from such dependable jurisprudence thereof. What is more, since natural law favours permanence in marriage, Lord Penzance could have meant the same literally.

In short, a community reading of the provisions of the natural law as taught by Thomas Aquinas, Augustine of Hippo, John Paul II and the Second Vatican Council, in the defence of Literal Indissolubility, presupposes that any Christian sociology of marriage that worth its name is unlikely to define

¹⁸ DS Browning 'A Natural Law Theory of Marriage' available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9744.2011.01209.x/abstract> accessed on 19th September 2014.

¹⁹ *Supra*

marriage otherwise. Augustine of Hippo for one had argued that marriage is both intrinsically and instrumentally good. As it were, commitment to marriage entails willing its good in a way that transcends any specified goal and in a way that is not limited in time. It is an event rooted in conjugal covenant with irrevocable consent. Emphasis is on irrevocability. In view of the good of the society, the spouses themselves and their offspring, Augustine argues, that marriage does not essentially depend on the contingencies of human decision to sustain or to terminate it. In this way, marriage discloses itself as an atypical type of contract.

A deep feeling of sexual desire and attraction is called erotic love. This kind of love foreshadows and/or prefigures the nature of permanence required in marriage. The point is that erotic love and conjugal affection leading to or arising from marital intercourse presses for an indissoluble union. This is because in 'eros' and the intercourse orienting to it, there is a strong tendency to self donation to the other in a way that prefers to be permanent. Hence lovers are jealous and would 'want' an exclusivity which only can guarantee permanence of an indissoluble kind. And predicated upon such indissolubility, persons who desiring to go into marriage and who 'reasonably' understand what marriage essentially entails know that 'their prospective marriage, though formed by their consent, somehow will be indissoluble even if one or both should later change their minds'.²⁰ In a uniquely different presentation of the same argument, it is asserted as follows:

A couple who wish to marry should enter into an extensive and permanent union. However, people cannot commit themselves to marriage as an exclusive and permanent union unless they believe it has this property. But they will not reasonably believe this if it is not so. Thus people can marry as they should only if marriage of itself excludes... divorce. Now people can marry as they should. Therefore, marriage, independent of the will of those who enter into it, is exclusive and indissoluble.²¹

²⁰ G Grisez *et al* 'Living a Christian life: Marriage, Sexual Acts and Family life' available at <http://www.twotlj.org/G-2-9-A.html#Note60> accessed on 19th September 2014.

²¹ *Ibid.*

This stuff of interpretation offered, by nature, reason, history, context and dispassionate reading of experts, finds in marriage a kind of metaphysical bond which lingers as an indestructible subtractum, though the parties may tear apart when love becomes extinguished by hate.

Little wonder it is trite by reason of nature that an absolute severance of the bond of marriage would be manifestly unjust, and more likely impossible. Perhaps, the inherent conflict in trying to provide divorce for indissoluble marriage is reflected in the ambiguity of our present laws²² and policies of states like the Nigerian Matrimonial Causes Act and Rules.²³

Constructive Model of Marriage: Indissolubility

No doubt, to understand 'marriage for life' in the sense of absolute indissolubility would not appear fashionable for the modern and prevailing culture of marriage. Hence the courts have tried to construct a hermeneutics of 'indissolubility' that could be consistent with 'dissolubility'. In *Nachimson v Nachimson*²⁴ it was held that marriage for life means that at the time of contracting it, the parties intend it to be for life unless dissolved earlier by a process prescribed by law. Obviously, such a process relates to ground of divorce as available for instance under section 15(1) of Nigerian *Matrimonial Causes Act* of 1970. By this understanding, the concept of relative indissolubility immediately crystallises.

