TERMINATION OF MARRIAGE IN NIGERIAN FAMILY LAWS: THE NEED FOR REFORM AND THE RELEVANCE OF THE TANZANIAN EXPERIENCE

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ABSTRACT

Nigeria enacted the Matrimonial Causes Act in 1970 to regulate the dissolution of statutory marriage. But this limitation to statutory marriage only entails shortcomings in respect of the other marriage systems that are also found in Nigeria: customary and Islamic marriage. All three systems, based on very different traditions, are, in principle, largely incompatible. This becomes particularly apparent when a marriage between the same persons contracted both under customary and statutory law is to be divorced. The requirements for customary and statutory divorce are not congruous in the different concepts of the (potentially) polygamous, customary (and Islamic) marriage and of the monogamous, statutory marriage. There are no provisions in the Matrimonial Causes Act considering obvious conflict situations. Reform has been frequently suggested but has not been implemented yet.

This article tries at first to analyse the main aspects of customary, Islamic and statutory marriage and, especially, divorce, for in the case of the dissolution of marriage the distinguishing elements become most apparent. Then a proposal of an integrating divorce law will be presented which takes account of central features of the present marriage systems. It will be shown that many essential elements of these systems can be retained and combined to some extent in a unifying law. The proposal will frequently refer to the Tanzanian Law of Marriage Act 1971 which constitutes a fairly convincing attempt to unify different marriage systems.

I. INTRODUCTION

In Nigeria the law of marriage and divorce is characterized by a distinctive legal pluralism. One finds statutory law, based on English law, and largely taken over from colonial times with few important changes; and customary law, consisting of a great number of different local customary

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laws of the various ethnic communities in Nigeria. In the North, Islamic law is mainly applied, which constitutes, in theory, a separate body of law, but in practice its rules are heavily influenced by the respective customary laws. Consequently, the border between these two systems is often blurred. However, the different nature of Islamic law\(^1\) justifies a separate discussion on Islamic marriage and particularly divorce in a special section.\(^2\)

All of these marriage laws embody to a great extent different traditional and religious values that are scarcely compatible. Conflicts between them frequently arise, especially in the case of divorce. Customary law is still the primary source of family law, for most Nigerians contract marriages only under their respective customary laws, but rarely perform solely a statutory marriage. The (extended) families of the spouses would hardly recognize a marriage without any traditional foundation as a valid marital union. Marriages under both laws, however, are common.\(^3\) When it comes to a divorce, problems emerge, because the requirements for the dissolution of marriage are different under customary and statutory law. The same may apply when Islamic law is involved, but combinations between Islamic and statutory marriage are rare and conflicts between indigenous customary and Islamic law are unlikely. In addition, it has been repeatedly argued that the present statutes on marriage and divorce which apply to monogamous marriages make this kind of marriage superior to the (potentially) polygamous, customary marriages.\(^4\) For these reasons, several authors have proposed an integration of the inconsistent marriage systems. One of the earliest was Dr Akinola Aguda, then state legal draftsman, who said in 1965 (Aguda 1971:87):

We are trying to build a Nigerian nation [. . .]. It is our duty to preserve our culture, and if a particular custom is on[e] unacceptable to the generality of the people it is the duty of the state to alter it. [. . .] Reformation of our marriage laws now is imperative . . .

His words have remained valid. In the following thirty years various suggestions have been made and some of them refer to the Tanzanian attempt of unification in the Law of Marriage Act 1971 as an acceptable model.

This paper will show that an integration of the diverse marriage laws is possible by combining central features of the present laws. Throughout the article the discussion will emphasize the termination of marriage through divorce, for that event highlights the distinguishing elements of each marriage system; and it is not so much at the formation but at the dissolution of marriage when conflicts emerge.

The study will be divided into two main parts. The first section will deal with the customary, Islamic and statutory marriage systems and the conflicts and problems arising in connection with dissolution of a
statutory marriage combined with a customary marriage. The second part will discuss the Tanzanian law, at the time of enactment an advanced example of unification of the marriage laws in a country that had similar problems to those of Nigeria today. Then the relevance of the Tanzanian concept for reform in Nigeria will be examined and a proposal for a new harmonizing Nigerian law of divorce will be made.

II. THE THREE DIFFERENT SOURCES OF NIGERIAN LAW OF MARRIAGE AND DIVORCE AND THE CONTEMPORARY SITUATION IN NIGERIA

A. The Three Systems of Marriage and Divorce

(i) The customary non-Islamic law of marriage and divorce

Customary law, which is still the main source of Nigerian family law, is a set of rules developed and – as a result of long usage – socially recognized as obligatory by a given community. This body of rules is embedded in religious-ritual and social customs that provide the framework of a society and regulate social behaviour. Customary law, however, is not merely custom but enforceable law, although this difference may not always appear clearly in practice. Customary law embodies aspects of tradition as well as of evolution: principles and values safeguarded by implemented rules are retained and handed down from the ancestors of the respective ethnic groups, but not unaltered. Customary law was and is never immutable, it was always changing in order to remain adaptable to new conditions of social life (Kasunmu and Salas-cuse 1966:17; Gluckman (ed) 1969: 9–10).

Nigerian customary law comprises hundreds of sets of laws, which differ both as between the various ethnic groups, and as between the various areas, even villages. Since customary law is not enacted written law, rules of customary law must be proved in judicial proceedings by the party relying upon them. Even if the rule is established, the judge can refuse to enforce it, if s/he finds it ‘repugnant to natural justice, equity and good conscience’. Attempts to strengthen the weaker position of customary law compared with statutory law have been made by recording the customary laws of the respective regions. ‘These ‘restatements’ (ie systematic and comprehensive accounts of unwritten laws) were sometimes considered to be problematic, firstly, because formerly they were not infrequently undertaken by or on behalf of colonial authorities and do not always reflect the ‘real customary law’ (whatever that might have been) but an adapted version therefrom which proved useful for the colonial administration (Chanock 1985:55–9, 74–8). Secondly, some authors took a reserved stand on a restatement, because, in their view, customary law that is codified or partly laid down in
binding judicial decisions would become static and thus become deprived of its characteristic as a law responsive to the evolving social, political and economic life (Allott 1960: 89–90; Allott 1970: 147–8). However, a systematic recording of customary law substantially removes the problem of uncertainty and ensures an easier enforcement of the customary rules.

What are, generally, the features of a customary (non-Islamic) marriage and divorce?

Formation of marriage. Traditionally, a marriage was constituted, as a result of negotiations, as a union between husband and wife as well as between the two kinship groups of the spouses, and entailed, apart from the performance of marriage ceremonies, the transfer of property from the husband's to the wife's family. Hence customary marriage was concluded rather between the families of the spouses than between the spouses themselves (Phillips and Morris 1971: 7), and the consent of the parties, especially of the bride, to this union was not essential.

Today, marriage under customary law may be seen as a private contractual union between a man and a woman as the nucleus of an association between the spouses' families. Customary marriages are polygamous or potentially polygamous (polygynous), in which the man has a separate marriage contract with each of his wives, not one contract with all of them (Obi 1966: 155). Customary marriage ends with its dissolution or with the death of the wife. As the marriage is still regarded as a union (also) between the families of the spouses, the death of the husband does not inevitably lead to the termination of the marriage. The wife can (and, at least formerly, was expected to) retain the status of a married woman in order to stay on as a member of the late husband's family (Obi 1966: 156).

The essential requirements.

1. Capacity and Consent: The parties to a customary marriage must possess the capacity to marry each other; that means, inter alia, they shall have (in theory) a certain age and there must not be a prohibited degree of consanguinity or affinity between them. Since marriage still involves the spouses' families socially and legally to a high degree, at least the consent of the parents is deemed an essential requirement for a valid marriage. This seems to be still the position in respect of the bride unless, according to some customary laws, the parents refuse their consent without sufficient cause. An adult man need not necessarily have the express consent of his parents although in practice he will try to get it for reasons shown below. Today also the agreement of the spouses is, contrary to the traditional laws, of great importance. In Nwogugu's opinion (1974: 44) a lack of the spouses' consent shall render the marriage voidable.
2. Transaction of economic value: Another prerequisite for a valid customary-law marriage is the marriage consideration or bride-price. A marriage payment must normally be made by the bridegroom to the bride's parent or guardian.\textsuperscript{21} The word 'dower' is inappropriate since the consideration is handed over to the representatives of the bride's family, not to the bride herself. Since the bridegroom's family has to pay or to contribute substantially to these payments the prospective husband will depend on his family's consent to the marriage. The bride-price consists of money or some other kind of property and its amount is normally determined by the family of the bride or negotiated; it has to be paid in respect of the marriage at once or by instalments. Its payment is enforceable in a court.\textsuperscript{22}

3. Marriage celebration: In many customary laws the ceremony of handing over the bride to the bridegroom's family and often cohabitation are essential for a valid marriage.\textsuperscript{23}

Dissolution of marriage. Although customary marriage is intended to be an enduring relationship, divorce can rather simply be obtained in either a non-judicial or a judicial proceeding.

There is no special procedure for the non-judicial dissolution of marriage in customary law. Nor is there a set of specified grounds that are to be fulfilled in order to get divorced (Obi 1966:364, 366–367; Nwogugu 1974:178, 181). If it comes to a marital conflict, a joint meeting of the families combined with an attempt at reconciliation will normally take place.

1. Non-judicial divorce, family arbitration: The divorce will often be initiated by a separation of the spouses, or one party may unilaterally declare unwillingness to continue the marriage. The dissolution can also be commenced by mutual consent. Such events will usually cause a meeting of the families involved, who first attempt to reconcile the spouses. If they fail, they will accept the breakdown of the marriage and enter into negotiations upon the custody of any children and upon the return of property that was brought to the matrimonial home or acquired during the marriage. A non-judicial divorce is only effected when the wife's father or guardian refunds the bride-price to the former husband. The woman cannot redeem herself even if she is able to provide the money. In case of disputes about the amount of the repayment the husband is entitled to invoke the assistance of the court (Nwogugu 1974:183–5).

2. Judicial Divorce: Where the family arbitration has failed the spouses may resort to the court to obtain a divorce. Judicial dissolution, frequently at the instance of the wife, has become increasingly common nowadays. The court, too, will try to reconcile the parties but if this attempt fails it will declare the dissolution of the marriage. Then the bride-price normally has to be returned but this is not a requirement
for the valid termination of the marriage (Kasunnu and Salacuse 1966: 176–8).

