

EXAMINING THE CONTEXT OF ADULTERY AND ITS CONTINUING BASIS AS A GROUND FOR DISSOLUTION OF MARRIAGE IN NIGERIA

BY

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ABSTRACT

Much is known and has been said about adultery, especially from an ecclesiastical standpoint. It is a known concept which forms the basis upon which a marriage can be dissolved in Nigeria, this paper has embarked on an attempt at examining what it entails. The paper takes a critical look at the laws and their judicial interpretation as they apply to adultery whether it is purely of a civil nature or a crime punishable by the state. A brief assessment of the fact that the offence of adultery is well founded on patriarchy. Customary Law being the organic law of the land and as some scholars have opined, is the living law which abhors adultery. Hence, the research narrows its scope to the YORUBA custom and tradition for its peculiarity. The influence and position of Islam on the laws of the land pertaining to adultery and their confinement to the Northern states of Nigeria. An attempt at a comparative analysis of the position of the law on adultery and the sanctions attached thereto in several other jurisdictions. Recommendations were made to ascertain whether as a matter of course the offence of adultery should be jettisoned in its entirety being that it is a private engagement between consenting adults.

Keywords: adultery, dissolution, offence, zina, tesho, Patriarchy, magun

LIST OF CASES

Nigerian cases:

- 1) Oke v. Oke (1974) 3 SC 1.
- 2) Okala v Okala (1973) 3 E.C.S.L.R 67.
- 3) Onile Ere v Oladana Williams (1974) 1 N.M.L.R 363
- 5) Somorin v Somorin (1973) 10 C.C.H.C.J 103
- 6) Bakare v Bakare (1972) U.I.L.R 500

Foreign cases:

- 1) Hyde v. Hyde (1866) All ER Rep 175
- 2) W (otherwise K) v W [1967] 3 All E.R. 178.
- 3) Sapsford v Sapsford & Furtado [1954] 2 All E.R 373.
- 4) Dennis v Dennis [1955] 2 All E.R 51.
- 5) Goodrich v Goodrich (1972) 1 W.I.R 1314.
- 6) Wijker v Wijker 1993 (4) SA 720 (A)

LIST OF STATUTES

1. English Matrimonial Causes Act
2. Matrimonial Causes Act, 1970
3. Constitution of the Federal Republic of Nigeria, 1999 as amended.
4. The Penal Code (Northern States)

LIST OF ABBREVIATIONS

MCA – Matrimonial Causes Act

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INTRODUCTION

The term Adultery which is synonymous to infidelity is a consensual intercourse between two persons of opposite sexes or same sex, at least one of whom is married to a person other than the one with whom the intercourse is had, **and since the celebration of the marriage**. Under the Nigerian system, a marriage celebrated under the Act is regulated by the Matrimonial Causes Act, 1970 and adultery is one of the bases upon which a marriage can be declared to have broken down irretrievably. Nigerian being a multi-diversified system, besides the provisions in the Matrimonial Causes Act pertaining to adultery, the implication of the act of adultery in a marriage depends on where the act is committed, in the Northern part of Nigeria where penal code is applicable it is a criminal offence for a married person to commit an act of adultery while in the southern part where Criminal Code and Administration of Criminal Justice Law of Lagos State is applicable, an act of adultery by a married person is not a criminal offence.

Section 31 of the Matrimonial Causes Act further provides that a party to a marriage can claim damages for adultery if such an act is not condoned and was not perpetrated for up to three years before such a claim is made. Damages for adultery are compensatory and in awarding damages, the court considers the loss suffered by the petitioner, Injury to petitioner's honor and feelings, hurt to family life, value of the adulterous spouse to the petitioner.

where the spouse condones the act, connive, ... the court will not terminate the marriage, as held in *Alabi v. Alabi*.

PART ONE

BACKGROUND OF THE STUDY

Marriage is a sacred union recognised and revered by law as an institution that creates bliss and happiness for its participants. Unfortunately, the concept of marriage as an institution ‘made in heaven’, ‘a bed of roses’ and ‘a fairytale’ has been watered down by the cankerworm of adultery which has eaten deep into the fabrics of the institution, has caused grief to many lives and has shattered several homes. Indeed, whether or not marriage remains a union for life as stated by Lord Penzance in *Hyde v. Hyde*¹ remains an arguable issue because the dynamism of societal environment, the breakdown of family bondage, lack of skills and motivation to solve problems of conjugal life etc. are all other factors that drive spouses to drift away from their marriage in search of a new partner in whom they can find happiness and satisfaction. Hence, the law makes provisions for machineries that would ensure that the sanctity of marriage is preserved as provided for in the Marriage Act² and in the sad event that its sanctity is violated by a third party, there exists some remedy in damages against such third party in favour of the aggrieved party. This remedy is only available to a person who contracted a monogamous marriage under the Marriage Act. And under customary law, the remedy could be in the form of cleansing to appease the gods or the groom as the case may be. In fact, many authors have expressed their views to the effect that marriage and divorce affects Nigerian women more than it affects the male folks. This is as a result of the deep-rooted culture that all women should be married, leaving them with little or no choice as to what direction or dimension their lives

