

## **OTIOSITY OF PROCEEDINGS AND DECREES FOR RESTITUTION OF CONJUGAL RIGHTS IN NIGERIA: THE NEED FOR THE ABOLITION OF THIS MATRIMONIAL REMEDY**

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### **Abstract**

*Parties to a legally binding marriage may cohabit for a while immediately after the marriage and subsequently cease cohabitation along with other incidents of consortium for one reason or the other. It may also be that both parties may not have cohabited since the marriage was contracted. In either case the law allows any of the parties to file a petition for a decree of restitution of conjugal rights on the grounds that the other party has without just cause or excuse refused to cohabit with and render conjugal rights to the Petitioner. This paper attempts to appraise the concept of restitution of conjugal rights in Nigeria, expounding how unconstitutional, otiose and redundant the practice is and the need to have it expunged from our statute books and abolished in its entirety.*

**Keywords: Conjugal Rights, Cohabitation, Petition, Decree, Spouse**

### **1. Introduction**

The institution of marriage under matrimonial laws the world over is a union which imposes upon each of the parties a number of marital obligations or duties which may collectively be referred to as consortium. Some of these imposed duties or corollaries of marriage include the right to live together as husband and wife, the right to have the marriage consummated, sexual fidelity, mutual defence<sup>1</sup> amongst others. The law provides remedies in certain cases where either of the spouses fails or refuses to fulfil one or more of these marital obligations<sup>2</sup>. It follows therefore that after a marriage has been validly contracted, if any of the parties to the marriage without reasonable excuse refuses to cohabit with, and render conjugal rights to the other, then the aggrieved party has the legal right to file a petition for a decree of

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<sup>1</sup> EI Nwogugu, *Family Law in Nigeria, Revised Edition* (Ibadan: HEBN Publishers Plc 1990) 72

<sup>2</sup> For Instance, if a party to a marriage refuses to consummate the marriage or commits adultery, the other party may present a petition under Section 15 of the Matrimonial Causes Act, Cap M7 Laws of the Federation of Nigeria 2004, for dissolution of the marriage.

restitution of conjugal rights. This matrimonial remedy is provided for in Section 47 of the Matrimonial Causes Act<sup>3</sup>.

The object of this paper is to appraise the concept of restitution of conjugal rights in Nigeria, the abolition of the proceedings in relation to restitution of conjugal rights in England and proffer reasons why the practice in Nigeria is futile, anachronistic and should be jettisoned.

## **2. The Concept of Restitution of Conjugal Rights in Nigeria**

Section 47 of the Matrimonial Causes Act 2004 provides as follows:

A petition under this Act by a party to a marriage for a decree of restitution of conjugal rights may be based on the ground that the parties to the marriage, whether or not they have at any time cohabited, are not cohabiting and that, without just cause or excuse the party against whom the decree is sought refuses to cohabit with, and render conjugal rights to the petitioner.

The relief is one which is common and appropriate in cases where matrimonial cohabitation has ceased for one reason or the other and one of the parties is desirous of resuming cohabitation. However, this is not to say that the remedy is not available where both parties never cohabited at any time after the marriage. Section 47 makes the remedy available whether or not the parties have ever cohabited.

The Court after hearing the petition of the aggrieved party may on being satisfied that the party against whom the decree is sought has without just cause or excuse refused to render conjugal rights to the petitioner, make a decree of restitution of conjugal rights. However, the Court will not make a decree for restitution of conjugal rights unless it is satisfied that the petitioner genuinely desires cohabitation. Sincerity is therefore a crucial element.<sup>4</sup> By and large to succeed in an action for decree of restitution of conjugal rights the petitioner must establish the following:

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<sup>3</sup> Cap M7 LFN 2004

<sup>4</sup> In *Lacey v Lacey* (1931) 146 LT 48 it was held that there was no sincerity where a wife agreed to a proposal to resume cohabitation merely to provide a home for the children.