3. Grounds for divorce: Grounds for divorce in a technical sense need not be established, in either a non-judicial, or a judicial, divorce. In addition, the responsibility of a spouse for the failure of the marriage plays only a secondary role. Nevertheless, some reasons have become generally accepted as a sufficient justification for dissolving a marriage. These include adultery, impotence of the husband or sterility of the wife, incest by either spouse, ill-treatment and cruelty, commission of crimes (especially if repeated), lunacy, desertion and witchcraft (Obi 1966:366–7; Obi (ed) 1977:291–2). Although several reasons may resemble some ‘facts’ under the Matrimonial Causes Act (see below section iii) they are not as clearly characterized and do not necessarily have the same meaning. For instance, under statutory law adultery only, committed by either party, can lead to a divorce, whereas under customary law a husband’s (not a wife’s) adultery must be compounded by some other matrimonial wrong in order to constitute a reason for divorce.

(ii) The (customary) Islamic law of marriage and divorce

Around the fourteenth century the peoples of Northern Nigeria came into contact with Islam, mainly through the trade routes of Islamic merchants. The first region that appears to have accepted Islam was Kano, followed by Katsina and Zaria in the fifteenth century. Yet conversion to Islam was not inevitably coupled with the abandonment of traditional animism (Hiskett 1994:108). Several subsequent jihad’s in the eighteenth and nineteenth century (Crowder 1966:90) consolidated the position of Islam in this region and even the British colonial authorities did not interfere substantially in the Northern Emirates (Hiskett 1994:114), nor with their religion and, thus, their application of Islamic law. However, the shari’a in the form of the Maliki school which is supreme in this area was never enforced in a pure manner by the Qadis (or Alkalai, as they are also called in Northern Nigeria). There is always a strong element of local customary law within Islamic law, even a mixture between both (Anderson 1965:153) although some Qadis claim to implement solely the shari’a. This applies particularly to Islamic marriage (nikah) and divorce (talaq) which will be discussed now according to Maliki school with its variations derived from indigenous customary laws. Islamic family law is very elaborate, therefore the following account should not be regarded as comprehensive.

Formation of Marriage: Under Islamic law the marriage contract is concluded between a man and a woman through offer and acceptance which has to be made within one contractual session (majlis), and, as a rule, before two male witnesses. Both parties must possess the capacity to
contract the marriage. In particular, there must be no impediment of relationship or religion to the marriage. Since a woman in Maliki law lacks capacity to conduct her own marriage contract, her consent is given on her behalf by her guardian (her nearest male relative, usually her father). A man has the right to marry up to four women if he is able to treat them with perfect equality. But here customary law prevails: maintenance is in practice calculated by exclusive reference to the husband's means (Anderson 1954:208).

Islamic marriage is not a sacred tie but a civil contract that, however, embodies some religious elements. From this contract emanates the obligation of the husband to maintain his wife and to pay her the dower (mah\textit{r}, sadaq). The dower, which may consist of anything that can be the object of a lawful obligation, is, according to the Malikis, a condition for the validity of the marriage. Theoretically the dower should become the property only of the wife but – and this is another point where indigenous customary law prevails over Islamic law – the dower is usually handed over to the bride's father (Anderson 1954: 207) and has therefore the function of a customary consideration.

\textit{Dissolution of marriage:} It is a characteristic of contracts of (economic) partnership in Islamic law that either party can terminate the contract unilaterally if the harmony and co-operation of the association dwindles, irrespective of whether the other party has caused this development or not. In principle, this applies also to marriage, hence divorce in Islamic law is merely the dissolution of the marriage contract, a special contract of partnership. Therefore Islamic always permitted divorce at the initiative of one party or by mutual consent. The divorce can be effectuated non-judicially or by a court. However, the right to actually rescind the marriage contract unilaterally is, in contrast to other contracts, confined to the husband. The exercise of the husband's exclusive right of withdrawal is known as the \textit{talaq} (Coulson 1984:77).

\textit{Talaq}, the most common kind of non-judicial divorce, is the repudiation of the wife by her husband. It is valid without any further formal requirements when the husband pronounces the divorce either expressly (eg by using the word \textit{talaq} or a derivative) or implicitly (eg 'you are not my wife'), preferably but not obligatorily in the presence of his wife and/or witnesses (Ahmed 1972:29, 33). There are, very broadly speaking, two major kinds of divorce, the proper and the disapproved \textit{talaq}. In the former case the \textit{talaq} is uttered once or twice during the wife's \textit{idda} period (three menstrual periods or three lunar months if the woman is past child-bearing age) and is revocable, ie the husband can take back his wife even without her consent. The marital status is terminated only when the divorce becomes irrevocable, that is to say, when the \textit{idda} is completed or the \textit{talaq} is pronounced for a third time. Morally reprehensible and discouraged, nonetheless legally valid (and
very common), is the *talaq* pronounced three times at once. This triple *talaq* dissolves the marriage immediately (irrevocable divorce). After the divorce the spouses are prohibited to remarry unless the wife has concluded an intervening marriage. Suspended and delegated divorce, both recognized in Islamic law, have almost no importance in Nigeria (Anderson 1954:213). Apart from some exceptions, the dissolution of a consummated marriage entitles the wife to claim the whole dower if it has not already been (fully) paid.

Marriage can also be dissolved by mutual consent (*mubara'a*) and by *khul'* the release of a wife in consideration of a money payment. *Khul'* is not strictly an agreement between the parties upon the termination of their marriage but rather a form of dissolution whereby the wife induces her husband to divorce her for a consideration which the wife pays or promises to pay. The consideration will normally equal the amount of her dower but can be increased occasionally by expenses of the husband made in respect of the marriage (Anderson 1954:210). In Northern Nigeria most divorces take place at the instance of the wife either by mutual consent or by *khul'.* Divorce can usually be obtained by refund of the dower, at least when efforts to reconcile the spouses have failed (Anderson 1954:209).

Besides the non-judicial divorce by *talaq, mubara'a* and *khul'*, Maliki law emphasizes the possibility of divorce by judicial process.

First of all, a woman can obtain her release with the assistance of the court. According to the Maliki doctrine the husband can be forced to agree on a *khul'* divorce if two arbitrators appointed by the court recommended the dissolution after having examined the causes of marital discord and after having attempted unsuccessfully a reconciliation. This rule which is accepted only in the Maliki school results undoubtedly from the impact of customary law on Islamic law (Anderson 1965: 154).

Apart from the compulsory *khul'* the wife is entitled to demand a judicial divorce — that is, in the Maliki view, pronounced in the form of an irrevocable *talaq* by the Qadi on behalf of the husband, even against the latter's will — in the case of cruel behaviour of her husband which makes it impossible for her to continue living with him. The wife can obtain a judicial divorce also for the failure of the husband to pay maintenance to her. Strict Maliki law allows divorce only after one to three years' separation and if the woman fears to commit adultery because of the continuing absence of her husband, but in practice the courts, apparently influenced by indigenous customary law, grant divorce after a three to six months period without any further specified requirements.

Thus, in Northern Nigeria a discontented wife can normally get released from her husband if she can provide compensation. The suitable refund is ordered by the court after a failure of reconciliation
(Anderson 1954:210). In cases of divorce due to ill-treatment of the wife most jurists are prone to grant divorce without any refund. Where the wife cannot give sufficient evidence for her maltreatment she has to seek a compulsory khul' (Anderson 1954:212). A woman does not normally get a judicial divorce for the failure of adequate maintenance but she can obtain a compulsory khul' (1954:211). Nonetheless, here as well as in other areas of divorce law court decisions are only fairly predictable.

(iii) The statutory law of marriage and divorce

The statutory law of marriage and divorce in Nigeria derives from two influences. First, Christian missionaries brought the Christian ideas of marriage and family to West Africa; in Nigeria Protestants were active mainly among the Yoruba and Catholics among the Ibo (Igbo) (Rinehart 1982:19, Ajaji 1965:7, 79 etc.) during the nineteenth century.

From the 1880s onwards, the English colonial rulers were the second influence that shaped the statutory marriage laws. Colonial legislation on marriage appeared in a secularized form but was largely based on Christian ideas.

The achievement of independence in 1960 did not considerably change the statutory law of marriage and divorce in Nigeria. The current Marriage Act is still virtually the colonial Marriage Ordinance of 1914. The Matrimonial Causes Act 1970 (MCA), which embodies the current statutory law of divorce, is, besides the fact that it was enacted only ten years after independence, curiously enough, the product of a long evolution of English, and not of Nigerian, divorce law. For the MCA is closely based on the English Divorce Reform Act 1969 and the Australian Matrimonial Causes Act 1959 and adopts exactly their principles concerning the ground for divorce. Hence, it will be necessary to look very briefly at the history of English divorce law.

The English marriage laws were dominated by the doctrines of the Roman Catholic and, as from the sixteenth century, of the Protestant churches. The Roman Catholic Church considers marriage as a sacramental bond which ties and unites man and woman and is therefore indissoluble, particularly after consummation. Marriage is strictly monogamous and has to be concluded in public before an official of the Church. Divorce, that is the dissolution of a valid marriage other than by death, is impossible.

After Henry VIII the gradually evolving Church of England assumed the Protestant stance on divorce. In the eyes of the Protestants the marriage was not a sacrament but in principle a life-long relationship, which could, however, be dissolved, as an exception, if one partner commits adultery or deserts the other partner wilfully. This thought, which was buttressed by some passages from the Bible, created the doctrine of the matrimonial offence. Divorce therefore contained the character of a penalty against the wrongdoing spouse (Eekelaar 1991:11)
who had destroyed a union intended to last for the joint lives. It was not the marital discord between the spouses but the attack on the social order which justified divorce. When one party violates the (religious, social and legal) institution of marriage, the other party should not be compelled to continue the marital relationship with the offender.

The doctrine, whereby a divorce may be granted only if one of the matrimonial offences – adultery, desertion and, later, cruelty – has been committed, was retained in the first secular divorce law in England 1857 and dominated all divorce laws up to the Divorce Reform Act 1969, which claimed to have abolished the matrimonial offence doctrine. Instead, the sole ground for divorce now became irretrievable breakdown of the marriage. However, this breakdown may be established only if at least one of the listed grounds (now ‘facts’) set out in the Act are proved. This list of ‘facts’ contains mainly the classical matrimonial offences, partly in a modified form.