¹(1866) All ER Rep 175

²See Section 39-48 of the Marriage Act, Laws of the Federation of Nigeria 2004. Wherein offences and penalties are prescribed for; i.e. marriage with a person previously married, attracts imprisonment for five years. Making false declaration for marriage also attracts imprisonment for five years. False pretence of impediment to marriage attracts two years imprisonment, unlawful performing marriage ceremony attracts five years imprisonment, wilful neglect of duty to fill up or transmit certificate of marriage attracts two years imprisonment, Personation in marriage attracts five years imprisonment, Fictitious marriage attracts five years imprisonment, Contracting marriage by native law when already married by this Act, attracts five years imprisonment, contracting marriage under this Act when already married by native law attracts five years imprisonment, and lastly, Marrying minor without prescribed consent attracts two years imprisonment.

should take. Consequently, more women are trapped in abusive and adulterous marriages, and when divorce is contemplated by them, it is condemned and highly stigmatized by the society. The hallmark of this paper is to attempt a critical evaluation of the basis for the retention of adultery as a continuing ground for dissolution of Marriage in Nigeria. Should adultery still be criminalized and retained in our divorce laws, and what convincing reasons if any are there for the sustenance of this ground for divorce in the Matrimonial Causes Act and under the Customary/Islamic law marriages. *After all, most Nigerian women hardly rely on adultery of their husbands; they would rather prefer to rely on other intolerable grounds to invoke the rigors of the law.*

RESEARCH OBJECTIVES

The main aim of this study is to examine the context of adultery and its continuing retention **as a ground for divorce** in Nigeria. To achieve this, the research sets out to achieve the following objectives:

1. An analysis of the concept of adultery in order to understand its true nature, causative rationale, historical development, the penal modalities and statutory basis for its continuity as a ground for divorce in Nigeria.
2. An appraisal of the intricacies of adultery, and justification for legal regulation in the society and whether its retention, modification or deletion is indispensable in the present context or otherwise.
3. An analysis of adultery under the Nigerian customary laws, with particular reference to the Yoruba customs.
4. Examination of adultery under the penal code/Islamic law
5. Examine the efficacy of the penal structure of Nigeria matrimonial system as it relates to punishment of adultery when juxtaposed with other jurisdictions like the United Kingdom, United States, Germany, South Africa, etc.
6. Proffer recommendations on the way forward at the cross road.

RESEARCH QUESTIONS

In view of the foregoing, this research formulates the following research questions in order to arrive at a reliable conclusion, provide viable solutions and recommendations that can provide a deeper understanding of the relevance of adultery in the Nigerian Criminal and Matrimonial jurisprudence:

- i. **Should adultery be considered enough basis to dissolve a marriage considering that the norms of the society are now changing and attitudes to sex are more relaxed than in the past?**
- ii. Is it proper for the law to interfere in the private lives of consenting adults, and in the light of the universal protection and enforcement of human rights, including the rights preserved by the Nigerian Constitution can we justify the Islamic law punishment for adultery and fornication?
- iii. Is the legal regulation of adultery still relevant? And if so, to what extent?
- iv. Is the Punishment for adultery sufficient enough to cause a deterrence of its continuity?
- v. Why is adultery not criminalized in the Southern part of Nigeria as opposed to its counterpart in the North?

SCOPE OF THE RESEARCH

The scope of this study focuses on an evaluation of adultery as a continuing basis for the dissolution of marriage in Nigeria. This research would engage in an examination of adultery within the context of the Nigerian customary law, with particular preference to the Yoruba tribe in Nigeria, which still retains some archaic and metaphysical practices and whose definition of adultery appears to have gone beyond the universal notion of adultery, and then, the Islamic law. Reference shall be made to the obtainable practices in other climes, with particular attention paid to the United Kingdom and some states in the United States of America, Germany and South Africa Ultimately, this research would provide a critical examination of the concept and basis for the retention of adultery as a ground for dissolution of Marriage in Nigeria.

