

ARBITRATING FAMILY DISPUTES IN NIGERIA: BENEFITS AND CHALLENGES*

Abstract

Family is the immediate social structure for sustenance, support, dependency and love of human life. Under the Nigerian family law, instituting proceedings in court has been the only means through which family disputes particularly matrimonial disputes are resolved or put to an end. However, this means have many disadvantages ranging from the fact that it is highly costly, time consuming, filled with rigorous proceedings and lacks confidentiality. These shortcomings have led to the birth of non – adjudication schemes such as conciliation, reconciliation, negotiation, mediation and arbitration for resolution of family disputes. However, amongst these schemes, it is only arbitration that has achieved a global recognition to settlement of family disputes because the award (decision) reached by an arbitrator is final and binding. This does not mean that arbitration has no impediments in its ways in the resolution of dispute in Nigeria. Some of these impediments are to some extent the challenges that have made arbitration unattractive as a scheme for family dispute resolution in Nigeria. The researchers have undertaken an analytical appraisal of the prospects and challenges of adopting arbitration as a mechanism for family dispute resolution in Nigeria. In doing so, this work will not only be discussing the need for arbitrating family dispute in Nigeria but also its benefits and challenges. It is therefore recommended that the Arbitration and Conciliation Act of 2004 should be amended for family disputes to be resolved through arbitration other than provision for commercial disputes only, Furthermore, the National Assembly should adopt and incorporate all other non- adjudication schemes particularly arbitration as a mechanism for family dispute resolution. This will also make resolution of family dispute quick and erode the possibility of technical justice.

Keywords: Family, Family disputes, Adjudication Scheme, Non-Adjudication Schemes, Arbitration

1. Introduction

Biblically, family was the first social unit established by God.¹For this reason many fundamentalist Christian Churches for instance the Roman Catholic Church, states that family is as a result of a recognized marriage and is seen as one of the essential sacraments of religious worship. Under the Nigerian family law, the concept of family is closely linked to marriage which comprises of those legal rules or norms regulating the legal relationship between spouses (husband and wife) parents and children, guardians and custody. It is also concerned with laws regulating family and family property. Dispute or conflict is part and parcel of human life, In Nigerian society, the most commonly experienced and recognized family dispute is the matrimonial dispute which is also regulated under the Matrimonial Causes Act².The primary concept behind family dispute resolution is for peace and tranquility due to the fact that most of societal problems emanate from family separation. In Nigeria, the process of effectuating family disputes particularly on matrimonial dispute is usually executed through Adjudication Schemes (litigation). However, various shortcomings have been found with the scheme, these include unnecessary delay caused by congestion of court, high cost of litigation, confrontational nature of litigation, amongst others. Many countries, for instance England, Australia, India and United States of America have resorted to Non- Adjudication Schemes such as conciliation, reconciliation, negotiation, mediation and arbitration in resolving family disputes because they are considered to promote confidentiality, reduce inconvenience, less cost and time saving. However amongst the Non-Adjudication Schemes it is only the decision of arbitration that is final and binding, thus decision reached in other schemes still ends up in court due to lack of final and binding decision.

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¹The British and Foreign Bible Society, *Holy Bible Revised Standard Version* (Bible Society Resources Ltd, 2009) Genesis 2: 18-24

²Cap M7 Laws of the Federation of Nigeria 2004.

2 Sources of Nigerian Family Law

The Nigerian family law was adopted from the English legal system by reason of our affiliation inherited through the instrument of colonialism, the practice of family law is influenced by the general context that prevailed in England and the major statutes that guide family law in Nigeria are the Marriage Act³ and Matrimonial Causes Act⁴. The term 'source' is capable of two interpretations; in one aspect it can be construed as meaning the origin from which the Nigerian Family Law springs, in another breath it means the source of legitimacy or validity of Nigerian Family Law⁵. For the purpose of this study, the researcher adopts the former as meaning of source in relation to Nigerian Family Law. The principle sources of Nigerian Family Law are:

Customary Law: Customary laws are rules of conduct established by custom which over the years acquired the force of law as the mirror of accepted usage. Customary law is an important source of family law because it constitutes a chunk of customary law marriage contracted in Nigeria and can only be enforced when it is not repugnant to natural justice equity and good conscience or incompatible with any written law and public policy.⁶ The Law governing customary marriages is the native law and custom prevailing in the area of the jurisdiction of the court or binding on the parties.