The Nigerian MCA has adopted the modern English concept of divorce virtually unchanged. Section 15 provides:

s. 15 (1). A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.

The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts –
(a) [wilful and persistent refusal to consummate], (b) [adultery], (c) [behaviour of the respondent which the petitioner cannot reasonably be expected to bear],
(d) [desertion], (e) [separation and respondent’s consent to dissolution], (f) [three years’ separation], (g) [failure to comply with a decree of restitution of conjugal rights], (h) [presumption of death].

It is appropriate to attempt a definition of statutory marriage at this stage, because the concept of marriage law is most clearly revealed by the law of divorce. Statutory marriage in Nigeria is a voluntarily concluded contractual union between one man and one woman, thus monogamous without exception, and intended to last for life. Consequently divorce, the severance of an actually existing marital bond, is solely judicial and permitted only for a few exceptional reasons which are prescribed rather precisely in the law and have to be established before the court by the party seeking the dissolution. This is in fact the Protestant notion of divorce in a secularized appearance and a diluted form. At least in theory, divorce is discouraged and should be the very last resort. That idea inheres in the list of detailed ‘facts’ in the MCA which regulate and limit the possibility of dissolution. However, not only this aspect does reflect Christian ideas, but the construction of the divorce provisions also. It discards the old fault-based matrimonial offence principle, but lets it materialize again in a new guise. The return is
achieved by founding the divorce solely on the irretrievable breakdown of the marriage in which the old matrimonial offences of adultery (s15. 2. b), cruelty (s15. 2. c) and desertion (s15. 2. d) are the only admissible proof of the marriage breakdown although no longer grounds for divorce in themselves.

Under the Nigerian formula it does not make much difference in practice that the matrimonial offence doctrine has been superseded by the irretrievable breakdown principle. One has to concede that the law attempted a shift from the fault-based divorce to a divorce where the establishment of guilt has no relevance. But even this objective was not convincingly attained as the examples of desertion and separation show.

Desertion (s15. 2. d) is intentionally bringing cohabitation permanently to an end with the intention to do so but without a just cause and without the consent of the deserted spouse (Bromley and Lowe 1992:200). The deserter must not be justified by the behaviour of the other party (especially cruelty – s15. 2. c; Nwogugu 1974:150). This is the old fault-based matrimonial offence of desertion. However, separation (s15. 2. e) is a fault-free fact: when there is the clear intention of one or both spouses not to return to the other and, if the separation has lasted for at least two years, the respondent consents to a decree, the marriage will be dissolved. Thus the facts which, exclusively, prove the irretrievable breakdown, are fault-based and fault-free conditions side by side. It is in effect still possible to obtain a divorce on the basis of fault. Furthermore, the facts of a particular case do not always allow a clear distinction between desertion and separation. As a result, the establishment of guilt may still be relevant in divorce proceedings.

B. The Contemporary Situation in Nigeria

Soon after the promulgation of the MCA in 1970 much criticism arose in academic writings and, rarely, in judgements. The critical remarks concern the following major areas:

a) The Act itself in terms of wording and structure, is a mere copy of foreign statutes; b) the neglect of traditional values and rules in African family relations; c) the possible superiority of the statutory marriage; d) the antagonism between monogamy and polygamy and the religious tensions; e) the situation of women under the different laws; f) the still unsolved problems of internal conflict of laws.

a) The MCA relies completely on western concepts and legal techniques of dissolution of marriages without any ‘domestic’ contribution. It was pointed out that virtually all sections of the MCA were copied word for word from the English and the Australian Matrimonial Causes Acts (Kasunmu 1971:88). The fundamental feature of this import was the establishment of irretrievable breakdown as the sole ground for divorce exclusively based on ‘facts’ that largely retain the old matrimonial offences of adultery, cruelty and desertion. Despite that, ss15 and
16 of the MCA are often seen as a compromise (Nwogugu 1974:133) between the matrimonial offence and the irretrievable breakdown theory. Nonetheless, as emphasized earlier, this solution is only the scarcely altered matrimonial offence doctrine, which has been newly labelled and made more complex in procedure by the introduction of the 'irretrievable breakdown' principle, an empty addition to the 'facts' that actually remained independent grounds for divorce (Ilegbune 1970: 195; Kasunmu 1971:138). Furthermore, the wording and technique of the text were rightly subjected to criticism, especially with regard to s15 and the detailed provisions of s16 as extensions of s15. 2. c (Kasunmu 1971: 140). Over-elaborate rules inevitably entail problems of differentiation, as was pointed out above with respect to desertion and separation. Apart from that, it is not only troublesome and costly for the spouses to have to prove the existence of all details of the necessary facts, it is also unjustifiable to require the courts to scrutinize all stages and developments of highly personal relationships. This encroachment on the parties' privacy by a public authority turns the failure of a marriage to a public issue and thus confirms the concept of the matrimonial offence doctrine. It is not so much the breakdown of the marital relationship but the offence by one partner against the social order which justifies a divorce.

Since nowadays the Public Prosecutor should no longer have the right to intervene in divorce proceedings, Aguda rightly proposed to abolish the 'archaic' decree nisi (s56) (Aguda 1971:121).

It was emphasized that no public debate took place before the enactment of the MCA (Adesanya 1973:2); however, this is not surprising when a law has been introduced by a military government.

b) In a preceding public discussion not only could these points have been raised but also the fact that the MCA does not respect the legacy of indigenous values in society. This is why the MCA is often seen as an alien element in Nigerian law. Many remarks have been made on this subject. Some, though, are rather astonishing.

Most customary laws, for instance, require more than mere adultery by the husband for a divorce at the instance of the wife, whereas adultery alone by the wife could be a sufficient reason. Therefore, it was said that the MCA regretfully does not make this distinction and hence fails to reflect traditional African views (Kasunmu 1971:209; Ilegbune 1970:185).

Customary law normally allows a man to divorce his wife if she is barren but the MCA does not recognize this reason as a ground for divorce. It was argued that marriage in African families exists primarily for procreation and for this reason the divorce of a barren woman should be permitted also under the MCA in order to allow her husband to look for another wife to fulfil this vital role (Uzodike 1990:57).
Others feared that the possibility of a divorce after 'only' three years' separation (s15. 2. f) could lead to a liberation of divorce and weaken the institution of the family (Karibi-Whyte 1970:29). 69

But most of the arguments which are put forward in respect of the MCA are sound and well-founded. It is true that the detailed 'facts' (ie grounds) for divorce under the MCA are not in accordance with customary or Islamic divorce law. There are some general reasons justifying the dissolution of a marriage in these systems 70 but even those with similar names to the 'facts' under statutory law (adultery, desertion, cruelty) are not defined as precisely as in the MCA. Besides, many more reasons for divorce can be considered in customary divorce proceedings and an exhaustive list does not exist. In effect, customary law regards the actual marriage breakdown as more relevant for the divorce than the Act. In connection with this it has to be taken into consideration that customary and Islamic marriage is primarily dissolved in an extra-judicial process when prior attempts at reconciliation failed. Although in Islamic law the Malikis are much more sympathetic to a judicial divorce (particularly, and this is the significant point, at the instance of the wife) than the other Sunni schools, 71 customary and Islamic laws are so closely interlinked that a consultation between the concerned families will be unavoidable in most cases. If a husband gives his wife the talaq (which itself needs no 'grounds' at all) he will often contact the families. The possible appointment of arbitrators within a khul divorce, a peculiarity of Maliki law, 72 points in the same direction: before a non-statutory marriage is dissolved, the spouses usually have to undergo reconciliation proceedings. In former times the families of the spouses decided whether the marriage should be dissolved or maintained. The establishment of exact and specified grounds for divorce was unnecessary as the families were not bound by them for their findings. The traditional reconciliation, often a forced reconciliation in which a divorce was denied and the partners – especially the wife – had to put up with their situation, is of dwindling importance but the families will still try to achieve a compromise in order to avoid a divorce.

The MCA indeed takes into account the traditional institution of reconciliation in ss 11–14, but only to a very limited extent. A mere family reconciliation is not admissible to the court at all, and the judge who acts as or appoints a marriage conciliator need not necessarily include the families and is not obliged to enforce the results of the reconciliation. For these reasons, it has been stated that the provisions are ineffective (Kasunmu 1971:116; Karibi-Whyte 1970:29), a 'mere paperwork with no practical utility' (Aguda 1971:101).

c) 73 Unlike a customary marriage, a marriage under the MCA can only be dissolved judicially. As a result, a statutory marriage may have a stronger position in subsequent divorce proceedings than a customary
The circumstances in which a marriage breakdown can be assumed are set out in the MCA in fairly clear rules. These are complemented by court decisions, and the judges can consult not only domestic but, because of the similarity of these laws, also English and Australian precedents. Therefore lawyers can rely on a rather dense and precise pattern of laws with comparatively few difficulties of evidence in the procedure. An extra-judicial customary divorce is not founded on such a sound fabric of accurate rules. First, the legally relevant criteria in the respective law must be established and secondly their existence in the present case must be proved.

It can become difficult to ascertain the essentials of a valid customary divorce, for these seldom appear clearly in the context of traditional dissolution proceedings. Neither the marriage nor the divorce need normally be recorded anywhere but even if a petition for a customary divorce is submitted to the customary court, which would make the divorce 'official', the court will refuse to dissolve a marriage when there is insufficient evidence to establish the existence of the marriage.

Furthermore, since a High Court dissolves a statutory marriage and a customary or Islamic marriage, Oyebanji argues that statutory marriage is superior to any other marriage because the High Court is superior to the customary court (Oyebanji 1981:155).

d) The latter problem is also combined with the fact that the MCA solely applies to monogamous marriages (s114. 6.). The refusal of recognition of polygamous marriages in statutory marriage and divorce law, a colonial legacy that is retained in the MCA, provoked strong criticism (Oyebanji 1981:153; Agbede 1981:141; Karibi-Whyte 1981:27 and others) since most Nigerians still live in (potentially) polygamous unions, the usual pattern in African societies. In addition, it was alleged that the MCA – exclusively based on the Marriage Act which regulates monogamous marriages only – largely embodies Christian principles, such as monogamy, and imposes them on the Nigerian population, although Nigeria is not a Christian State. This touches a delicate issue.