On all fours with the foregoing epistemology of 'Union for Life' is Rebecca Probert's attempt to demonstrate that absolute indissolubility is not implied by the definition of marriage in *Hyde v Hyde*. The gravamen of her argument is that Penzance's definition tries to defend and project indissolubility as is obtainable in Christendom and does not try or attempt to legislate it. Without more, the Law Lord merely observes and recognizes the nature of marriage in Christendom. After all, as Poulter has correctly noted; as at the time Lord Penzance was defining marriage in 1866, the 1857 *Matrimonial Causes Act* had been in operation for almost a decade and hence the granting of divorce

²² Symes, *art cit.*, 58.

²³ The Nigerian Matrimonial Causes Act and Rules would, while providing for dissolution of marriage, emphasize greatly the ideal of reconciliation. The Act in section 15 (2) (a) –(h) would also dangle between irretrievable breakdown and matrimonial offence approaches

²⁴ (1930) available at <http://caselawyer.blogspot.com.ng/2014/10/nachimson-v-nachison-1930-p-217.html>, accessed on 6/7/2015 at 2:30am.

decrees was already a familiar function for English Courts.²⁵ In other words, the fact of legal divorce which has been in existence since 1863, was not unknown to the Law Lord as at the time he was pontificating. Precisely in the words of Rebecca Probert:

But I would suggest that Lord Penzance defined Marriage as being 'for life' because he presided over the Divorce Court, not despite this fact. Marriage for life was as it remains an aspiration. From the vantage point of the twenty-first century, with over 150,000 divorces each year, we may look at the few hundred divorces granted each year in the second half of the nineteenth century and imagine that the nineteenth century was seen at the time as a period of marital stability.²⁶

This rather new concept of indissolubility is based 'not on any metaphysical bond or abiding principle/rule which springs into operation at the moment of celebrating a marriage and/or continue to sustain the marriage but one which is rather based on empirical objective facts about human relationships namely: 'that the institution of marriage, being an alliance founded on dependence and trust, creates a bond which was never intended to be severed.'²⁷ It expresses the idea 'not that marriage cannot be dissolved, but that marriage is not intended to be dissolved.'²⁸

The above point of argument has been extensively criticized in the following terms: if *Union for Life* merely implies 'that at the time of contracting the marriage, the parties intended that it should be for life'²⁹ and thus can be dissolved by a process prescribed by law, it only logically entails that in its nature marriage is alien or antithetical to dissolution. Hence, even if

²⁵ S Poulter 'The Definition of Marriage in English Law' (1979) Vol. 42, *Modern Law Review*, 418.

²⁶ R Probert 'Hyde v Hyde: Definition or Defending Marriage?' (2007) 3 Child and Family Law Quarterly Vol 19 No p.330-331.

²⁷ Oppenheim as cited by Symes, *art cit.*, 57.

²⁸ *Ibid.*

²⁹ M Aderibigbe, *Family Law: A Friendly Guide to Rights and Obligations in Marriage and the Family*, (Lagos: Godas Publishing Consult, 2004) p. 2.

dissolution is foisted on it, it happens only to destroy and do it a grave wound. Arguably, what the laws seek to do is not to disorganize or distort natures but to support and sustain in nature what is salutary and good. But on the other hand what the divorce laws try to do is to force dissolubility on an essentially indissoluble substrate/legal composite. This has its consequences. According to Symes:

Quite clearly, marriage as it is, and has been traditionally practiced, is not intended to be ended by divorce. Indeed, traditional house wife marriage has a most potent feature of indissolubility built right into it – dependency. When that dependency is reinforced in the social infrastructure (both explicitly through social security and taxation laws and implicitly in the underlying assumptions about marriage) then the marriage bond becomes practically indissoluble. The accumulation of responsibility and obligations, the consequences of an unequal partnership based on dependency – all mean that an absolute severance of the bond without massive adjustment would be manifestly unjust, more likely impossible. The inherent conflict in trying to provide divorce for indissoluble marriage is reflected in the ambiguity of our present law.³⁰

From Legal History to the Norm of Indissolubility

Irrespective of the fact that ‘indissolubility’ with respect to the matrimonial bond has been approached with great reluctance by courts and the legislatures; one still finds the vestiges and/or prefigurations of the element of indissolubility in the legal history of marriage relations both within and without the English jurisdictions. In order to have a fair sampling of the situation, this work will examine such jurisdictions as: England, France, Ireland and perhaps the remote judicial statements in the American

³⁰ Symes, *art cit.* 57.

jurisdiction, by judges who are independently persuaded by the idea of indissoluble marriage bond.