PART TWO

1.0 MEANING AND STATUTORY PROVISIONS GOVERNING ADULTERY

Nigeria, being a former colony of Britain, inherited the bulk of her legal system from Britain to the extent that we cannot have a comprehensive examination of the position of Nigerian law on adultery without reference to English law.³

DEFINITION OF ADULTERY

Adultery according to Black's Law Dictionary⁴ ... *is voluntary sexual intercourse between a married person and someone other than the person's spouse ...* in its literal sense, Adultery has been defined as a consensual physical association between two individuals who are not married to each other and either or both are married to someone else having living spouse. The actual definition of adultery may vary in different jurisdictions but the basic feature is sexual relations outside marital wedlock, also known as marital infidelity or affair. Considering how widely spread this virus has become, it is considered by almost all religions, cultures or legal jurisdictions as an abomination and a sin. To constitute adultery, the petitioner must prove the actual act of penetration of the female sex organ by the penile organ, **that is**, sex between the respondent and some other third party. Though the term is not defined in the Matrimonial Causes Act, it has been defined to mean carnal sex between two opposite gender and penetration is an important factor. The act of only seducing, caressing, sexual harassment, sodomy, etc cannot be strictly treated as 'sexual intercourse' within the context of the Matrimonial Causes Act,⁵ it is a matrimonial wrong which can entitle a person to the dissolution of the marriage, where the petitioner shows that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. Adultery has been defined as the sexual intercourse between two

³The terms 'Britain' and 'England' for the purpose of this work are used interchangeably.

⁴ Ninth Edition, Bryan A. Garner at page 60. (According to Black's law lexicon... in many jurisdictions, adultery is a crime, but it is rarely prosecuted...) ...Judges traditionally viewed adultery as a reason for denying the offending spouse primary custody of a child in a child-custody dispute.

⁵Cap M7, LFN 2004.

persons of whom one or both of them are married but who are not married to each other.⁶ What would constitute intercourse under adultery generally differs from what constitutes intercourse for the purpose of consummation. It has been held that where a husband is unable to sustain erection a short period after penetration it will not amount to consummation.⁷ The court has held the same scenario to constitute adultery.⁸ Penetration of the slightest nature would constitute adultery provided such penetration is consensual.⁹ It appears that penetration is an essential ingredient in proving adultery as the manual masturbation of a co-respondent by the respondent has been held not to constitute adultery. This therefore raises a problem of proving adultery as it is established usually by circumstantial evidence rather than direct evidence. It is also important to state that even where such instances as overly familiar conduct between a respondent and a co-respondent are sufficient to prove adultery; it can be sufficient evidence to prove the behavior of the respondent is of such that the petitioner cannot reasonably be expected to live with the respondent.¹⁰ The nature of adultery also raises controversies regarding artificial insemination and where a woman who without the consent of her husband becomes pregnant through the artificial insemination of the semen of another man.¹¹ Before the promulgation of the Matrimonial Causes Decree (now Act) in 1970, adultery simpliciter was a ground for dissolution of a valid marriage in Nigeria. This was as a result of the fact that all that a petitioner was required to prove was that there was a consensual sexual intercourse between the respondent and a person of the opposite sex other than the petitioner whilst the marriage was still subsisting. **Under the Matrimonial Causes Act, a petitioner seeking dissolution of marriage by reason of adultery of a spouse must prove that the marriage has broken down irretrievably, and in coming to the**

⁶P.M Bromley and N.V Lowe, Family Law, London, 7th ed. 1987 at 176.

⁷W (otherwise K) v W [1967] 3 All E.R. 178.

⁸Sapsford v Sapsford & Furtado [1954] 2 All E.R 373.

⁹Dennis v Dennis [1955] 2 All E.R 51.

¹⁰Section 15(2)(c) Matrimonial Causes Act, Cap M7 Laws of the Federation Nigeria, 2004.

¹¹G.W Bartholomew, "Legal Implications of Artificial Insemination", (1958) 21 M.L.R 236.

conclusion that such a marriage has broken down irretrievably the petitioner must furnish the court with proof to show that the respondent has committed adultery. The said provision does not leave it at proving adultery alone but went further to state that the petitioner finds it intolerable to live with the respondent as a result of the adultery.¹²The petitioner must produce evidence to show that the sexual relation between the respondent and the third party was voluntary. That the respondent indulged in carnal sex with clear head, no undue influence or rape from the co-respondent, no use of force or any other element that vitiates consent. Again, it is incumbent upon the petitioner to prove that the said adultery was committed without his/her consent or connivance. Furthermore, the act amounting to adultery must have occurred within the context of a **valid marriage**, which could be marriage celebrated under the Act, customary marriage or Islamic marriage. Therefore, mere assertion that parties are living together as husband and wife cannot amount to sufficient proof of marriage between them.¹³An allegation of adultery cannot be based on suspicion, emotion and induced speculation. It must be borne out by facts and evidence. Of course, the law recognizes that it is only in rare cases that direct evidence of adultery can be given, so there are other ways of proving an allegation as grievous as adultery.¹⁴ Thus, adultery can be inferred from certain circumstances such as over familiarity coupled with opportunity, admission, confessions, improper behavior and suspicious circumstances etc. The Matrimonial Causes Act of 1970 requires that adultery must be proven to the satisfaction of the court as in other matrimonial matters.¹⁵

¹²See section 15(1)(2)(b).