- a. That he or she sincerely desires conjugal rights to be rendered by the respondent and is willing to render conjugal rights to the respondent.<sup>5</sup>
- b. That a written request for cohabitation, expressed in conciliatory language, was made to the respondent before the institution of the proceedings, or that there are special circumstances which justify the making of the decree notwithstanding that such a request was not made<sup>6</sup>

It is important to state that the above pre-conditions are very critical to the grant of a petition for a decree of restitution of conjugal rights and where a petitioner fails to establish compliance with the above preconditions, the court will not make the decree, and where it does, such a decree will be set aside on appeal. In *Eyofor v Eyofor*<sup>7</sup> the respondent (Petitioner at the trial court) petitioned for a decree of restitution of conjugal rights as well as ancillary reliefs which included maintenance. The trial judge granted a decree for restitution of conjugal rights. On appeal, the Court of Appeal allowing the appeal held that Section 49 of the Matrimonial Causes Act lays down the statutory condition precedent to the granting of prayer for restitution of conjugal rights and the conditions are mandatory. Since the learned trial judge failed to show that the provisions of that section had been complied with before granting the decree in favour of the respondent that decree cannot stand.

The Courts have a duty to grant a decree for restitution of conjugal rights in a case where either of the spouses has abandoned the other without any just cause or excuse and the aggrieved spouse fulfils the conditions set out in Section 49 of the Matrimonial Causes Act. Whenever the question arises whether there was a reasonable excuse for the respondent's withdrawal from the Petitioner, the burden of proving reasonable excuse shall be on the respondent. Thus, once the petitioner has proved his or her case, the burden of proof shifts to the respondent to prove the defence of just cause or excuse.

Upon hearing a petition for restitution of conjugal rights, the Court can only order cohabitation but cannot enforce sexual intercourse.<sup>8</sup> Thus the decree cannot be

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<sup>5</sup> Section 49(a) of the Matrimonial Causes Act

<sup>6</sup> *Ibid.* Section 49(b)

<sup>7</sup> Unreported, Suit No: FCA/B/42/78 Court of Appeal, Delivered on May 17 1979.

<sup>8</sup> See *Foster v Foster* (1790) 1 Hag. Con. 144, *Orme v Orme* (1824) 2 Add 382

granted where the respondent already lives with the Petitioner but refuses to have sexual intercourse with the petitioner.

Notably, a decree for restitution of conjugal rights cannot be enforced by attachment<sup>9</sup> nor can refusal to comply with the decree constitute contempt of court<sup>10</sup> although such a refusal to comply with the decree for one year will constitute a ground for dissolution of the marriage under Section 15 (2)(g) as the respondent will be deemed to have deserted the Petitioner. Further the Petitioner cannot forcibly abduct and compel the respondent to cohabit with him or her in order to enforce the Court's decree for restitution of conjugal rights.<sup>11</sup> Such forcible compulsion may render the petitioner liable to damages in an action in tort or for the breach of the Respondent's fundamental rights.

One may ask out of curiosity, of what utilitarian value is a decree for restitution of conjugal rights if same cannot be enforced either by attachment or compulsion and where refusal to comply with the decree will not constitute contempt of court?. The Petitioner is simply left with a decree which enforcement is dependent solely on voluntary compliance which invariably will be hardly obtained since it is very unlikely that a respondent who ignored the petitioner's written request in conciliatory language to resume cohabitation would voluntarily comply with a toothless decree of Court for restitution of conjugal rights. The Petitioner would therefore have secured a pyrrhic victory having further strained the marital relationship by instituting an action against the respondent to obtain a decree that cannot be enforced. However, this will be discussed in details anon.