Nigeria did not adopt a particular state religion and is formally a secular state. It must be regarded as a multi-religious state comprising adherents of traditional religions, together with Muslims and Christians. The country is increasingly beset by conflicts between more and more politicized religious groups where calls for tolerance try to avoid, as it has been put, the detonation of a time-bomb (Atanda 1989:189). Political life as well as legislation are much more directly influenced by religious values and far more subject to religious power than in a truly secular country. Indeed it has been said that Nigeria is a de facto religious State (Atanda 1989:184). This is certainly true with regard to the applied marriage and divorce laws, as was shown earlier. Divorces in the Muslim north are implemented in accordance with religious law. Statutory divorce, too, albeit less obviously, consists of provisions that are in essence Protestant law and the maze of rules in s15 (and particu-
larly in s16) mirrors well the Protestant stance to make divorce difficult. When it has been put forward that common law is English law and ipso facto Christian law (Ekoko and Amadi 1989:129) this argument is accurate with regard to statutory marriage and divorce law.

e) The situation of women is also a very contentious matter which often appears in this context, since some representatives of different religious groups do not hesitate to claim the superiority of their respective faiths by demonstrating the purportedly better position of women in their respective family laws. A glance at the divorce laws in respect of maintenance and child custody quickly remove possible temptations to evaluate these arguments.

In all customary laws the divorced wife is under no circumstances entitled to maintenance payments (Nwogugu 1974:216), because maintenance after divorce would be regarded as imposing a form of punishment on the husband whereas the wife, no longer having a relationship with him, would benefit twice: she can (in theory) go back to her family which is then responsible to maintain her. The right to custody of the children belongs in principle to the father or his family (Obi 1966:376). The judges, though, refuse to enforce this rule if it contravenes the welfare of the child.79

Islamic law grants the wife maintenance until her 'idda expires and the revocable divorce becomes irrevocable. During the 'idda of a finally divorced wife the husband has to provide maintenance and lodging if she is pregnant, otherwise, in the Maliki view, she is only entitled to lodging (Anderson 1954:364). After the termination of the 'idda she can no longer claim maintenance. Therefore in cases where the absent husband fails to maintain his wife the Qadis prefer not to preserve marriages by, for instance, selling the husband's property in order to provide payments for the wife but tend to dissolve the marriage (Anderson 1954:211). In theory, the father has custody of the boys and the girls should stay with the mother until the age of puberty when they can choose where they wish to live. However, some variants often prevail over this rule, such as that the father can always claim his offspring, or at least the boys, after the period of weaning etc. (Anderson 1954:214; Muhammad 1967:7). Here again, Islamic law is mingled with cutomary law.

Under the MCA the situation of the woman is most favourable, not because it is a 'Christian' law but rather because the provisions on maintenance and custody depart from the Christian legacy. Christianity, which always opposed divorce and, besides, was not particularly woman-friendly over the centuries, was naturally not much concerned about such questions after a divorce. S70 (in connection with s114. 1. c) provides that the court can make an order for maintenance of the wife after divorce and the judge has a discretion with regard to the mode of payments (eg in the form of a lump sum or a periodic sum, s73).
respect of custody the court has to regard the interests of the children
as paramount (s71). The maintenance provision has been criticized as
contrary to customary rules (Aguda 1971:111; Kasunnu 1971:210). This is unquestionably true, though traditional African laws can and
should be subject to change like other laws.

f) Another central problem which the MCA failed to solve was that
of internal conflict of laws. Since the law expressly does not apply to
polygamous marriages (s114, 6.) it maintains three separate systems of
marriage and divorce which seem to be irreconcilable but are very likely
to conflict. As already said, spouses usually combine statutory and tradi-
tional marriages. Although the difficulties of a subsequent divorce in
such a marriage must appear obvious, the MCA (in combination with
the Marriage Act) provides very defective solutions. Furthermore, there
are few learned articles and few judicial decisions which offer guidance,
perhaps because, as far as the customary part of the divorce is con-
cerned, a court need not necessarily become involved. But even if one
leaves aside cases with foreign elements, conflict situations often arise
between the statutory and customary or Islamic law, respectively, or
between different customary laws. These conflict variants, and combina-
tions of them, occur increasingly often, particularly in urban areas.

This paper is not designed to give comprehensive solutions to the
intricacies of the present legal position but will suggest ways to simplify
this situation and can therefore confine itself to some short remarks.

What should happen, for instance, in the following case:

Two Nigerians of different ethnic groups (i.e. subject to two different
customary laws) marry under (which?) customary law and sub-
sequently under the statute (Marriage Act). Later the husband takes a
second wife under (his) customary law and the first wife petitions for
divorce in accordance with s15 MCA.

Jurisdiction to dissolve a monogamous statutory marriage is vested
in the High Court of any Federal State and is governed and determined
by the lex domicilii of the parties, which means here, they must be domi-
ciled anywhere in Nigeria (s2.2.) (Agbede 1989:54). Judicial dissolu-
tion of a customary/Islamic marriage can only be granted by a custom-
ary court according to the parties' respective customary laws. Hence,
as it would appear, the High Court can only dissolve the statutory but
not the customary marriage with the first wife. In fact, s47 of the
Marriage Act in effect permits a statutory marriage after a concluded
and subsisting customary marriage with the same person, while
according to s48 a customary marriage contracted during the existence
of a statutory marriage with someone else or remarkably even with the
same spouse attracts imprisonment for five years – virtually a dead letter
(Ibidapo-Obe 1981:132). Furthermore, s35 states that such a sub-
sequent customary marriage is void. On this point the monogamous,
statutory marriage seems to prevail over the (potentially) polygamous,
customary marriage, as a statutory marriage can follow a customary marriage between the same parties, but not vice versa. The first customary marriage, it has been said, is partly extinguished by the following marriage under the Act, which entails a change of status (Okagbue 1975:183). In the case above, the second marriage is void and the husband offends against s48 of the Marriage Act. It seems that the High Court could dissolve the statutory and customary marriage (despite the fact that the grounds for divorce do not correspond) and pronounce the invalidity of the second customary marriage by virtue of s3. 1. a. MCA. Accordingly, a customary court would then have no jurisdiction although a customary marriage is also concerned.

In addition, in a few, though older decisions, Christian marriage has been held to be synonymous with marriage under the Act. All this gives rise to the feeling that a statutory marriage (and therefore a marriage emanating from Christian tenets) has a stronger position than a customary marriage (Agbede 1981:138; Oyebanji 1981:155).

It follows that the existing systems of divorce are inconsistent with each other but legislation only inadequately caters for acceptable solutions of the arising difficulties. For this reason, suggestions for a new law were frequently made which, inter alia, refer to the Law of Marriage Act 1971 of Tanzania, perhaps the most developed model for reform.

III. THE ATTEMPT AT UNIFICATION IN TANZANIA: THE TANZANIAN LAW OF MARRIAGE ACT 1971

The Tanzanian Law of Marriage Act 1971 (LMA), which will be discussed now as a possible model for a unification of the Nigerian marriage laws, itself had a Kenyan origin. One effect of the recommendation of the African Conference on Local Courts and Customary Law in Dar es Salaam 1963, to attempt an integration of the existing African family laws, was the appointment of a Commission on the Law of Marriage and Divorce by the Kenyan government in 1967. The Commission presented its Report in 1968, making recommendations for the reform and integration of the customary, Muslim, Hindu, Christian and statutory marriage and divorce laws and including a draft Bill for a unifying ‘Law of Matrimony Act’. But the Kenyan Parliament rejected the Bill several times, mainly because this Bill was regarded as un-African, a model of English law that took insufficient account of African customs and traditions and gave too many rights to women. However, it was the Parliament of Tanzania that, after only a very short public discussion in a Government Paper in 1969 (Government proposals on a Uniform Law of Marriage and Divorce), passed the Law of Marriage Act in 1971 which, with minor variations, copied verbatim the provisions drafted by the Kenyan Commission (Read 1972b:19; Rwezaura 1983–84:85).
The Tanzanian LMA subscribes to the notion of a uniform law that must be founded on the African way of life, and that also recognizes the existence of different ethnic and religious groups but emphasizes the necessity of guaranteeing equal rights and responsibilities for everyone. The law should interfere with religious and customary practices as little as possible. The last principle prevented an entire unification of the marriage laws.

The law recognizes monogamous and (potentially) polygamous (polygynous) marriages (ss9 and 10) and provides the possibility of converting an existing marriage from one to the other if both husband and wife formally declare that they each, of their own free will, agree to the conversion (s11. 1). Nevertheless, a Christian marriage (celebrated in a Church) cannot be converted to a polygamous marriage so long as both parties continue to profess the Christian faith (s11. 5). This provision, which was not planned in the original proposal (Rwezaura 1983–84:88), confers a special status on the Christian monogamous marriage within the otherwise unified secular law.

The registration of the marriage, however, follows a uniform procedure (s43). The Act does not prescribe how a marriage has to be concluded: it may be contracted in a civil, Christian, Hindu or Muslim form or according to customary law rites (s25), but certain minimum requirements must be fulfilled, like the presence of at least two witnesses and publicity (ss27, 28). The registration of the marriage is obligatory but failure to register does not render the marriage void (s41. f).

Divorce, which principally interests us here, is also enforced in a uniform procedure. Judicial divorce is mandatory, and only a court of competent jurisdiction (s76) can dissolve a marriage, by a judicial decree (s110). The LMA promotes the stability of marriage and family life and sees divorce as the last resort. Therefore, except for cases of exceptional hardship, divorce can only be granted after two years (s100). Furthermore, nobody can petition for divorce without satisfying the court that he or she has attempted reconciliation by referring the matrimonial difficulty to a Marriage Conciliatory Board which has failed to settle the dispute (s101). The lower courts, however, not infrequently failed to observe the rules relating to reconciliation in dissolving the marriages (Rwezaura 1977:81 with further references). The idea of the conciliatory boards was to make them as informal and the procedure as flexible as possible and to give them minimal connection with the court (Wako 1969:82). In fact, couples usually seek informal conciliation before divorce where family councils, relatives and church officials are at least as important as state officials (Rwezaura 1983–84:91). If all these attempts to settle the dispute fail, either party can institute divorce proceedings.