¹³M.Z Agams, “Adultery as Ground for Divorce in Nigeria” (2010). Sourced from <https://mzagams.wordpress.com/2011/12/12/adultery-as-ground-for-divorce-in-nigeria> Accessed 22nd August, 2018

¹⁴NaijaTalk, ‘Adultery and Damages’ Sourced from <https://www.naijalegaltalkng.com/article/family-law/marriage/314-adultery-and-damages>.

¹⁵ Section 82 of MCA.

STANDARD OF PROOF NECESSARY IN PROVING ADULTERY

The standard of proof necessary to establish adultery is provided under Section 85 of the MCA which provides explicitly that such allegation of adultery must be proved to the reasonable satisfaction of the court. The term “reasonable satisfaction” with regards to the standard of proof of adultery can therefore be interpreted to be at the discretion of the court and not necessarily on the standard of proof required in civil suits and criminal trials as provided by the rules of evidence. In the case of *Oke v Oke*¹⁶ the court held that the standard of proof, as set out in Section 82 of the MCA, was on a balance of probability. However, in *Opajobi v Opajobi*¹⁷, Orojo, CJ held that the standard of proof of adultery was a high one and that it must be proved beyond reasonable doubt as is applicable in criminal cases. From the above cited judicial cases it is obvious that the standard of proof to be applied where the question of the allegation of adultery has been raised is at the discretion of the court.

The court in *Okala v Okala*¹⁸ went a step further to make clarifications as to the provision of Section 82 of the MCA when it held that while the rule that adultery had to be proved beyond reasonable doubt was obsolete in Nigeria, the said provision is not a bar to the court from requiring a petitioner to prove the allegation of adultery beyond reasonable doubt to the satisfaction of the court. Unfortunately, there has been no judicial interpretation of the provision of Section 82 of the MCA at the apex as the Supreme Court in *Onile Ere v Oladana Williams*¹⁹ only reiterated the wordings of the said provision and did not make further clarification or guideline as to how it is to be interpreted. The wordings of Section 82 (MCA) appear clear and without ambiguity in that the standard of proof to be applied where a petitioner has alleged the commission of adultery by the respondent is at the discretion of the court.

¹⁶ (1974) 3 SC 1.

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¹⁸Per Agbakoba, J. (1973) 3 E.C.S.L.R 67.

¹⁹(1974) 1 N.M.L.R 363

STANDARD OF PROOF REQUIRED FOR THE PURPOSE OF INTOLERABILITY

Aside from proving the actual adultery the petitioner must also prove that he finds it intolerable to live with the respondent.²⁰ This requirement is a departure from the pre-1970 position. The question then arises whether the intolerability of living with the respondent was as a result of the adultery or that the petitioner finds it intolerable to live with the respondent not necessarily based on the adultery but for some other reason. It is important to note here that Section 15(2) (b) is the exact duplication of its English Act²¹ save for the inclusion of the phrase “since the marriage.” This question has led to conflicting judicial pronouncement whether intolerability is conjunctive with the adultery of the respondent or disjunctive. In the case of *Goodrich v Goodrich*²², the court held that in proving intolerability, reference need not be made to the adultery as the petitioner finding it intolerable to live with the respondent is independent of the adultery and the petitioner did not have to show that the intolerability was as a result of the adultery.²³ Contrast this decision with the position in *Roper v Roper*²⁴ where it was held that the intolerability was as a result of the adultery and both cannot be independent of each other. The courts in Nigeria are yet to resolve this issue as there are still contrasting decisions as the question as to the independence or otherwise of intolerability and adultery is yet to be brought before the Court of Appeal or the Supreme Court. The court in the case of *Somorin v Somorin*²⁵ held that the intolerability must be a consequence of the adultery of the respondent and that the test of intolerability was not subjective. Coincidentally, this decision was a departure from the decision of the same court in an earlier case of *Bakare v Bakare*²⁶ where it held that a disjunctive interpretation should be applied in determining intolerability.

²⁰Section 15(2)(b) MCA

²¹See Section 1(2)(A) of the English Matrimonial Causes Act 197

²²(1971) 2 All E.R 1340

²³This position compares with the decision by the English Court of Appeal in *Cleary v Cleary* [1974] 1 All E.R.

²⁴(1972) 1 W.I.R 1314.