English Jurisdiction

Between 1660-1857, a great semblance of indissolubility reflected in the marital systems of England and its dominions. This is arguably attributable to the fact that marriage issues/cases were largely within the jurisdiction of the ecclesiastical courts, wherein the actual words of Christ (*ippissima verba*) to the effect that ‘what God has joined together shall not be sundered by any man’, were interpreted to mean some sort of indissolubility more or less. As a matter of fact within the period under review:

Marriage in England could be like quicksand; easy to walk into and impossible to get out of. A verbal contract between a man and a woman that was witnessed by at least two people was all the legal cement that was needed to glue a marriage together.³¹

In essence, before the English Divorce Act of 1857, the words ‘Till death do us part’ were subject to a literal interpretation. Many were the implications of this strict interpretation. For instance, many marriages were held in secret to enable subsequent breakups when needed. Although such clandestine marriages were forbidden by law, Kent in 1990 reports that one third of English plebeian marriages took place in secret. What is more, under the circumstance of indissoluble marriage, the common people often decide to get round the law by walking out of the marriage to set up another in a remote district or to simply join the military. Thus though bigamy was in principle punishable by death or in practice burning out of the offender’s hand, people still risk that option.

Yet another illegal value accessed by victims of unfortunate marriage was to draw up private separation agreements. Such an agreement nevertheless does not cure indissolubility since remarriage was still not possible legally under the prevailing circumstances or any other. Such an agreement specified three

³¹ SR Aiyagari *et al*, ‘Looking Back: Marriage, Divorce and Out-of-Wedlock Births’ (2005) Working Paper No. 516 Rochester Centre for Economic Research. Available at http://papers.ssrn.com/sol3/papers/cfm2abstract_id=720541 accessed on 1st March 2013.

things: the amount of alimony due to the wife, the wife's financial independence and the issue of custody of children of the marriage. An agreement of this nature was confronted with some ominous perplexities. In the first place, a wife is entitled under the agreement to one third of the husband's income, making such an agreement phenomenally dreadful. Yet without such an agreement, the husband would remain liable for the future debts of the wife. A way out was for husbands to bargain for reduction of alimony by relinquishing their inalienable right to custody of children under the law.³² But instead of a private separation agreement, wealthy couples usually take to litigation for a separation order. Note that the sole ground for judicial separations were then only 'life threatening cruelty or adultery.'³³

Hence, Lawrence Stone observes that 'in the early modern England, for most people there were only two ways to get out of a valid marriage: one's own death or the death of a spouse.'³⁴ An exception to this strict rule was the obtainment of a parliamentary divorce with right to remarry.³⁵ This is difficult to achieve and costs a lot of fortune and so very few people except the extremely rich explored it.

French Jurisdiction

Prior to 1792, marriage in France was held to be indissoluble.³⁶ When in 1792, the French Divorce Law was promulgated, it was considered a revolutionary departure from what has been the *status quo* and this generated more than enough outcry and reactions. This revolution reflected the modern commitment to the rights and freedom of the individual as well as anti-catholic stance. While the divorce law continued to be in place, for most part of 1800s, France in principle treated marriage as indissoluble. In 1816 precisely, divorce became absolutely abolished and in spite of multiple divorce bills presented by the legislature in 1830's and particularly in 1848, it was rather difficult to pass any of such bills into law.

³² *Ibid.*, 3.

³³ *Ibid.*

³⁴ L Stone 'Uncertain Unions: Marriage in England 1660-1753'. Available at <http://www.thefreelibrary.com/uncertain+unions%3a+marriage+in+England%2c+1660-1753.-a014960818>.