The LMA endorses the principle that a divorce decree should be granted only on the basis of the irretrievable breakdown of the marriage, or as the law puts it in ss99; 107. 1. a., b.; 107. 2:
S. 99: Subject to the provisions of sections 77 [domicile in Tanganyika], 100 [bar to divorce for two years from the date of the marriage] and 101 [petition for divorce only after attempt at reconciling the parties], any married person may petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down, but no decree of divorce shall be granted unless the court is satisfied that the breakdown is irreparable.

S. 107. 1.: In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular,

a) shall [ . . . ] refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing; and

b) shall have regard to the custom of the community to which the parties belong.

S. 107. 2.: Without prejudice to the generality of subsection (1) the court may accept any one or more of the following matters as evidence that a marriage has broken down but the proof of any such matter shall not entitle a party as of right to a decree — [104]

a) [adultery], b) [sexual perversion], c) [cruelty] etc.

The law adopts the concept of an 'inquest' rather than that of an 'accusatorial' procedure (Read 1972b:33) which would have been associated with the discarded matrimonial offence doctrine. However, the matrimonial offences reappear in a list of 'matters' which constitute possible evidence of breakdown but these matters are neither exclusive instances of breakdown nor conclusive proof of it (Read 1972b:33) (s. 107 2. a–i): adultery, sexual perversion, mental or physical cruelty, wilful neglect, three years' wilful desertion, separation for at least three years, imprisonment for life or not less than five years, mental illness (with additional requirements) and change of religion, where both parties followed the same faith during the marriage and according to the laws of that faith a change of religion dissolves the marriage. Contrary to the Nigerian MCA, these matters, if established, do not necessarily lead to a divorce, they are only a strong indication of the marriage breakdown and represent a guideline for the court in its finding. The mere proof of one of these matters does not by itself entitle a party to a decree of divorce.

Another feature, besides the rule of strict monogamy for Christian marriages, which does not well accord with the notion of a unified law, is the exceptional recognition of a talaq as a compelling ground for divorce (s107. 3). When reconciliation has failed the court must find that a divorce by talaq is evidence of irreparable breakdown, here in fact a legal fiction. Contrary to the general concept, the court here has no discretion to examine whether the ground for divorce (irreparable breakdown) is established, and the husband, in line with Islamic law, need not state any reasons for divorcing his wife. The rationale why virtually unaltered Islamic divorce law is kept in the LMA can perhaps be explained by the fact that the Shafi'i school, predominant in Tanzania, does not prefer a judicial process for the dissolution of a
marriage where the judge intervenes as an external authority. Moreover, the Shafi’is, in contrast with the Malikis, certainly do not see a divorce pronounced by the court as a judicial *talaq* (Linant de Bellefonds 1965: 451, 453), and a corresponding interpretation of a modern divorce law, in order to make the mandatory judicial divorce acceptable to Islamic law, is therefore more difficult. S107. 3. seems to cover the *khul* divorce as well.

The LMA provides that the court can order a man to pay maintenance to his divorced wife under certain circumstances, s115. This is a very satisfactory step, since such a rule is not founded in African legal traditions; however, because of the latter reason the wife has no right to maintenance. The criteria for the eligibility of maintenance are rather complicated. The needs and means of the parties play a role as well as the degree of responsibility of each for the marriage breakdown (Read 1972b:35).

As to the custody of children after divorce, the courts, inconsistently with the tradition, tend to support the mothers and grant them custody. Nevertheless, this depends on the age of the child and must be reconcilable with the welfare of the child (Rwezaura 1983–84:92), which always has to be the paramount consideration (s125. 2).

According to s114 LMA the court has the power to order the division of the matrimonial assets between the divorced parties acquired by them during the marriage by their joint efforts. The courts ruled that the correct legal interpretation of ‘joint efforts’ includes the housework by the housewife as well (Rwezaura 1984:177, 192).

The retention of essential elements of Christian and Islamic marriage laws makes the Tanzanian law a ‘partial unification’; thus the Act does not represent a complete integration of the different personal laws, but it is a very convincing attempt. The following section will consider to what extent the LMA provides a model for the unification of the divorce laws in Nigeria.

IV. A PROPOSAL FOR A NEW LAW OF DIVORCE IN NIGERIA. THE TANZANIAN ACT AS A CONVINCING MODEL?

A. Problems of Integration

Before embarking upon discussion of a proposal of a new divorce law which would incorporate all systems of divorce in Nigeria, we have to define the characteristics of marriage and divorce in the different systems at present and in an integrated system of the future. Integration, however, is an ambiguous term. It is questionable whether the different laws should be embodied in one Act for better practical administration but otherwise be essentially unaltered, or whether the laws should be amalgamated. The latter possibility is preferable, for only this way
would lead to a serious reform which, nonetheless, is based on essential elements of the former laws. Furthermore, a reform is incomplete without an attempt at removing shortcomings of the present marriage systems as far as possible. Such a project inevitably entails a partial deviation from the tradition and involves the idea of social engineering, in other words, the law does not necessarily comply with the present practice of the people but tries to change it to some extent. The process is somewhat similar to that in metalworking: in the first case two kinds of metal are welded together, in the second they are fused and in the third case another metal is added to the melt to make the new metal harder.

A further decision which has to be made at this stage is to what extent the new divorce law should be detached from traditional and religious systems and their concepts of divorce. Under the Tanzanian law Christians cannot conclude a polygamous Christian marriage (s11. 5), thus a Christian has to change his faith or, if possible, to divorce his first wife. The LMA also recognizes the talaq (s107. 3); in this event the court has no discretion but must accept the fait accompli of the talaq and proceed to grant a divorce. A uniform law, however, should be more secularized. It should refrain from supporting one belief or another and the respective concepts of marriage and divorce. In addition, an unlimited recognition of religious marriage concepts in the law obstructs any harmonization and is inconsistent with the idea of a secular State.

Having all this in mind, we should look at the concepts of each marriage system in Nigeria, the factors which secure the stability of the marital relationship and the features of dissolution. All these aspects are, certainly, interdependent.

Christian and, subsequently, statutory marriage is a public institution, ascribing a status to the parties, hence the marriage is concluded in an official way, in facie ecclesiae, or, after secularization, before an official of the State. The stabilizing factor is the principle of strict monogamy and the marital bond, an idea which is maintained to a greater or lesser degree, both in Church marriages and in civil marriages. Divorce could only be accepted, if at all, in a complicated and always official, ie judicial, procedure.

Customary marriage is a more private event which mainly affects the kinship and neighbourhood of the spouses. The stability of the marriage is ensured by the right of the families to reconcile marital disputes and to decide whether a divorce should be granted or not. The intervention of an external authority (a customary court or an unofficial tribunal) is possible but not necessary.

Islamic marriage is largely a private matter. It is based on a contract which the husband, who has himself the power to divorce, can rescind without any reasons when the mutual confidence within the relationship vanishes. The possibility of a divorce by mutual agreement again emphasizes the private character of an Islamic marriage. The steadiness
of the marriage obviously consists in the rule that the wife has no right to free herself from the union. The families can intervene but need not do so. The interference of an external authority, a court, which could control how the husband exercises his rights, is permissible but never recommended and, except in Maliki law, often discouraged.

B. The Essentials of the Proposal

A modern standpoint should see marriage as a primarily private union which, of course, touches issues of public interest, such as the change of the status of the parties and the well-being of their children. Therefore the parties who, as all modern marriage laws emphasize, have the freedom to contract their marriage must also have the right to dissolve their contract. When a matrimonial dispute arises, it is only the parties who are able to decide whether their marriage has broken down. They are the parties to the marriage, hence they should have the choice to terminate the marriage or not. Even if only one party wants to break up the relationship, the marriage, as it is based on mutual affection, will invariably break down. To that extent this concept comes close to the notion of Islamic marriage. Otherwise, it is untenable to grant the husband but not the wife the unfettered right to divorce.

Discrimination against women can also be found in the traditional marriage laws which allow polygamous unions. But equal rights for women can only convincingly be ensured in monogamous unions. The emphasis on monogamy is the aspect which Christianity can contribute to an integrating divorce law.

In the concept of the marriage as an essentially private institution a means to safeguard the stability of the marriage has to be provided, since otherwise a divorce can be too easily implemented. The idea of the customary marriage to prevent a divorce through reconciliation but to recognize the fact of a marriage breakdown as such, when attempts to reconcile the parties fail, is a very acceptable way of stabilization and should be embodied in a new law.

Although it has been stressed that marriage and divorce are mainly matters of private concern there are two indispensable essentials of public interest which have to be included in a modern divorce law, although they may not have a strong tradition in African laws: the requirement that divorce can be obtained by judicial process only and the need to grant a right to maintenance after divorce in order to protect the economic position of the divorced spouse.

It is therefore possible to achieve an integration of the Nigerian divorce laws that retains central elements of the present laws. This proposal will be discussed in more detail under the following headings: reconciliation, divorce, maintenance after divorce.
(i) Reconciliation

Traditional African societies took a realistic and reasonable stance on divorce. When a marriage was likely to break down, members of the families tried to reconcile the parties and in case of failure, they would bring the legal condition in accordance with the fact and recognize a dissolution of the marriage (Obi 1966:364). The Malikis, too, perhaps responding to African customary law, emphasize reconciliation through two arbitrators in an Islamic, though judicial, divorce procedure. The requirement of making a prior attempt at reconciliation should be imposed by law in a unified marriage system, as it caters for the stability of marriage and prevents the parties from seeking a divorce after minor matrimonial disputes. But all reconciliation proceedings, however informal they might be, would have to satisfy certain basic requirements to be recognized in the compulsory judicial procedure. Otherwise the typical problem of customary law, the uncertainty whether a marriage has been dissolved and what are the elements of a valid dissolution, would be maintained.