²⁵(1973) 10 C.C.H.C.J 103

²⁶(1972) U.I.L.R 500

1.1 ADULTERY AS A CRIME

1.2 Nigeria inherited its legal system from Britain and before the enactment of the MCA in 1970, English law was applicable in Nigeria,²⁷ thus an allegation of adultery was treated as a crime as it obtained in Britain. Before the shift in ideology in recent times, adultery was treated as a heinous crime. It has been stated earlier that proving adultery in Nigeria beyond reasonable doubt by virtue of the pre 1970 position is no longer valid.²⁸ This, however, cannot be said to be the position in Nigerian federation. The federal legislation that criminalizes adultery is the Penal Code.²⁹ However, broadly speaking, there are two criminal codes; the criminal code and penal code having legal effect in the Southern states and Northern states of Nigeria respectively. Adultery is not codified under the Criminal Code hence it is not a crime.³⁰ Same cannot be said of the Northern part of Nigeria as the Penal Code which is applicable to the North made provisions for adultery as a crime and prescribed punishment. Haiti in 2015 decriminalized adultery, hence, the adultery of a wife is no longer considered a mitigating circumstance excusing her murder by her husband after witnessing her in the act of adultery unlike the previous position.³¹ In some jurisdictions, where a wife is killed as a having sexual intercourse another man and she is killed by her husband as a result of her infidelity such a husband can raise the defence of honour.³² There has been a marked deviation from the earlier position of adultery being considered a crime in some jurisdiction. Countries such as England, Germany, have all

²⁷Section 4 of the State Court (Federal Jurisdiction) Act Cap 177, 1958. Laws of the Federation of Nigeria and Lagos

²⁸Okala v Okala op. cit, n. 15

²⁹The Penal Code (Northern States) Federal Provisions Act is only applicable to the Northern States which comprises of the erstwhile Northern Region of Nigeria. See Section 2 of the Penal Code

³⁰See Section 36(12) of Constitution of the Federal Republic of Nigeria, 1999 as amended.

³¹See J. Toussaint, Current Legal Framework: Adultery in Haiti, 2011; UN Secretary General's Database on Violence Against Women, Decree modifying offences of sexual aggression and eliminating discrimination against women, Haiti, 2005.

³²See General Recommendation 19, CEDAW, Par 24(r)(ii) which recommended the adoption of laws to remove the defence of "honour" in a crime against or murder of a female family member.

decriminalized adultery especially taking into consideration the fact that punishment of such crimes are skewed in favour of males.

Adultery is an offence under the penal code which is applicable only in the Northern states. For a person to be guilty of adultery under the Nigerian Criminal Law, it must be proved that:

- a) A person is subject to a native law and custom where extra-marital sexual intercourse is a criminal offence.
- b) A reasonable belief that the person with whom he/she has sexual intercourse is not his/her wife or husband.
- c) The sexual intercourse was not such to amount to rape.³³

Under the Nigerian Criminal Code which is applicable in the south, adultery is not recognised as an offence. It is only under the native law and customs of this area that adultery is recognised as an offence. Similarly, persons who are married under the Matrimonial Causes Act of 1970 can claim damages for adultery committed with their wife. On the other hand, under the penal code, adultery as well as fornication are offences. It provides;

*"Whoever being a man subject to any native law and custom in which extra-marital sexual intercourse is recognised as a criminal offence has sexual intercourse with a person who is not and whom he knows or has reason to believe is not his wife, such sexual intercourse not amounting to the offence or rape is guilty of adultery and be punished with imprisonment for a term which may extend to two years with or without a fine."*³⁴ *And, "Whoever being a woman ... has sexual intercourse with a person who is not and whom she knows or has reason to believe is not her husband is guilty of the offence of adultery."*³⁵

³³See section 387 and 388 of the penal code.

³⁴Section 387 of the penal code.

³⁵Section 388 of the penal code

PART 2

2.0 CUSTOMARY LAW AND ADULTERY

Adultery is one of the cardinal sins in the Ten Commandment and despite the modern apparently relaxed attitude towards sexual intercourse; it has remained one of the main reasons for marriage breakdown. Of particular gravity was adultery by a wife which was described as being unforgivable by a husband for which a husband could divorce his wife on the sole basis of her adultery, a wife had to prove other material facts in addition to her husband's adultery in order to obtain a similar relief. Hence, she had to prove facts like cruelty, bigamy, rape sodomy or bestiality on his part as well.³⁶ Even under customary law, adultery, particularly by a wife was treated as a sin against the ancestral gods and required the performance of certain rituals to appease them and the husband and to cleanse the violated woman. Unlike the pre-set grounds for divorce under the Matrimonial Causes Act, adultery may well be a vital reason why a man would want to divorce his wife.