### **3. The Practice in England and its Abolition in 1970**

Restitution of conjugal rights was a relief available under common law to a deserted spouse in the ecclesiastical courts. In the ecclesiastical courts desertion was not a matrimonial offence thus, the only remedy available to a deserted spouse was to obtain a decree of restitution of conjugal rights compelling the other spouse to resume cohabitation with the deserted spouse. Failure to comply with the decree was punishable by excommunication. In 1813, the punishment of excommunication for failure to comply with a decree of restitution of conjugal rights was abolished and substituted with sentence of imprisonment for a period not exceeding six

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<sup>9</sup> Section 51 of the Matrimonial Causes Act

<sup>10</sup> Itse Sagay, *Nigerian Family Law, Principles, Cases, Statutes and Commentaries* (Lagos: Malthouse Press Ltd 1999) 122

<sup>11</sup> *R v Jackson* (1891) 1 Q.B 671

months by the Ecclesiastical Courts Act 1813. Later in 1884, with the enactment of the Matrimonial Causes Act 1884, failure to comply with a decree of restitution of conjugal rights ceased to be punishable by imprisonment. Rather, such failure to comply was deemed to be desertion (Statutory Desertion) which entitled the deserted spouse the right to an immediate decree of judicial separation and if coupled with the husband's adultery allowed the wife to obtain an immediate divorce. The Matrimonial Causes Act 1923 abolished the double standard in English divorce laws and equalised the rights of divorce of husband and wife, giving the wife the right to divorce her husband on the ground of adultery alone<sup>12</sup> so that it thereafter became unnecessary for her to rely on the husband's failure to comply with a decree for restitution of conjugal rights in order to obtain a divorce.<sup>13</sup> In other words, it was no longer necessary for a wife to approach the courts for a decree of restitution of conjugal rights as a step to establish desertion in order to obtain sufficient grounds to succeed in an action for divorce.

The Supreme Court of Judicature (Consolidation) Act 1925 repealed the Matrimonial Causes Act 1884. Failure to comply with an order of restitution of conjugal rights continued to be a ground for judicial separation but was no longer deemed to constitute desertion. In 1969, The Law Commission laid before the parliament a proposal for the abolition of any proceedings or action for a decree of restitution of conjugal rights, pursuant to which the Matrimonial Proceedings and Property Act 1970 was enacted abolishing the matrimonial remedy of restitution of conjugal rights as the action was seen as outdated and rarely used.

It is noteworthy that shortly after the abolition of this remedy in England, other territories in the United Kingdom, Australia and Africa followed suit and abolished the practice<sup>14</sup>

#### **4. The Otiosity of this Remedy and the Need for its Abolition in Nigeria**

The practice of restitution of conjugal rights is a complete waste of time, and the decree which the Courts are empowered to make by virtue of the extant provision of Section 47 of the Matrimonial Causes Act is otiose. The decree by its very nature is unenforceable being a decree intended to compel parties to maintain personal

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<sup>12</sup> Prior to that time, the husband could divorce the wife for adultery alone, but the wife was required to establish in addition to adultery other matrimonial offences such as incest, cruelty, bigamy or desertion.

<sup>13</sup> See The Law Commission (Law Com. No. 23) Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights, 1969

<sup>14</sup> It was abolished in Australia in 1975, South Africa in 1979, Scotland in 1984, and Ireland in 1988.

relationship. The futility of such a decree is further amplified by fact that it cannot be enforced by attachment.<sup>15</sup> It is submitted that a party cannot be compelled by a decree of Court to render conjugal rights to their spouse whether or not such a party has just cause for refusal to do so. Being a matter involving personal relationship, a party cannot be compelled to continue personal relationship with another against his/her wish especially where such relationship carries with it a significant degree of intimacy such as cohabitation and other concomitant incidents of consortium.

It is noteworthy that the decree of restitution of conjugal rights is aimed at reconciling estranged spouses and saving the marriage from total collapse. This can be gleaned from the provision of Section 49 which requires as a condition for grant of the decree that the petitioner sincerely desires conjugal rights to be rendered by the respondent and is willing to do same and further that the petitioner has made a written request in conciliatory language to the respondent before instituting the suit. However, it is ironical that this is sought to be achieved through litigation which by its adversarial nature increases acrimony between the parties to the proceeding. Where a respondent has been served with a written request as required by Section 49(b) and he or she refuses to resume cohabitation with the petitioner, it serves no 'reconciliatory purpose' to compel such a party by a decree of court to resume cohabitation.