Every spouse should have the option of resort to a Marriage Reconciliatory Board if a serious matrimonial difficulty has arisen which could lead to a breakdown of the marriage. People should be encouraged to approach such an institution at an early stage when it is more likely that reconciliation can still be achieved. These Boards should be linked with the lower courts but should have little administrative connection with them. The parties should have a choice between the officially provided Board or, with the approval of that Board, their own conciliators. In the latter case they should be entitled to propose a certain number of arbitrators of their own choice, preferably members of both families, but also friends, officials of the local Church etc. The official Board would consider all suggestions and follow them in the appointment of the (external) conciliatory members as far as it is satisfied that minimum requirements are met, i.e., that the composition of that conciliatory body would not result in an unfair outcome, particularly at the expense of the wife. The reconciliation can take place in a fairly traditional way if all persons involved agree. Muslims may, according to Maliki law, suggest two arbitrators, one from each family.

If there is a risk that the proposed conciliators might impose a forced reconciliation against the actual will of one spouse, as it often happened in the past, or if the parties are unable to reach an agreement on the composition of the suggested body, the official Reconciliatory Board would attempt a settlement. The Tanzanian law in ss102–104 is a good guide as to how these Boards may be composed and the way in which they should deal with matrimonial disputes. They should consist of between two and five members and a chairman (s103. 1), and should comprise people with training or experience in social work.
The procedure, irrespective of whether a selected or a provided Board has come into operation, should not last less than three months, for a durable reconciliation can hardly ever be achieved earlier; and this period is fairly in accordance with the Islamic *'idda* after divorce. A *talaq*, regardless of how often pronounced, should not come into effect of itself, because a non-judicial dissolution should be invalid in any case. However, a *talaq* would be a serious enough reason to seize the Reconciliatory Board with this matter. If the husband does not revoke his *talaq* within the reconciliation process he can petition for divorce after three months and have the marriage dissolved in compliance with Islamic law. The reconciliation procedure shall not endure longer than six months, as a definite result should be achieved as soon as possible.

If the Board succeeds in reconciling the parties it will issue a corresponding certificate which shall be a bar to divorce for one year, otherwise the whole reconciliation procedure could be overruled by a subsequent divorce decree. Too long a period, however, would contravene the idea of a divorce law as such, for a party would be unable to get relief if the situation in the marriage deteriorated.

If the reconciliation fails, the Board will issue a certificate and that alone will entitle either party to petition the court for divorce.

Yet some exceptions must be made to the general rule. In circumstances where it is obvious that reconciliation can never be achieved or where a reconciliation procedure cannot be implemented, as in cases of long-term imprisonment, or of desertion where the whereabouts of the deserter is unknown, the other party would be able to petition for a divorce without the requirement of a prior process.

The same would apply to polygamous marriages. No modern marriage law will promote polygamy since this kind of marriage invariably boils down to the fact that the equal treatment of wives cannot be satisfactorily guaranteed. But a mere prohibition would not necessarily improve the position of women, for these polygamous unions often provide the only social security for them in the absence of a national insurance system. Furthermore, such a provision would become a dead letter again (as now in Nigeria), and the effect would be that all wives after the first one would become concubines, without enjoying the legal status of a wife, for instance, in respect of maintenance. The Tanzanian 'conversion of marriages'-model (s11) is cumbersome and unrealistic. What could induce a couple, and especially the husband, to go to the registrar during their subsisting marriage to declare a conversion? And can they reconvert their marriage later on if they change their minds? Therefore this problem should be considered more effectively within the divorce law. It is the wife who has to cope with the difficulties that a polygamous relationship entails as she has to get along with the co-wives. Hence, she should have the right to decide whether she wants to continue the marriage or not. Even if the wife initially did not object
to a second wife, the conditions may change and become unbearable. Thus the wife should have the right to petition directly for divorce if the husband has married or marries another wife. One could argue that this would introduce a new ground for divorce besides the ground of irretrievable marriage breakdown. But in the case of a polygamous marriage the wife could have the option to take part in reconciliation proceedings; if these are unsuccessful, the marriage is apparently broken down. Hence, this solution is consistent with the irretrievable breakdown principle.

(ii) Divorce

Apart from the exceptions just mentioned, only when the attempts to settle the matrimonial dispute and reconcile the spouses fail could the parties resort to the court and petition for divorce.

As already pointed out, in contrast with the Nigerian MCA, divorce in the Tanzanian LMA is really based on the irretrievable ('irreparable') breakdown as the sole ground for divorce. Nonetheless, the Tanzanian law is not necessarily more liberal than the Nigerian law. It is submitted that marriage should be primarily a personal matter between the spouses and thus the history of a broken-down marriage should be discussed in public as little as possible. But in both laws the spouses cannot be protected from an inquisition into their private lives by the court. This may just happen at different stages of the procedure: in Nigeria an investigation may be connected with the establishment of a 'fact', in Tanzania it will occur in respect of the establishment of the 'matter' and, in addition, of the breakdown. The difference will be of more theoretical interest; in the Nigerian case the outcome of a proceeding may even be more predictable.

The last point reveals an important problem. A divorce law which is founded on the irretrievable breakdown of the marriage as the ground for divorce but which at the same time requires or accepts the establishment of certain facts as evidence or as a strong indication of the breakdown is a contradiction in terms.

Under the Nigerian MCA the establishment of at least one fact always leads to a divorce. The element 'irretrievable breakdown' is therefore a redundant addition. According to the Tanzanian LMA the establishment of a matter may, but does not necessarily, lead to the proof of the irreparable breakdown of the marriage which is required for the divorce. Therefore the 'matters', which in Tanzania may establish marriage breakdown, are, technically speaking, a superfluous addition as well. Apart from that, these facts/matters are often not the reasons for but the results of a marriage breakdown.

For these reasons, a new divorce law should entirely omit any list of grounds/facts/matters. If the preceding reconciliation fails it is evident that the marriage has broken down irretrievably and court proceedings
should concentrate on solutions for the potential difficulties after the divorce rather than on an inquisition into why the marriage has broken down. In addition, if the court retained a discretion to dissolve the marriage after the reconciliation procedure, then the foregoing process would be useless or the divorce is in fact not based on the irretrievable breakdown of the marriage. Typical reasons for the breakdown, like adultery or cruelty, may be stated within the reconciliation, if they really occurred, but it may be better if they have not happened and the breakdown was caused by less severe events. It is not a convincing argument to say that a petition for divorce should not rest only on the breakdown of the marriage because this would be unfair to the other party. If one spouse wants to terminate the marriage, the marriage is broken down; the law should recognize the fact and not protect perhaps an 'empty shell' of the marriage by taking into account whether the reasons for breaking up the marriage were fair or not.

Divorce proceedings should be kept short particularly when children are involved. The court shall take into consideration reasonable arrangements as to maintenance and custody of children upon which the parties might have agreed during the reconciliation procedure.

A modern divorce law should not enforce traditional prerequisites of a customary dissolution such as the refund of the marriage consideration or the repayments in connection with an Islamic khul'. The parties are free to follow these traditions, but the divorce should be valid irrespective of whether the wife's family refuses to return the bride-price or the husband declines to accept the repayments. Otherwise the wife would have only very limited chances to obtain a divorce. This view also departs from the concept of Islamic law where the wife can obtain a divorce in consideration of a money payment which normally amounts to the dower (khul' divorce). But in the light of Maliki law, this deviation is not so grave: if the husband does not accept a khul', the courts already pronounce the divorce (a talaq) on behalf of the husband, and it depends on the reasons in each specific divorce whether the wife has to refund the marriage payments.

Finally, it must be stressed again that divorce would only be obtained by a court decree; a dissolution effected otherwise than by a court would be void.

(iii) Maintenance after divorce
A law of divorce which requires irretrievable breakdown as the only ground for dissolving the marriage, without any obligation to prove a specific reason, but with the emphasis on the prevention of a divorce merely through an informal reconciliation procedure, makes divorce in fact rather easy. This directly affects the economic and social position of the spouses, always an essential factor in marriages. If the husband no longer wants to bear the obligation of maintaining his wife, he need
only obstruct the reconciliation, obtain a divorce, and after all that, his economic duties have ceased.\textsuperscript{142} That could be accepted if the wife, assuming she has not been working yet, could find paid employment without major problems. The advantage would be the wife’s complete economic independence from her former husband. Existing Nigerian societies, however, still largely patriarchal, do not offer women much paid employment and even where they do this work often diminishes a woman’s economic status considerably and/or is simply irreconcilable with her social position. A rigid divorce law would not solve but postpone this problem. On the other hand, a provision which grants the divorced wife a right to maintenance in any case could lead to situations, where, to put it in an overstated way, a woman could marry a wealthy man in order to obtain a divorce and consequently maintenance for the rest of her life.

Therefore it is suggested that a right to maintenance should be established for the spouse who finds himself/herself in a weaker economic position than the other spouse, after the divorce. This will normally, but not necessarily, be the wife. In fact, it is hardly possible to give a clear guidance in this field; s115 of the Tanzanian LMA is too constricting\textsuperscript{143} and should not be followed. As a whole, it will be subject to the discretion of the court to whom, for how long and how much maintenance should be paid. The entitlement to maintenance would cease eg with a new marriage or when support is granted by another person.\textsuperscript{144} But since this concept of the divorce law is not to be based on fault, the party who caused the marriage breakdown would not necessarily forfeit the right to maintenance or, in other words, the ‘innocent’ party is not automatically entitled to maintenance regardless of the actual needs.\textsuperscript{146}

The same idea applies to custody of children as well. Undoubtedly the welfare of the child shall be the paramount consideration\textsuperscript{147} but what does that mean in reality? The issues of the marriage breakdown and the well-being of the child certainly have to be dealt with separately. Thus an adulterous wife who induced the husband to seek a divorce is, because of that, not necessarily unfit to rear the children and may get custody and maintenance for them. However, it should be admitted that this problem is virtually insoluble and the situation is compounded by the fact that children still have a weak position in divorce proceedings.

Finally, a few words will be said about nullity of marriages. The court pronounces a decree of nullity when the marriage could not or should not have come into existence because of certain impediments. In the first case, the marriage has never become valid and the decree merely declares it a complete nullity; in the second, the marriage is voidable, ie valid until the decree annuls the subsisting marriage (Nwogugu 1974: 106; Bromley and Lowe 1992:73–74).\textsuperscript{148} Thus nullity is merely to a limited extent a case of termination of marriage.
Although all marriage systems in Nigeria recognize nullity,\textsuperscript{149} this institution was most important in the history of Christian marriage where divorce was difficult or impossible. If the parties were able to prove or pretend the existence of an impediment which rendered the whole marriage void they could obtain a \textit{de facto} divorce in the guise of nullity.