2.1 THE CONCEPT OF ADULTERY WITHIN YORUBA CUSTOMARY LAWS

In Yoruba society like other African societies, adultery is a serious and capital offence and Yoruba society has a way of punishing the offenders. In view of this deviant act, an attempt is made in this paper to take cursory look at Magun (Thunderbolt) and Tesho³⁷ as a device among the Yoruba people to punish the act of adultery. Yoruba people use Magun and Tesho device to check infidelity because of their potency. These devices have the power to kill the victim especially the man who has sexual intercourse with the woman who had been laced with this charm. When a woman is under the spell of Tesho the man who attempts to have intercourse with her will vomit continuously while about to attempt the act until he

³⁶ S.M. Cretney, *Principles of Family Law*, London, 4th ed. 1984 at 101.

³⁷ A traditional way of preventing pre-marital sex among the Yoruba people of South-Western part of Nigeria.

withdraws from the act and may not be able to regain strength throughout the day. In the case of Magun (Thunderbolt) any man who has no anti-Magun device and has intercourse with a woman laced with Magun will instantly die. Magun (Thunderbolt) and Tesho-charms are imbued on a string of thread or single broom and then placed on the entrance of a house or room for a woman who is promiscuous to cross over and there and then the woman has been charmed with this killer device. It should, however be noted that magun has various type of taboo (eewo) associated with it. These taboos are the power that will trigger the potent of this charm to kill the victim. For example, magun that has groundnut as its taboo the moment a man had sexual intercourse with a woman laced with magun, he begin to look for groundnut to eat and as soon as he chewed a nut the charm dashed him on ground and plunged him into a state of death. He foamed (sometimes) at the mouth with his whole body covered with sweat. From all that has been said in the introductory part of this paper, Tesho and Magun charm are regarded by Yoruba people as instrument of justice to punish adulterous act among them but the researcher is of the opinion that this method is barbaric and primitive which should not be used in modern day Yoruba society. Magun and Tesho Explained In Yoruba scholarship, there is hardly a phenomenon less understood but zealously persecuted as magun. Magun does not kill willfully without a justifiable cause.

Magun is not a disease but mystical device or a magic to expose or punish the man who meets another man's wife sexually. Magun is common among the Yoruba, Togo, Azande and Bunyoro people. Its forces can be geared towards productive, protective, and destruction channels. The power of magun remains constant and the same on the victims. In other words, the general effect of magun remains the same with no regards to social or political standing. Magun is a killer with no respect for the status of the victims, in as much as the victims flout the taboo of sex. Abraham (1958) in his Dictionary of Modern Yoruba defines magun as Magic drug which has adverse effect on the adulterous man causing him

to fall over three times or crow like a cock and die. The issue of magun in Yoruba land cannot be over emphasized. In some part of Nigeria, a man may want to punish unfaithful wife by using this dreaded device. In most part of Anpa Local Government Area of Benue State magun's potency is only realizable if the husband warns the adulterous man to stop sleeping with his wife for three times. But among the Yoruba people, only a confession from both partners and the interpretation of a witch doctor who knows the antidote to administer may save the lives of the adulterers. After the preparation of the charm, the husband of the adulterous woman puts the charm on the way the wife takes. The charm could be used on a string of tread or on a single broom and the wife who is not aware would cross over the broom or tread. After seven or nine days, whether there is sexual intercourse between a man and the unfaithful wife or not, the charm would affect negatively on the woman, and normally, the woman would die. If there is intercourse, the man would die immediately or later, depending on the type of Magun.³⁸

³⁸ International Journal of Theology and Reformed Tradition.

PART 3

3.0 THE POSITION OF ISLAM ON ADULTERY

Adultery is sexual intercourse by a person whether by a man or a woman, with someone to whom they are not married³⁹. Under the Islamic Law, all forms of sexual intercourse outside wedlock are described as “*zina*”. The word *zina* applies to both adultery and fornication. Islamic law takes a very serious view on *zina* because it damages social health, destroys the very basis of the family. It is regarded as an opening to other forms of evil, thus; "And do not draw near to fornication; surely it is an indecency and an evil which invites evil."⁴⁰ “Say ‘verily, my Lord has prohibited the shameful deeds, be it open or secret, sins and trespass against the truth and reason.’”⁴¹“Say to the believing man that they should lower their gaze and guard their modesty; that will make for greater purity, and God is well acquainted with all they do. And Say to the believing woman that they should lower their gaze and guard their modesty”.⁴² Under the teachings of Islam, adultery is considered one of the three major sins. Fornication and infidelity are regarded as unpardonable and reprehensible sins. Under Islamic Law, for a person to be guilty of any offence, certain basic ingredients constituting such offence must be proved.

Thus, in proving the offence of *Zina*, the following must be established:

- a) That a person had sexual intercourse with a woman who is not his wife and that it was done not under duress, compulsion.
- b) That the person who committed the offence of *zina* is an adult and capable of understanding the consequences of his act.