Islamic Law: Islamic Law means the legal system that regulates the ways of Muslims. Most often, Islamic Law is used interchangeably with Sharia Law which is viewed as the ultimate criterion aimed at creating a most humane and just society. In Islam, there are four important schools of thought. These Schools are; The Hannafi School, The Shafi School, The Hanbali School and Maliki School. In Nigeria, Muslims generally follow the interpretation of Islamic Law according to Maliki School. In the Northern States, Muslim Laws are modified by customs of each locality. Sharia Court of Appeal Rules provides that Muslim Law of Maliki School as customarily interpreted at the place where the trial took place in the first instance shall apply.⁷

Statutory or Enacted Legislation: The Nigerian statutes constitute a source of Nigerian family Law. The 1999 Constitution of the Federal Republic of Nigeria vests the Federal Government with the exclusive power to make laws on matrimonial cause.⁸ Pursuant to this, the federal government enacted two principal statutes that govern family laws particularly on matrimonial causes in Nigeria. These laws are; The Matrimonial Causes Act and the Marriage Act. Matrimonial Causes is defined as dispute arising from statutory marriages conducted in accordance with the Marriage Act.

3 Family Disputes under the Matrimonial Causes Act

The law of matrimonial causes relates to monogamous marriage contracted under the Marriage Act and not under the Native Law and Custom.⁹ Section 2(2) of the Matrimonial Causes Act provides for the reliefs available to a person in a matrimonial dispute, these reliefs can only be sought by a person domiciled in Nigeria.¹⁰ The available reliefs for spouses in matrimonial disputes ranges from nullity of marriage, dissolution of marriage, judicial separation, restitution of conjugal rights and jacitation of marriage.

Nullity of Marriage: The term 'Nullity' is where a party seeks to demonstrate before the court that due to some material defects or impediment, the marriage is invalid.¹¹ Generally statutory marriage is seen

³Cap M6 Laws of the Federation of Nigeria 2004

⁴Cap M7 Laws of the Federation of Nigeria 1970

⁵A G Agu and E A Odike 'Modern Nigeria Family law and Succession with the Marriage Act and The Matrimonial Causes Act' (Vougasen Limited),2003.p 2

⁶ *Mojekwu.v. Ejikeme* (2005)5 NWLR(pt403)@406.

⁷A G Agu and E A.Odike 'Modern Nigeria Family law and Succession with the Marriage Act and The Matrimonial Causes Act' (Vougasen Limited),2003.p 51

⁸Section 4(2) &(3) and Item 61 of part 1,Second Schedule to the Constitution of the Federal Republic of Nigeria,1999 (amended)

⁹*Chukwuma.v.Chukwuma 1 NWLR (Pt 426)542@563 .*

¹⁰Cap M7 Laws of the Federation of Nigeria 2004

¹¹A G.Agu and E A Odike 'Modern Nigeria Family law and Succession with the Marriage Act and The Matrimonial Causes Act' {published in Nigeria by Vougasen Limited 2003}.pg84

as a holy sacrament by the court, this makes them reluctant in nullifying a marriage except on the grounds that the marriage is void or voidable. Nullity of marriage is only relevant to void or voidable marriage.

Void marriage is the one that has never been in existence and the parties thereto have never acquired the status of husband and wife. Section 3(1) of the Matrimonial Causes Act listed five grounds in which marriage may be void and they are¹²:

Where there is an Existing Lawful Marriage: This rule applies only to statutory marriages celebrated in Nigeria under the Marriage Act.¹³ However where the marriage is contracted outside Nigeria, the provision does not apply thus the validity of a foreign marriage will properly be determined by the application of the conflict rules as to the capacity to marry.¹⁴

Prohibited Degree of Affinity and Consanguinity: Parties who are within consanguinity or affinity will be considered unfit to legally marry each other.¹⁵ However, Section 4 of the Matrimonial Causes Act provides for the possibility of persons within the degree of affinity or consanguinity to marry each other with the consent of the High Court Judge.¹⁶

Where there is Non-Compliance with the Requirements of the Law of the Place of Celebration of Marriage: A marriage which is invalid by reason of failure to comply with the law of the place of celebration is void.¹⁷ Where the marriage is celebrated in Nigeria, the rules applicable to its formalities are contained in the Marriage Act. Section 33(2) of the Marriage Act provides that a marriage shall be null and void if both parties knowingly and willfully acquiesce in its celebration without compliance with some formalities prescribed by the Act.¹⁸

Where there is Lack of Real Consent: Absence of consent will invalidate the marriage. There are cases where there is an apparent consent but the party did not in fact give his real or true consent. Such cases are where a consent of the party is obtained by fraud¹⁹ or duress²⁰, or where the party's consent is obtained by mistake²¹ and where the party is incapable of understanding the nature of the marriage contract.²²

Where either of the Parties is not of Marriageable Age: such marriage is null and void.²³ It is pertinent to note that neither the Marriage Act nor Matrimonial Causes Act prescribed any marriageable age. Owing to this lacuna, it is submitted that this provision of this Act has no effect whatsoever until some age limit is fixed by Law.