In a modern law, which enables the parties to obtain a divorce without unreasonable efforts, nullity should be confined to very few conditions only: eg marriage within prohibited degrees of affinity or consanguinity (albeit in a much narrower scope than at present in the MCA\textsuperscript{150}) and marriage which is celebrated without the most essential requirements\textsuperscript{151} or lacks real consent because of mistake, fraud or duress. It is questionable in which of these cases the marriage should be voidable or void \textit{ab initio}\textsuperscript{152} but as these problems rarely occur, they will not be further discussed.

V. CONCLUSION

This study has shown that Nigeria needs a new law which would integrate the existing different systems of marriage and, particularly, divorce. The customary, Islamic and statutory divorce laws, all of them based on diverse traditions, are largely incompatible with each other and in the present condition, satisfactory solutions for the emerging conflicts cannot be found.

Although it may seem to be an impossible task to reconcile the present contrasting systems of marriage and divorce, one can attain an integration by retaining essentials of the current laws if otherwise a compromise between them is accepted. The Tanzanian Law of Marriage Act provides numerous good solutions, but not all of them should be adopted since this law, enacted some twenty-five years ago, contains several outdated ideas which should not be taken over.

Therefore, the following (outlined) recommendations may be adopted in a future Nigerian divorce law:

1. If serious marital discord arises the spouses should have the opportunity to attempt reconciliation with the assistance of a Marriage Reconciliatory Board.

2. If reconciliation fails, it is evident that the marriage has broken down and the court should pronounce the divorce by decree. The establishment of specific matters as evidence or indication for the marriage breakdown is not required. Only the court has the power to dissolve a marriage; a non-judicial divorce is null and void without exception.

3. In the divorce decree the court should order the spouse who is more capable of gaining his/her livelihood after divorce to pay maintenance to the other spouse who is in greater need. Here further discussion will
have to find an answer to a complicated problem: the division of property between the parties and its effects on the maintenance rules.

These recommendations could serve to integrate the divorce laws in Nigeria; however, the present Nigerian constitution would not allow the enactment of a corresponding draft as federal law, because the federal legislature has jurisdiction only over statutory marriage and divorce, whereas customary and Islamic marriage fall within the jurisdiction of each of the thirty states. Nevertheless, this problem should be overcome, for instance, by congruous legislation in each state, since an integration of the marriage laws would create legal certainty and social equality.

NOTES

1 And Muslim authors normally insist on a clear-cut distinction, see eg Ayua (1990:5).
2 See below section II 11A(ii).
3 Anyebe (1985:50) claims that statutory marriage is seen today as a sign of social prestige.
5 I am fully aware that this complex problem of definition cannot be reduced to some paragraphs but, I hope, the treatment given here will be sufficient for the purpose of this paper. See generally with regard to the definition of customary law Allott (1970:145, 157); Elias (1956:52, 54-53); Gluckman (ed) (1969:9-15).
6 In the past certainly also by the heavy impact of colonial rule, see Read (1972a:183), with reference to East Africa.
7 See dealing with this problem in more detail Anyebe (1985:9-12), and as to marriage Abisogun v Abisogun 1 All NLR 237.
8 There is more about this matter in Phillips and Morris (1971:73-5), and Odje (1991:25-41). However, this 'repugnancy test' apparently reminds the judges too much of the colonial past and they rarely refuse to apply customary law because of the repugnancy doctrine (see however Solomon v Gbobo (1974) 2 RSLR 30) – if that is not embodied in a statute – but because they regard the law as not satisfactorily proved.
10 But see also Allott (1962:207) where he emphasizes the necessity of recording customary laws.
11 Otherwise it can be difficult to ascertain what the customary law in a special case is. One would have to rely on previous judgments, on legislation comprising some parts of customary law and perhaps on fieldwork, like the questioning of a local judge how he would decide theoretical cases etc. A reasonable restator would act in a similar way, see Gluckman (ed) (1969:12-14); Read (1972a:187).
12 Customary law undoubtedly gains more authority if it is written down in a systematic and comprehensive form. This is somewhat similar to the situation in Central Europe in the thirteenth century where private individuals recorded the old German customary law in order to preserve it from the encroachment of Roman law applied by the ecclesiastical courts. Both German customary law (which otherwise would perhaps have disappeared) and Roman law became the basis for the contemporary legal systems in Central Europe.
13 It may be questionable if the application of a rule as it appears in a restatement is the enforcement of a customary rule or rather the implementation of a provision of a not formally enacted 'code' (besides the existing statutory law) which is modelled upon the (pre)-existing customary law. In the latter case the restatement would not be a mere mirror of the customary law but a new creation of legal principles which influence and eventually supersede the customary law from which they originally have derived.
14 For the essentials of a customary marriage see also: Savage v Macfoy (1909) Renner Gold Coast Reports 504.
15 This is often a long-drawn-out process whereby, unlike in a European marriage, the parties may become husband and wife gradually and not at a definite time, see also Phillips and Morris (1971:107).
That is to say, no authority is involved in the formation of the marriage. However, by-laws of many Nigerian states require or recommend the registration of marriages, see Nwogugu (1974:54–5).

For the question of a minimum marriage age see Nwogugu (1974:41).

The case of a customary marriage during a subsisting statutory (monogamous) marriage is also a question of marriage capacity and will be discussed below under II B.

And usually also the families, see Ekundare (1969:12).

The consent of the bridegroom’s parents does not seem to be a requirement of a valid customary marriage, see Achike (1977:148).

Osamwonyi v Osamwonyi [1973] NMLR 25 (Bini Marriage); see also Kasunmu and Salacuse (1966:75–6).

See also Agbeja v Agbeja [1985] 3 NWLR 11.


Re case of Beckley and Abiodun (1943) 17 NLR 59; Re case of Ayorinde and Aima [1964] LHC R 71 (Yoruba marriage); see also Obi (1966:180–1).

Rabu v Adebowo and Adebowo (1979) OG SLR 76 (proof of adultery under customary law).

See with respect to the Yoruba: Fadipe (1970:90–1). Divorce procedure among the Ibo: Basden (1983:76–7, first published 1921); among the Edo: Bradbury (1957:49, 80); among the Yakó: Forde (1941:71–5). Some of these studies are fairly old and should be read with caution.

Re caveat Beddey and Abioiun (1943) 17 NLR 59; Rt caveat Ayorinde and Aima [1964] LHC R 71 (Yoruba marriage); see also Obi (1966:180–1).

Rabu v Adebowo and Adebowo (1979) OG SLR 76 (proof of adultery under customary law).

The numerous rules concerning this matter cannot be discussed here; see Linant de Bellefonds (1965:83–73: capacity; 105–51: impediments). Non-observance of these provisions makes the marriage either null and void (batil, a complete nullity) or ‘irregular’ (fasid), an actually invalid marriage which has nonetheless some legal consequences. However, the Malikis, unlike especially the Hanafis, do not make a clear-cut distinction between batil and fasid; see Linant de Bellefonds (1965:158).

For the detailed formalities of the marriage (with special reference to Nigeria) see Abdullahi (1975:122); Kanam (1981:24–9). For the marriage ceremony among the Hausa-Fulani Muslims see Doi (1984:98).

See Qur’an Sura IV:3. Thus Islam does not promote polygamy.

Despite this, some authors want to strictly separate the Islamic and the customary elements within the payments; see eg Abdullahi (1975:127). In Mahmud AB (1981:65) a clear distinction is avoided.

However, alongside with the scale of legal validity in Islamic law (valid, reprehensible, voidable, null and void) there exists a scale of religious qualifications (obligatory, recommended, indifferent, reprehensible, forbidden) (Schacht 1964:121), in which divorce is deemed highly reprehensible (though legally valid). This religious aspect cannot be neglected in a religious law.


Qur’an, Sura II:228.

For the huge casuistry in this field see Anderson (1954:377); Ahmed (1972:63–93); A. A. Mahmud (1981:111).

Qur’an, Sura II:230.


Or, as the court held in Salsi v Lawal [1986] 2 NWLR 435, if the husband refuses the offer of a khul’, the wife can resort to the court and obtain a divorce if she can prove that she is not able to live with her husband ‘within the limits of Allah’ (Qur’an II:229). This decision refers to some earlier Pakistani judgments based on Hanafi law.

42 For a more detailed treatment of the grounds for judicial dissolution of marriage see Linant de Bellefonds (1965:454).

43 See Anderson (1954:212), whose account is, albeit rather old, still the most accurate.

44 Marriage Ordinance No 10 of 1863; Marriage Ordinance No 14 of 1884.


49 Matrimonial Causes Act No 104 of 1959, repealed in 1975. The Australian law was a kind of forerunner within the Commonwealth and the experience from this law influenced the discussion on the reforms of the divorce law in England in the 1960s.

50 It is also a contract that is, though, inseparable from the sacrament; see Joyce (1948:206).

51 For theological justification of this criterion see Joyce (1948:446).

52 However, this was always controversial, both among the Catholics and the Protestants; see Stone (1995:67). Before the late Middle Ages, and especially before the Council of Trent in 1563, no religious ceremony was required. Besides that, clandestine marriages could be concluded until the eighteenth century.

53 See the unchanged point of view eg in the Code of Canon Law (promulgated 1983), Can. 1056: 'The essential properties of marriage are unity and indissolubility; in Christian marriage they acquire a distinctive firmness by reason of the sacrament' and Can. 1141: 'A marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death'.

54 See Elton (1958:231); Holdsworth (1924:35).


56 Previously, divorce could only be obtained by Private Act of Parliament; see Stone (1995:301).

57 For the history of the law of divorce from the 1850s see Stone (1995:368).


59 See also the definition in the English case Hyde v Hyde and Woodmansee (1866) LR 1 P&D 130, 133, which applies to Nigeria as well. It is not surprising that this decision refers to marriage 'as understood in Christendom'.

60 Especially s15 and s16 MCA. There are some supplementary provisions in ss 17–28.

61 Adultery alone is not sufficient, the petitioner has to find it intolerable to live with the respondent as well, see Ibuwe v Ibuwe (1980) 1–3/CCHCJ 78. See also Nwogugu (1974:139); Adesanya (1973:46).