PUNISHMENT FOR ADULTERY (*ZINA*)

"The woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes. Let no compassion move you in their case, in a matter prescribed by God. If ye believe in God and the last day. And let a party of believers witness their punishment."⁴³

Brutal punishments are given to men and women who get involved in the sinful act of *Zina*.

³⁹ www.advocatekhoj.com/library/lawareas/divadultery

⁴⁰ Qu'ran 17: 32.

⁴¹ Qu'ran 7: 33.

⁴² Qu'ran 24: 30-31.

⁴³ Qu'ran 24: 2

According to Islamic laws, for premarital sex, the chastisement is 100 lashes, while for adultery, they are punished by stoning to death which is also known as **Rajm** or **severe flogging**. However, stoning as punishment for extramarital sex is not stated in the Qua'ran but is prescribed in Hadith. Adultery is one of three justifications for killing a person, according to Mohammed⁴⁴. It is settled law that punishment for the offence of *zina* is one hundred stripes and a year's exile for unmarried offenders. The punishment for married offenders is one hundred stripes and stoning to death. The Holy Prophet (P.B.U.H) was reported to have said:

*"Take from me and accept from me undoubtedly Allah has now shown path for them (adulterers). For unmarried persons guilty of zina, the punishment is one hundred stripes and exile for one year. For married adulterers, it is one hundred stripes and stoning to death."*⁴⁵

Despite all the traditions of the holy prophet for the punishment of the offence of *zina* by stoning to death there exists a controversy over the award of the punishment. However, the consensus of the majority of Muslim jurists is that the punishment for *zina* by stoning to death was provided by the holy prophet as an interpretation of the Qur'anic injunction relating to the punishment of *zina*.

Punishment under Islamic law implies spiritual purification of human soul in readiness for the hereafter. It is also seen as a reformative act with a view to making an offender appreciate the moral values which Islam upholds for the dignity of mankind. The holy Qur'an made certain improvements on the primitive penal system which either prescribed severe and inhumane punishment or the form of application and enforcement of such punishment which was cruel. Despite that, some criticisms were and are still made against Islamic form of punishment as prescribed in the Holy Qur'an and *Sunnah* of the holy prophet (P.B.U.H.) as severe, cruel, inhumane, degrading etc. The critics have failed to look at the nature of Islamic law itself with a view to understanding the basic philosophy underlying punishment that is to protect the criminal from the society and see that the rights of offenders viz-a-viz of the society or individual are not jeopardized.

⁴⁴ Sahih Bukhari 83:37.

⁴⁵ AI-Muntaqa, Vol. 11 pp. 74-75 and jami al-usul, Vol. iv, pp. 396-39.

PART 4

4.0 A COMPARATIVE ANALYSIS OF VARIOUS JURISDICTIONS

Unfaithful wives were treated more harshly than husbands and expected to overlook their spouses' indiscretions. Where adultery was the primary ground for divorce, fabricated narratives and perjured testimony were widespread. According to Vladimir Nabokov, "Adultery is a most conventional way to rise above the conventional." But it also challenges the conventional and invites us to rethink assumptions about sexual exclusivity. The evils traditionally associated with adultery stem from deceit and betrayal. But adultery practiced openly, with the consent of all concerned, stands on different footing. The limited evidence available on open marriages and polyandrous relationships suggests that they compare favorably with monogamy in terms of party satisfaction and outcomes for children.⁴⁶

4.1 THE UNITED KINGDOM

In the UK, there is only one legal ground for divorce, which is that the marriage has irretrievably broken down. The person who starts proceedings, (called the Petitioner) must prove that the marriage has irretrievably broken down by establishing one of the following five facts; adultery, unreasonable behavior, desertion, 2 years separation with consent, or 5 years separation (no consent required). In the case of adultery, the petitioner must prove that the spouse has had sexual intercourse with another person of the opposite sex and that he/she finds it intolerable to live with the said spouse. If a relationship short of sexual intercourse has taken place or it would be difficult to prove adultery, it is suggested that the unreasonable behavior ground is used instead. This should prevent difficulties and delays later on. The person involved as a correspondent can be named in the petition but naming such person can make the whole situation more acrimonious and can also lead to delays later on in the proceedings if the co-respondent refuses to sign papers admitting the adultery.

⁴⁶Deborah L. Rhode, *Adultery, Infidelity and the Law* (Harvard University Press, 2016).

Adultery can be used as the basis for a divorce petition whether or not the parties are still living together or have separated. Not more than six months must have elapsed since the petitioner became aware of the adultery before the petition is sent to the court, unless the adultery is deemed condoned.