Voidable marriage on the other hand is one that will be regarded as a valid subsisting marriage until a Decree annulling it has been pronounced by a court of competent jurisdiction.²⁴ The Matrimonial Causes Act has laid down grounds on which a marriage can be void or voidable. These grounds are:

Where Either Party to the Marriage are Incapable of Consummating the Marriage: In order to make a marriage voidable, the incapacity to consummate must exist both at the time of the marriage and at

¹²Cap M7 Laws of the Federation of Nigeria 2004

¹³Section 3(1) (a) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

¹⁴*Pam.v.Pam*(1977)11 CC H CJ 289

¹⁵Section 3(1)(b) of Act Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

¹⁶Cap M7 Laws of the Federation of Nigeria 2004

¹⁷Section 3(1)(c) of Act Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

¹⁸Cap M6 Laws of the Federation of Nigeria 2004

¹⁹Section 3(1)(d) of Act Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

²⁰ *SzecherKarsov &orse v.Szecher* (1970) 2 WLR 170,180.

²¹Section 3(1)(d)(ii) of Act Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004.

²²Section 3(1)(d)(iii) of Act Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004.

²³Section 3(1) (e) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004.

²⁴*De Reneville.v. De Reneville* (1949) 111 C.A .

the time of the petition.²⁵ therefore if the incapacity existed at the time of marriage but was cured before the petition, the marriage will not be voidable.²⁶

Where Either Party to the Marriage is of Unsound Mind, Mental Defective and Epilepsy: A marriage is voidable if at the time of marriage celebration one of the parties was of unsound mind, a mental defective or subject to recurrent attacks of insanity or epilepsy.²⁷ Unsoundness of mind and other related forms of mental illness can impeach consent and hence nullify a marriage, however where any of these mental deficiencies arose only after the marriage, it would not make the marriage voidable.

Where Either Party to the Marriage is Suffering from a Venereal Disease in a Communicable Form: Section 5(1) ((c) of the Matrimonial Cause Act provides that a marriage is voidable if either party to the marriage is suffering from venereal disease in a communicable form. However if it cannot be satisfactorily shown that a party was suffering the disease at the time of the marriage, the disease will not constitute a ground for nullity.²⁸

Pregnancy of the Wife by a Person other than the Husband: Where at the time the marriage was celebrated the wife was pregnant by a person other than the husband, the marriage will be voidable at the option of the husband.²⁹ The court will not grant a decree if the husband had knowledge of the pregnancy at the time of the marriage, as this would amount to approbation of that fact.

Effect of Decree of Nullity

Void marriage does not need a court decree to bring it to an end because a marriage never existed. However, a decree of a nullity of voidable marriage annuls the marriage with the effect from the date in which the decree becomes absolute.³⁰

Dissolution of Statutory Law Marriage

The sole ground for dissolution of marriage on the ground that the marriage has broken down irretrievably'.³¹ However this decree of dissolution or divorce shall not be entertained by the court if it is instituted within 2 years after the date of the marriage except by the leave of the court.³² This rule is known as 'Two Years Rule' the rule is to prevent couples from seeking divorce and enable them to settle amicably without contemplating divorce within two years of their marriage and for them to get to know each other very well. The two years rule do not apply where there is a willful and persistent refusal to consummate the marriage, adultery which the party who is the petitioner finds intolerable to live with and where there is commission of rape, sodomy or bestiality by the other party who is the respondent.

Marriage will not be held to have broken except the party satisfies the court of one or more of the following facts listed under Section 15 (2)(a)-(h) of the Matrimonial Cause Act; Where a Party has willfully and persistently refused to consummate the Marriage: What constitutes a willful and persistent refusal to consummate will depend on the facts of each case.³³ Thus a mere neglect to comply with a request is not necessarily the same with refusal. A refusal implies a conscious act of volition and before there can be a refusal, there must be a number of requests, direct or implied and an opportunity to comply with such request must exist.³⁴

²⁵ Section 5(1)(a) of the Matrimonial Causes Act Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

²⁶ *S.v.S&orse* (1962) 3 WLR 396.