62 The wording of this provision paraphrases cruelty; see also Adefarasin J in the unreported case Oladehun v Oladetohun (6 July 1971) quoted in Adesanya (1973:58).

63 This element is not required in the case of three years' separation (s15. 2. f.).

64 The element is required in the case of desertion as well as on adultery or cruelty.

65 Based on desertion as well as on adultery or cruelty.


67 This element is not required in the case of three years' separation (s15. 2. f.).

68 Based on desertion as well as on adultery or cruelty.


70 See eg the evidence provision of s83.

71 See also Opute J in Agwuna v Agwuna (1972) 2 ECSR 20.

72 See above Section IIA(i) and IIA(ii).

73 Especially the Hanafite, see: Hinchcliffe (1968:16).

74 See also Jika v Jika (C. A.) 3 [1991] NWLR 708.
The problems discussed in this section are also related to those of conflicts of laws, see below under f).

For the requirement to prove a customary marriage in judicial proceedings see Lawal v Younan (1961) 1 All NLR 245, 251. In the case Emeri v Ememi (High Court of Lagos State) (1980) 7-9/CHCJ 310 the court refused even to dissolve a purported statutory marriage because a marriage certificate could not be produced.

The present constitution states this explicitly as well (art 11).

See eg the very polemic pamphlets Byang (1988:8, 24, 30-4); Bappa Mahmud (1988:28-34, 41, 45-6 – Islamic viewpoint).

See Section IIA(i), (ii), (iii).

Or the court is bound by statutory provisions, eg s22. 1. of the Customary Courts Law of Ondo State, see Okwueze v Okwueze [1989] 3 NWLR 321. See also Nwogugu (1974:260).

*° In the Hausa-Fulani regions the divorced wife is not allowed to stay during the 'idda; see Doi (1984:101).

Eg Odogwu v Odogwu [1992] 2 NWLR 539.

In Olawo v Olawo (1985) 12 SC 84, where a Yoruba had married a Bini woman, the Supreme Court accepted the possibility of changing one's personal law, here from Yoruba to Benin customary law, therefore the distribution of the estate of the deceased (former) Yoruba – which was controversial – will be governed by Benin customary law. See also with respect to conflicts of customary laws Agbede (1991:186).

On the federal domicile for matrimonial causes (departing from the English doctrine of unity of domicile) see also Agbede (1989:67).

In Ohochuku v Ohochuku [1960] 1 AllER 253, a Nigerian had contracted a marriage under customary law in Nigeria and later a second marriage with the same woman in England. The English judge held that he could only dissolve the second marriage under English law because for the first customary and potentially polygamous marriage he had no jurisdiction. This decision has been endorsed by Achikc (1977:156).

Not with another person, such a marriage would be void, Jatto v Jatto [1975] NNLR 70.


See, however, Anyebe (1985:49).

If the second marriage is also concluded under the Act, he commits bigamy (s370 Criminal Code Act), also a dead letter; see however R v Princewell [1963] NNLR 54.

But that is not so clear either, compare Karibi-Whyte (1970:28). Nevertheless, one could argue that the High Court has no jurisdiction to dissolve the customary marriage since it is polygamous, or the court definitely has jurisdiction because the second marriage is void anyway and thus the marriage as a whole is not (actually but nonetheless potentially) polygamous.

If two Christians marry according to the rites of their customary law only, this should be a valid and potentially polygamous marriage, irrespective of their faith which prohibits polygamy.

The wording of s25 is somewhat awkward, see Read (1972b:28).

See also Report (1968:3, 92).
103 There are some exceptions in s101 (a-f) from the requirement of prior reference to the Board, *inter alia*, where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable (s101 f). In *Khan v Khan*, 1973 LRT n57, 240, the High Court held that the mere allegation of violence on the part of the respondent by the petitioner does not constitute such an extraordinary circumstance.

104 See also s10. 1. LMA.

105 This recommendation is also in the Report (1968:101).

106 Particularly when more than one act of adultery has been committed. See *Masudi v Masudi*, 1977 LRT n 3, 15 (obiter dictum): Only one act of adultery by the respondent may, though not always, lead to a finding that a marriage has broken down completely and such a finding may be arrived at more readily where more than one act of adultery have been committed. This depends on the facts of each particular case.

107 Also a respondent's conduct which produced adverse effect on the petitioner's health can amount to cruelty, see *Kamulindwa v Kamulindwa*, 1974 LRT n. 11, 35.


109 Except for the fact that the *talak* is principally extra-judicial and does not need the involvement of the court at all. In *Lemu Silence v Hadjiya Matsul*, 1974 LRT n64, 273 the court said that a *talak* merely amounts to an intention to terminate the marriage and cannot by itself terminate the marriage. But the court cannot prevent the termination, it invariably pronounces the divorce and does not decide it.

110 See above Section IIA(ii).


112 Agbede (1981:141–4) tries to distinguish between Unification, Integration and Harmonization. This discrimination lacks practicability.

113 See above Section III.

114 This was always the prevalent opinion among Islamic jurists but does not clearly appear from the Qur'an, see Sura II:228: '[In cases of revocable divorce] the wives have rights similar to those which the husbands have, in equitable reciprocity [. . .]'.

115 Compare Qur'an IV:35.

116 See, for instance, a typical statement by Abu Zahra, 1954, quoted in Linant de Bellefonds (1965:317): 'Qui m'expliquera l'intérêt que peut trouver la femme mariée à voir rendre publiques et à laisser transcrire sur des registres officiels, les causes [. . .] qui ont déterminé son mari à la répudier? Une telle publicité ne risquerait-elle pas de la priver de toute chance de se remarier?' ('Who can explain to me the interest the married woman may have to see the reasons made public and recorded in official registers which determined her husband to repudiate her? Does such a publicity not risk depriving her of any chances to remarry?)

117 This is the usual premise of the modern, not necessarily traditional, marriage laws. However, provided that both parties can freely decide to marry, they may do so for whatever reason, and the law had better not interfere in this respect.

118 See also art 18 of the African Charter on Human and Peoples' Rights (1981) which Nigeria has ratified.

119 See, however, below under 'divorce'.

120 Maliki interpretation of the Qur'an Sura IV:35; see also Linant de Bellefonds (1965:463) and Anderson (1954:209).

121 Also Report (1968:93).

122 This is also advised in the Report (1968:80). The further suggestion, ibid, 80, such a service should be entirely voluntary because thus the service 'would attract responsible people' and 'it would be regarded as a matter of honour to be selected for membership' of a Board, is, with respect, naive. Nobody will be attracted to work that is more exhausting, nerve-racking and responsible than usual jobs if a decent salary is not paid.

123 But, deviating from Islamic law, a husband who wants to take back his wife during the 'idda would have to obtain her consent.

124 An external reconciliation body (ie composed according to the proposals of the parties) will have to inform the official Board of the result.

125 As in ss104. 5. and 101 LMA.

126 Eg one spouse has tried to kill the other.

127 S101. d. LMA.

128 Also s101. a. LMA.

129 See also Report (1968:22).
But see arguments in favour of polygamy in Anyebe (1985:45-50), and Doi (1984:255-62).

This, however, depends on the respective customary law. Among the Ibo, for example, only the first wife is granted the position and rights of a legal wife and she alone gains particular personal and sacred rights. The other wives remain in the background; see Basden (1983:97).

This applies to Christians as well. In that case the wife will certainly divorce her husband or the husband will not marry another wife in order to keep in accordance with her/his faith. Nevertheless, violations of religious rules would not have legal consequences.

The suggestion above can rightly be criticized for making all marriages potentially polygamous (such a solution is also rejected in the Report (1968:23) as a 'retrograde step'). Nevertheless, it is only important whether an individual marriage consists of one man and one or more than one woman, i.e., the essential question is if a marriage is actually (not potentially) polygamous or actually monogamous.

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See also (as to English law and with somewhat different arguments) Facing the Future, at 17.


Such a suggestion is also in accordance with the customary divorce which does not follow a (conclusive and exhaustive) list of grounds.


Facing the Future, at 3.

Support for this view with regard to the latter case can be found in some decisions of Nigerian customary courts, see e.g. Mariyama v Sadiku Ejo [1961] NNLR 81; Solomon v Gbobo (1974) 2 RSLR 30.

See Section II (a) iii.

This is the current position after a divorce in customary marriage and, after the 'idda expires, in Islamic law in Nigeria. This is also one reason why the Qadis in Northern Nigeria tend to dissolve a subsisting marriage if the husband fails to maintain his wife (see above Section II (a) iii). After divorce he is no longer obliged to maintain her and the actual condition is legalized. In the Tanzanian LMA the court constitutes a corrective in s115 which bolsters this harsh condition.

See above Section III. However, the Tanzanian law is a good example with regard to the division of matrimonial assets between the divorcees, see above, ibid.

For example, if the wife returns to her family which maintains her after the divorce. However, it cannot be inferred from this usual situation that the wife is expected to go back to her family and thus the husband can escape from his obligation.

In practice, this will have to be decided by the court as well and the question of fault will influence its finding. As far as maintenance is concerned, the establishment of fault, jettisoned in respect of divorce, is reintroduced to some extent.

It is an additional problem as to how such a maintenance provision could be enforced in practice: for example where the spouse who is supposed to pay maintenance gives up his/her employment or has no income in cash, which will often be the case in rural areas.

S 71 Nigerian MCA, s 125 Tanzanian LMA.

In fact this distinction is largely arbitrary, compare the respective provisions in English and in the otherwise very similar Nigerian law (English MCA 1973 ss 11 and 12, Nigerian MCA ss 3-5).

Nwogugu E. I. (1974:127-30) and above section II.

See s3. 1. b. MCA and Schedule I of the MCA.

For this ss15 (minimum age), 27 and 28 of the Tanzanian LMA can be a good orientation; see also above Section III.

In the long run the abolition of nullity should probably be considered and such problems should be dealt with within divorce. The distinction is blurred anyway, for example wilful refusal to consummate the marriage is a 'fact' for divorce in Nigeria (s15. 2. a. MCA) but a ground for nullity in England (s12. b. MCA 1973).

See s4 and Second Schedule, Part I no 59.

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