4.2 THE UNITED STATES OF AMERICA & LAWS ON ADULTERY & INFIDELITY

As sexual attitudes have grown more liberal, laws governing adultery have grown more anachronistic. The United States is one of the few industrialized countries to have laws criminalizing adultery. Adultery remains a criminal offence in twenty-one (21) states- Massachusetts, Idaho, Oklahoma, Michigan, and Wisconsin consider it a felony, while in other states, it is a misdemeanor, a class B misdemeanor in New York & Utah, a class 1 felony in Wisconsin, *etc.*, although prosecution is rare and is almost never enforced, and when they are, the rationales are scarcely compelling. The reason for this is not far-fetched since in family matters, marital infidelity almost bears no necessary relationship to parental fitness or need for alimony; neither is it a good measure of immigrants' moral fitness for citizenship. In politics, fidelity in marriage is generally not a good predictor of effectiveness in office. Up till the mid-20th century, most US States especially, the southern & northern states had laws against fornication, adultery or cohabitation; these laws have gradually been abolished or struck down by courts as unconstitutional. **Thus, in the USA, cheating on one's spouse is generally regarded as bad but whether or not it can get the participants in legal trouble depends on where the parties live.** California was the first state to implement the concept of 'no-fault' divorce in 1970, and since then, parties have only two options for filing for divorce; that the marriage is irretrievably broken or that the spouse is incurably insane. Thus, California courts do not usually consider infidelity or any other fault when granting a divorce, but they can consider the financial impact a partner's

adultery might have on the non-straying spouse. And in rare cases, the judge may consider if the adultery had any effect on the children of the marriage.⁴⁷

4.3 GERMANY

Since 1969 adultery is no longer a crime in Germany. And since the reform of the German matrimonial law in 1977, adultery no longer serves as a reason for divorce. Therefore, adultery is only unacceptable for moral reasons. From the above it is clear that the legal provisions on adultery have undergone substantial changes. Adultery is no longer a crime or a ground for divorce in most climes.

4.4 SOUTH AFRICA

Before 1979, adultery also played a significant role in the South African divorce laws, because it was one of only three grounds for a divorce.⁴⁸ The divorce system was fault-based at the time, and divorce could result in financial penalties for the adulterous spouse at the time of divorce, in accordance with the principle that "a spouse should not be allowed to benefit financially from a marriage which has been wrecked through his matrimonial delinquency".⁴⁹ After 1979 a "no-fault"-system was introduced, and in terms of the Divorce Act 70 of 1979 adultery is no longer a ground for a divorce. It is merely one of the guidelines that may be used to prove that the marriage has broken down irretrievably.⁵⁰ In this respect, adultery may indirectly be relevant as a factor to be considered when determining post-divorce spousal maintenance, a claim for forfeiture of benefits and/or a redistribution order.⁵¹

⁴⁷ Friedman Lawrence, "A Dead Language: Divorce Law & Practice Before No Fault" (2008).

⁴⁸ The grounds were based on Roman-Dutch law (adultery and malicious desertion) as amended by s 1 of the Divorce Law Amendment Act 32 of 1935 which added the further grounds of incurable insanity and habitual criminality. See HR Hahlo *The South African Law of Husband and Wife* 5 ed (Cape Town, 1985) at 330.

⁴⁹ HR Hahlo *The South African Law of Husband and Wife* 3 ed (Cape Town, 1969) at 424ff

⁵⁰ Section 4(2) (b) of the Divorce Act of

⁵¹ See, respectively, ss 7(2), 9 & 7(5) of the Divorce Act, 70 of 1979. In terms of s 9(1) the court may take into consideration any substantial misconduct on the part of either spouse when considering a forfeiture of benefits order. See *Wijker v Wijker* 1993 (4) SA 720 (A). Similarly, when considering a redistribution order.

PART 5

FINDINGS, RECOMMENDATION AND CONCLUSION

FINDINGS

In the course of research of this work, it was discovered that adultery is a basis for dissolution of marriage not only under the Act but also under customary law marriage and Islamic law marriage. The consequences or implication of adultery committed under each type of marriage differs, although emphasis is placed more on Statutory law marriage.

RECOMMENDATION

Nigeria should follow the United States of America, Germany and South African example by downplaying the customary potency and dogmatic cosmetic attached to adultery in some community where the penal code still regulates and take a leave from the western society as depicted in the body of the paper.

CONCLUSION

Adultery no doubt is a cankerworm that has eating deep into the fabrics of almost 90% of solemnized marriages in the world and women are advised to be neat and dress well after giving birth so that their husbands will not look out to other women in the society. Jesus in the bible in John 8 verse 1-11 used sophisticated refutation on the Pharisees who wanted to stone the adulterous woman to death. Consequently, it is our view that Adultery as a ground for dissolution of marriage under the MCA be discarded to the waste bin going forward as it has been down plaid in the southern part of Nigeria and some western world mentioned in the body of our work earlier.

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