³⁵ *Ibid.*

³⁶ Ohio University 'Divorce and Women in France available at <http://www.ohio.edu/chastain/dh/divorce.htm> accessed on 21st February 2013.

In 1831, 1832 and 1834, a divorce bill was introduced and easily passed by the chamber of deputies. However, each time, the chamber of peers rejected even the far more restrictive law of 1803 that was proposed. France's aristocracy clearly rejected any return to the revolution; their vote against these divorce bills was as much a rejection of the revolutionary heritage as of divorce's – social effects.³⁷

The common people too were critical of any divorce law. This point was made clear when the 1848 attack on the indissolubility principle was challenged by the people aggressively. As it were when in 1848, the 'remedy' of divorce was advanced again as a revolutionary principle of freedom and liberty, it met a hard rock. Indeed, before the proposal reached the National Assembly and quite even before the women's club took up the issue.

Critics of divorce maintained that the only moral foundation for marriage was its indissolubility. It was thought and argued that the reintroduction of divorce into the French society would challenge the purity and strength of all marriages, even those which it would not dissolve. In their view, indissolubility was not just a religious principle but also the cornerstone of social order and stability.³⁸

The rationale for an indissoluble union in marriage was so pressing to the common consciousness of the French so much so that the regime continued unabatedly for 68 years until July 27, 1884 when divorce was finally re-established. The divorce regime was sustained until about 1903 when the ground was made much tighter so as to discourage that option. That was as a result of the efforts of like-minded legislators and a plethora of social critics who used all available social and legislative devices to make divorce law ridiculous.³⁹ By 1903, in order to demonstrate its preference for values

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ One such criticism projected at that time to make divorce ridiculous was that an article claimed that divorce would interest widows and old maids the most because it would

inherent in indissoluble marriage, France tightened the grounds for her divorce laws; making divorce difficult to secure and so to achieve some level of stability in marriage. Thus:

...as part of the establishment of the civil code, the law was made more restrictive: grounds for divorce were reduced to adultery, ill-treatment, and condemnation to certain degrading forms of punishment. What is more, divorce by mutual consent now required the permission of family members, and the grounds of incompatibility were eliminated completely. In addition to a few other causes, divorce was more expensive and difficult procedurally. These changes and a few others, produced the desired effect to wit: number of divorces were drastically reduced to roughly a tenth of their number under the 1792 law.⁴⁰

Republic of Ireland

The Republic of Ireland is another remarkable experiment with indissoluble marriage. Perhaps this could be accounted for by its deep rootedness in Catholic ancestry and tradition. Thus the history and nature of marriage contract in Ireland cannot be appreciated without understanding the country's historical Catholicism. It cannot further be examined on its own rights without placing the same in the context of the role that the politically systemized Roman Catholic Church played in the public and private guardianship of marriage as both a religious sacrament and a contractual obligation carrying legal rights and duties.⁴¹ As a matter of fact, the sacramental aspects of a strictly Catholic marriage contract and its basis in

bring a large number of men back into the marriage market. Pauline Roland a long time advocate of free love in the 1830s recognized divorce's legitimacy, but saw it as a failure on the part of the couple.

⁴⁰ Ohio University 'Divorce and Women in France available at <http://www.ohio.edu/chastain/dh/divorce.htm> accessed on 21/02/2013 at 2:22am.

⁴¹ J Witte *From Sacrament to Contract* cited in JN Maogoto, 'Legalizing Divorce in the Republic of Ireland: A Canonical Harness to the Legal Liberation of the Right to Marriage Among the Disenfranchised' available at [www.http://ssrn.com/abstract=1465-343](http://ssrn.com/abstract=1465-343) accessed on 21st February 2013.

the Canon Law provided the legislative framework on which Ireland based its constitution.⁴² Ironically, although the Irish Constitution and Marriage Laws were inspired by the Canon Law, it became stricter than the latter in its insistence on absolute indissolubility. The situation was such that during the indissolubility regime in Ireland, a period that lasted from 1937-1996, an annulment granted by the Marriage Tribunal of the Catholic Church (Canon Law) will neither be recognized nor be of any evidential value on the Irish Courts. Thus:

Prior to the 1996 amendment, the Irish State would not recognize an annulment granted by the Catholic Church as a valid dissolution of marriage given the conflict with the express prohibition of its constitution based on adherence to Catholic – Centric Morality.⁴³

The situation was such that the pre-1996 Constitution of Ireland caught parties to marriage between the anvil of the Church and the hammer of the State. A paradox arising from this scenario is that though after annulment ‘a second marriage would be recognised as a valid union in the eyes of the Catholic Church, yet would be considered a bigamous union according to then extant Irish Law’.⁴⁴

Indissolubility in the Irish Constitutions: Philosophical Influences and Presuppositions

By and large, the Republic of Ireland since 1919 has grappled with three written constitutions. These were the 1919, 1922 and 1937 Constitutions respectively. While the 1919 Constitution was drafted during the intensities of the War of Independence, the 1922 Constitution inaugurated the Irish free State and as would be expected, was full of legal hangovers from its links with the United Kingdom. In 1937, a new dispensation of Constitution bereft of foreign influences was promulgated and brought into force. Interestingly:

⁴² Article 41 and 42 Constitution of Ireland, 1937.

⁴³ LL Abbate, ‘What God Has Joined ‘Let Man Put Asunder: Ireland’s struggle between Canon and Common Law relating to Divorce’ (2002) 16 *Emory International Law Review* 583, cited in Maogoto, *art.cit.*, p. 1.

⁴⁴ Maogoto, *ibid.*, p. 3.

A significant philosophical influence that pervaded the new Constitution was that for the first time the social teaching of the Catholic Church underpinned the key issues of family, education and private property. In essence, the family formed the social and moral foundation upon which the Irish Constitution was premised.⁴⁵

The most obvious outworking of this philosophical assumption was a Constitutional ban on divorce. Below are the relevant sections of the then Irish Constitution by the force of which divorce became illegal until the fifteenth amendment.⁴⁶

Art. 41.1.1. The State recognises the family as the natural primary and fundamental unit group of society and as a moral institution possessing inalienable and imperceptible rights antecedent and superior to all positive law.

Art. 41.1.2. The State, therefore guarantees to protect the family in its Constitution and authority as the necessary basis of social order and as indispensable to the welfare of the Nation and State.

Art. 41.3.1. The State pledges itself to guard with special care the institution of marriage, on which the family is founded and to protect it against attack.

Art. 41.3.2. No law shall be enacted providing for the grant of dissolution of marriage.

Art. 42.3.3. No person whose marriage has been dissolved under the civil law of any other State but is in a subsistence valid marriage under the law for the time being in force within the jurisdiction of the government and parliament establishment by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the life-time of the other party of the marriage so dissolved.

⁴⁵ K O'Halloram, 'The Family and the Law in a Divided Land' (1977) 19 Dublin University Law Journal, 78 cited in Maogoto, *art cit*, p.2

⁴⁶ Art 41 and 42 Constitution of Ireland, 1937

As slightly touched upon shortly before now, the Irish Constitution before the 15th amendment, was much more committed to indissolubility than the Catholic Church that inspired its constitutional philosophy. According to Abbate,

the Constitution prohibited divorce based on the centrality of family to a well ordered State; however, the refusal to recognise ecclesiastical annulment, seemed paradoxical because Irish conception of family are rooted in notions of the family and state promulgated by the Catholic Church.⁴⁷

The wind of change started blowing hard on the Irish principle of Indissoluble Marriage when in 1986, the European Court of Human Rights [ECHR] in the case of *Johnson v Ireland*⁴⁸ muted quite negatively in respect of the then Irish divorce laws, making rather harsh observations.⁴⁹