It may be argued that there may be the need to retain the practice since a party can petition for dissolution of the marriage under Section 15(2) (g) where the other party fails to comply with a decree for restitution of conjugal rights made under the Act for a period of not less than one year. However, this argument is untenable as that ground for dissolution is supernumerary and needless. Firstly, the aim of proceedings for restitution of conjugal rights is to salvage the marriage and not to destroy it. Thus, a party cannot be said to 'sincerely desire' cohabitation if the aim is to obtain a ground to dissolve the marriage. Importantly, it is submitted that the refusal to render conjugal rights to the requesting party upon a written request by that party in conciliatory language is enough communication of the other party's unwillingness to resume cohabitation with the requesting spouse and such a blatant refusal for a continuous period of one year is enough to establish desertion which is a ground for dissolution of the marriage under Section 15(2)(d). It is therefore totally otiose to petition for a decree of restitution of conjugal rights where the other party has clearly exhibited an unwillingness to resume cohabitation.

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<sup>15</sup> See Section 51 of the MCA

Notably, it cannot be reasonably argued that a petition for restitution of conjugal rights can ever be filed with a sincere intention at reconciliation considering the adversarial nature of litigation and the concomitant acrimonies and resentments that it breeds. These petitions are anachronistic devices sanctioned by law and wilyly adopted to achieve concealed motives other than reconciliation. Sometimes the petitions are filed to enforce demands for maintenance or to secure a ground for divorce.

Penultimately, a decree for restitution of conjugal rights in Nigeria being an unenforceable order of Court, its usefulness solely depends on voluntary compliance which may be hardly obtained. This regrettable situation is further exacerbated by that fact that no sanctions can be imposed in the event of breach. This simply places the Courts in a situation of utter impuissance as it stands by helplessly like a toothless bull dog and watches its orders being brazenly violated having been clothed with the power to make the order but deprived of the concomitant power to enforce same. Unfortunately, the unenforceability of a decree for restitution of conjugal rights detracts from the inveterate principle and practice of law that orders and judgments of court must be obeyed and are enforceable as the Courts do not act in vain.<sup>16</sup> In *J.O Anakwenze v Louis Aneke & Ors*<sup>17</sup>, the Supreme Court per Obaseki JSC pronouncing on the inherent and unimpugnable power of a Court to enforce its judgment held as follows:

One of the attributes of a court of law is its competence to enforce its judgment...It should be remembered that the term "judicial powers of the Federation" include powers to enforce a decision or judgment or order given and when section 6(1) of the Constitution of the Federal Republic of Nigeria, 1979 vested judicial powers of the federation in the Court of Appeal being one of the Courts established for the federation, it vested in it that inherent power to execute its own judgments and orders

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<sup>16</sup> See *Muhammed Ibrahim v Olatunji Ogunleye & Ors* (2012) 1 NWLR (Part 1282) 489, *Tajudeen Oladipo v George Oyelami* (1989) LPELR- 12756 (CA), *Okoya v Santilli* (1990) 2 NWLR (Part 131) 172

<sup>17</sup> (1985) 1 NWLR (Part 4) 771 at 779

Also in *Government of Gongola State v Tukur*<sup>18</sup> the Supreme Court as follows:

Judgments and orders are usually determinations of rights in the actual circumstances of which the court has cognizance, and give some particular relief capable of being enforced.

The Supreme Court further held at page 608 Para. H that a judgment ordering or restraining the doing of an act may be enforced by an order of committal or a writ of sequestration against the property of the disobedient person. Unfortunately, by Section 52 of the Matrimonial Causes Act, the decree for restitution of conjugal rights shall not be enforced by attachment. Further it has been stated that a respondent who violates the decree cannot be cited for contempt neither can he or she be compelled to resume cohabitation with the petitioner.

The dignity and honour of the Courts cannot be maintained if its orders and judgments are treated contemptuously and without respect. A toothless order of court which actualization depends solely on voluntary compliance will only lead to diminution of the vast powers of the Court, the image of the Court and exposure of its authority to ridicule and grave disrepute.