It finally came to be that divorce was legalized in Ireland with the 15th Amendment of the Constitution in the year 1996. The extant divorce provisions were thereafter enshrined in the *Family Law Divorce Act*.⁵⁰ But precisely because the motive and value of indissolubility was very strong in the sensibilities of the Irish people and their law, the conditions under which divorce can be granted under the 'new' law were made very stringent. The very narrow parameters⁵¹ permitting divorce are indeed predicated on the religious-Christian temper/considerations of the Irish. Till date, while most states opt for No Fault Divorce procedures/laws, the 'Irish law is complex with solicitors and barristers required to negotiate and complete all divorce applications and at the same time playing a role that can only be said to be akin to that of marriage counsellors or Church priests.⁵² What is more, the

⁴⁷ Abbate, *op. cit.*, p. 596-597

⁴⁸ [1989] 112 Eur Ct HR (Ser A)

⁴⁹ Maogoto *art. cit.*, p. 4.

⁵⁰ Section 5(1)

⁵¹ At the date of the institution of the proceedings, the spouses have lived apart from one another for a period of or periods amounting to, at least four years during the previous five years; secondly, there is no reasonable prospect of reconciliation between the spouses and; lastly, such provisions as the court considers having regard to the circumstances exist or will be made for the spouses and any dependent members of the family

⁵² Maogoto, *art. cit.*, p. 6.

extant Irish Law does not provide for a 'clean break' between the parties to a valid marriage. The payment of maintenance and other incidental reliefs are provided for. All that added together operates as disincentive for divorce in Ireland.

The American Jurisdiction

Although it sounds intellectually absurd to contemplate indissolubility as an element of marriage contract in the American Continent today, Steve Miller did observe that 'for more than half of the history of America, marriage was until-death-do-us-part, and legitimate marriage was never divorceable'.⁵³

Civil divorce then, though was available and obtainable, were merely civil disabilities which make a contract of marriage void *ab initio* 'and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction.'⁵⁴ What at that era was called ecclesiastical divorce was rather a misconstrue; this is because in the event of 'divorce' in the Spiritual Court a *Vinculo matrimonii*, all the issue born during the covertures are bastards; because such divorce was always upon some cause that rendered the marriage unlawful and null from the beginning.⁵⁵ As it stood, only non-marriages could be cancelled,⁵⁶ due to flawed original contract. Legitimate marriages as it were must and was always upheld.

Indeed, most American Supreme Court decisions up to the 1890's⁵⁷ confirm the same. Until the first attempt to articulate what stands out today as the American Constitution, there had not been a singular incidence of divorce in over 100 years in the State of New York for instance.⁵⁸ Even when in 1819, the United States Supreme Court gave a judicial blessing to a possible divorce, the Court ruled that to divorce a man without his fault and over his

⁵³ S Miller, 'In defense of Marriage' available at <http://famguardian.org/subjects/FamilyLaw/Marriage/InDefenseOfMarriage.htm> accessed on 19th September 2014.

⁵⁴ Blackstone's Book 1 at page 423-424.

⁵⁵ *Ibid.*, p. 445.

⁵⁶ Divorced in the modern sense of the term

⁵⁷ These Supreme Court cases are all inheritance cases

⁵⁸ *Maynard v Hill* 125 US p 206

objection would be a 'flagrant violation of the principle of justice.'⁵⁹ During the era under discussion in the American jurisdiction, divorce, as it is today, was not a cancellation of legitimate marriage and to question the legitimacy of a man's marriage is to risk death.⁶⁰

Interestingly, the US Supreme Court in *Maynard v Hill*⁶¹ used exactly, Lord Penzance's categories, in defining marriage. It saw it as a 'relation for life.' Continuing, the court explained that 'when formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract.'⁶² The jurisprudence according to which the Court was minded to so define marriage was given by the same Court to the effect that 'marriage merged the legal existence of the parties into one.' If this was to be so, how can an attorney represent just the wife? Or better put, how can any court settle a controversy between one.⁶³ In *Blackstone Commentaries*,⁶⁴ it was reasoned that all marriages validly celebrated shall be indissoluble:

For the Canon Law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever that arises after the union is made...