Finally, a serious issue to be considered is the constitutionality of a decree for restitution of conjugal rights. Under the Constitution of the Federal Republic of Nigeria 1999 (As amended) every person is entitled to his personal liberty.<sup>19</sup> Further, the privacy of citizens is guaranteed and protected under the Constitution.<sup>20</sup> A person who has left the society of another (whether or not for just cause), and has clearly exhibited an unwillingness to resume cohabitation with such a person cannot be ordered or compelled to do so. Such an order will amount to a violation of the person's right to personal liberty and privacy. The fact the parties are married is of the moment and cannot be a justification for making such an order. A party cannot by the application of marriage be said to have lost his or her constitutionally guaranteed right to personal liberty or privacy to any extent. Once a person has exhibited a firm resolve not to live with their spouse even before the marriage is dissolved, such a person is not obligated to give a just cause or excuse for doing so, and the Courts cannot interfere in such a person's private life and/or personal liberty by ordering them to render conjugal rights to the deserted spouse.

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<sup>18</sup>(1989) 4 NWLR (Part 117) 592 at Page 602

<sup>19</sup> Section 35(1) of the Constitution of the Federal Republic of Nigeria 1999 (As amended)

<sup>20</sup> Ibid Section 37.

What is more, it is the Courts that determine what amounts to just cause or excuse, and in so doing the Courts will usually apply the objective test. It is simply anachronistic and grossly unconstitutional to compel a person to resume cohabitation with another simply because the reason they have given for deserting their spouse is not just or objective. Being a matter relating to cohabitation and/or consortium which severely affects a person's privacy due to the nature of intimacy involved, the reason given for the withdrawal cannot be subject to any other person's assessment of what is reasonable or just cause. This is why the Courts cannot interfere.

### **5. Conclusion**

Marriage ordinarily carries with it a high degree of intimacy and emotional connection. When this has been lost and a spouse withdraws from the society of the other, compelling the withdrawing spouse to resume cohabitation with the aggrieved spouse cannot restore this connection or the connubial felicity that once existed. The lost connubial bliss cannot be revived by a decree which compels parties to cohabit. This only serves to heighten the acrimony between the parties and annihilate whatever hope there is to salvage the dying marriage. Litigation and court orders do not breed peace, intimacy, affection or happiness and it is certainly not an effective way of reconciling parties.

What is more, a court should not be clothed with jurisdiction to entertain and decide a cause if it is deprived of the concomitant jurisdiction to enforce whatever judgment it delivers. There is need to maintain the sanctity and inviolability of the Courts and their orders and as stated earlier a toothless order of court which actualization depends solely on voluntary compliance will only lead to diminution of the vast powers of the Court, the image of the Court and exposure of its authority to ridicule and grave disrepute.

Further, the practice can hardly survive the test of constitutionality as it amounts to a violation of a party's right to personal liberty and privacy to compel them to resume cohabitation with another against their wish.

The concept is a vestige of ancient times. It originated from ancient England and was imported into our laws as a result of colonization. Presently the practice may be considered as anachronistic and retrogressive and even though it is intended to reconcile spouses, it has lost its utility and significance in modern society. This is why in 1969, The Law Commission laid before the parliament a proposal for its abolition, pursuant to which the Matrimonial Proceedings and Property Act

1970 was enacted abolishing it in England as the action was seen as outdated. Shortly after the abolition of this remedy in England, other territories such as Australia, Scotland, Ireland and South Africa who like Nigeria borrowed the practice from England all abolished the practice. Unfortunately, close to 50 years after its abolition in England, this practice is still extant in Nigeria.

It is finally submitted that the practice should be abolished as same is unconstitutional, retrogressive and totally otiose as a decree for restitution of conjugal rights is of no utilitarian value to the petitioner. However, in order to maintain the laudable intention of the practice which is to salvage marriages from total collapse, a provision may be made empowering the Court to appoint one or two persons to act as mediators with the aim of seeking to reconcile the parties and securing the freewill return of the deserting spouse.