This ratio was also re-enacted when the Mississippi Supreme Court,⁶⁵ re-emphasized the inseparability of husband and wife 'not only before God but also before men.'⁶⁶

Granted, marriage is a contract, and all contracts can be arguably rescinded by any of the parties thereto, it was the opinion of the court *ex orbita* in Georgia Supreme Court case of *Askew v Dupree*⁶⁷ that marriage is an a

⁵⁹ *Darmouth College v Woodward* 17 US 518

⁶⁰ S Miller, *art cit*, 40

⁶¹ *Supra*

⁶² *Supra* at 212

⁶³ S Miller, *art cit*, 20

⁶⁴ Book 1 pages 423-428.

⁶⁵ *Dickerson v Brown* (1963) 49 Miss 370

⁶⁶ See also *Maynard* Supreme Court in *Denison v Denison* (1872) 35 Md 372 which held marriage indissoluble even by the consent of the parties.

⁶⁷ (1860) 30 Ga 173

typical kind of contract hence; 'all other contracts may be rescinded and the parties restored to their former condition, [but] marriage cannot be undone.' It was particularly left for the Texas Supreme Court in *Lewis v Ames*⁶⁸ to cite the biblical definition of marriage with great approval: 'A marriage is a mutual agreement of a man and a woman to live together in relation and under the duties of husband and wife, sharing each other's fate or fortune for weal and woe until parted by death.'

It was however left for the Washington State Supreme Court⁶⁹ to conclude that statutory provisions require marriage to be permanent. According to the Court, whether marriage be made dissoluble or otherwise, victims must arise either way and the Court reasoned that the path to less evil will be to insist on indissolubility. Thus:

However this question is decided, it may result in hardship in some cases, but we think the lesser injury will come from an adherence to the statutory requisites than otherwise, to the end that these contracts shall be permanent and not revocable at the will and pleasure of the parties.⁷⁰

The situation has considerably changed in the present American jurisdiction where no fault divorce is the rule of the same.

Conclusion

Indissolubility belongs to the essential nature of marriage. It is not just a Christian attitude to marriage as adopted from the scriptures (bible). No, it is much more than that. This is because, nature is older and thus prior to the bible. Man was in existence before the bible was written but human nature was coterminous with human existence. Hence, any law that operates to exclude the element of indissolubility from marriage is an affront to human nature and by reason of that infamous pilgrimage, a spite to the natural law.

⁶⁸ (1875) 44 Tex 341

⁶⁹ *Mclaughlin's Estate* (1892) 4 Wash 570

⁷⁰ Note that the *Mclaughlin's Estate* case (*Supra*) was decided four years after the US Supreme Court ruled in *Maynard v Hill* (*Supra*) which (a local case from Washington territory), and three years after the Washington Constitution was altered to prohibit legislative divorces.

All such laws which contravene the provisions of the natural law are void ab initio.

To say that indissolubility/permanence/stability of modern marriages is on fire is an exercise on the obvious. The challenge to indissolubility has been waged by the divorcists and the propounders of free love like Stirner⁷¹, Nietzsche⁷², Bertrand Russell⁷³ and Leon Blum.⁷⁴ The advocates of contract and/or trial marriages too are ardent sponsors of matrimonial dissolubility. Pinsorf for one has made an entry in the *Family Process Journal* and titles it 'The Death of 'Till Death Do Us Part': The Transformation of Pair – Bonding in the 20th Century'.⁷⁵ Bender, in the *Cardozo Journal of Law and Gender* wrote on 'Until Death (or sex Change) Do Us Part: Advocating for Adoption of the European Legal Approach to Validating Marriages Involving Post – Operative Transsexuals'.⁷⁶ It is also common to hear such musings as 'Until Death or Divorce Do Us Part'. An official commentary on the rising statistics of divorce in US in 1997 observes that 'the marital institution has been modified substantially in one regard: in the incorporation of divorce as a normatively acceptable mode of transition from one marriage to another'.⁷⁷

Yet, the irony of the contemporary culture is that what the law rejects as under one name, it quickly accepts under another nomenclature. In this scenario, the modern society is approbating and reprobating at one and the same time. What it denies by one set of argument, it establishes by parallel ones. Thus, today, it is fashionable to hear and read about urgent cases being

⁷¹ Johann Kasper Schmidt (25 October 1806 – 26 June 1856), better known as Max Stirner was a German Philosopher. He is often seen as one of the forerunners of nihilism, existentialism, post modernism and anarchism.

⁷² Friedrich Wilhelm Nietzsche (15 October 1844 – 25 August 1900), was a German philosopher, poet, composer and a Latin and Greek scholar. His key ideas include Perspectivism, Atheism, Psychologism and Historicism. His major works include *Will to Power, Master – Slave Morality, the Death of God and Eternal Reoccurrence*.

⁷³ Bertrand Arthur William Russell (18 May 1872 – 2 February 1970), was a British philosopher, logician, mathematician, historian, writer, social critic and political activist. He is widely known as one of the founders of Analytic Philosophy and one of the 20th century's premier logician.

⁷⁴ Andre Leon Blum (9 April 1872 – 30 March 1950), was a French politician and a three – times Prime Minister of Paris. He was the chairman of his party's executive committee and a representative of Paris during the First World War.

⁷⁵ Fam. Proc. Vol. 41. No 2. 2002.

⁷⁶ 18 *Cardozo JL & Gender* 35, 2011 – 2012.

⁷⁷ Statistics Abstract, 1997 on *Divorce in US*, p.112.

made for 'post divorce families'. The critique of this concept shows that it is nothing but the society turning around to take the advantage of *indissolubility* even when it perseveres in *dissolubility* of marriages.⁷⁸ All arguments in the direction of sustaining a post divorce family are geared towards the need to ensure domestic and social stability. This is as it concerns the good of the children, devolution of estates, the common good of the society without excluding the psychological healing of the ex-spouses. Notice that it is this clamour for post divorce families that has led to the epiphany of the concept of *indissolubility of parenthood*. This idea of *indissolubility of parenthood* defends the need to ensure that spouses though divorced remain actually indissoluble in the realm of filiation, that is, for the sake of their children. One wonders why it is difficult for modern ideologies to achieve a logical connect from the indissolubility of parenthood which it believes in the indissolubility of marriage which is its logical implication and antecedent. The point is that it is for the same very reasons of parental indissolubility that marriage is normatively and naturally indissoluble.⁷⁹

Recommendations

Accordingly, this paper recommends as follows:

1. That the divorce provisions in the laws of the States be proscribed and the provisions for 'Separation'⁸⁰ and 'Nullity' be expanded to take care of ailing and fake marriages respectively.
2. That in all countries, which insists on divorce, example Nigeria, the ground(s) and facts evidencing divorce should be reviewed with a view to encouraging the philosophy of reconciliation of the spouses. For instance, the ground of divorce with the facts to be proved as provided in sec. 15 (2) a – h of the Matrimonial Causes Act, should be reviewed along the above lines so as to align them with the spirit (*epikaia*) of natural law teleology and to favor reconciliation. Particularly that all the grounds relating to time be reviewed with the allowance of longer durations. This will affect sections of 15 (2) (d) (e) (f) (h).

⁷⁸ MO Izunwa & SC Ifemeje, 'Non Inclusion of Mediation in Nigerian Divorce Law: An Urgent Call for Review' *Journal of Law and Diplomacy* (2011) Vol. 8, No.1, pp. 43 – 44.

⁷⁹ See generally, SL Nock, (2000) 'The Divorce of Marriage and Parenthood' *Journal of Family Therapy* 22: 245 – 263.

⁸⁰ Defenders of legal separation hold and it is true that the practice provides a useful period of time in which reconciliation may occur.

3. It is further recommended that Trial and Contract Marriages in all their ramifications be made illegal under the provisions of applicable state laws. This is because they are offensive to and exclusive of the norm of indissolubility.