²⁷ Section 5(1)(b) of the Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004.

²⁸ Cap M7 Laws of the Federation of Nigeria 2004.

²⁹ Section 5(1)(d) of the Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

³⁰ Section 35(b) of the Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

³¹ Cap M7 Laws of the Federation of Nigeria 2004

³² Section 30(1) of the Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

³³ 15 (2)(a) of the Matrimonial Cause Act Cap M7 Laws of the Federation of Nigeria 2004

³⁴ *Horton.v.Horton* (1947) 2 All ER 871-874

Where a Party has committed Adultery and the other Spouse finds it Intolerable to Live with the Respondent: To constitute adultery three elements must be present- the commission of adultery, the petitioner finding it intolerable to live with the respondent and these factors occurred after the celebration of the marriage.³⁵ This sub-section does not apply to an insane spouse because the insane spouse does not know that the nature of his act is wrong.

Where a Party has behaved in such a way that the other Spouse Cannot Reasonably be expected to Bear: The test here is objective, that is, whether it is reasonable to expect the petitioner to put up with the behavior of the respondent? Behaviour may be negative or positive under this provision.³⁶ Behaviour may be positive in cases like violent language or violent activity, on the other hand it may be negative in cases like silence or total inactivity thus where this is the case the court would expect the petitioner to be more tolerant than where the behavior is positive. The conduct in question must also have some reference to the marriage as the impact of conduct in question will be a relevant consideration. If for instance a spouse partner fights regularly at his place of work or defrauds his employer, the court will consider what impact if any, such conduct would have on marital relationship.³⁷

Desertion: This is the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse.³⁸ To constitute desertion, four elements must be in existence – there must be a separation of spouse from the matrimonial home there is an intention of a spouse to withdraw from cohabitation permanently, there is lack of just cause for the withdrawal from cohabitation and the absence of the consent of the deserted spouse³⁹. However, desertion may be terminated where one of the four constituent elements of desertion ceases to exist at any given moment during the course of the prescribed period.

Living Apart for Two Years: Mere physical separation does not constitute ‘living apart’ under the Act.⁴⁰ Thus living apart must involve physical separation accompanied by the termination of consortium. Where the parties are compelled by the exigencies of external circumstances such as absence on professional or business pursuit, ill health or outbreak of war to live apart. The situation will not amount to ‘living apart’ under the Matrimonial Causes Act.

Where the Parties have lived apart for Three Years: A court may reach the conclusion that a marriage has been broken down irretrievably where the parties have lived apart for a continuous period of three years immediately preceding the presentation of petition.⁴¹ The period of three years separation under this sub section must be continuous and should have lasted for three years, it must also have occurred immediately before the presentation of the petition.⁴²

Where Parties have Failed to Comply with a Decree of Restitution of Conjugal Rights: Section 15(2) (g) of the Matrimonial Causes Act provides for the dissolution of marriage on the fact of irretrievable breakdown where the respondent has for a period of not less than one year refused to cohabit with the petitioner in compliance with a court order to that effect.⁴³

Presumption of Death: A marriage may be dissolved on the fact that the respondent has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presuming that the respondent is dead.⁴⁴ This fact must be established by proof of the respondent’s

³⁵ Sec 15(2) (b) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004,

³⁶ *Richard.v.Richard (1972) 1WLR 1073*

³⁷ *Katz.v.Katz(1972) 1 WLR 955,960.*

³⁸ J Jackson and C F Turner ‘*Rayden’s Practice and Law of Divorce*’ 9th Edn (Butterworth London 1971).165

³⁹ Section 15(2) (d) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004 r

⁴⁰ 15(2) (e) Of the Matrimonial Causes Act

⁴¹ Section 15(2) (f) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

⁴² *Agunwa.v.Agunwa(1972)ECSLR 41*

⁴³ Cap M7 Laws of the Federation of Nigeria 2004

⁴⁴ Section 15(2) (h) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

continuous absence for seven years immediately before the petition and the fact that the petitioner has no reason to believe that the other party was alive at any time within seven years period.

A Decree for dissolution of marriage is in two stages – Decree Nisi⁴⁵ and Decree Absolute.⁴⁶ A Decree Nisi is a temporary Decree made to leave the marriage open three months after which such decree nisi becomes absolute. Before a Decree nisi becomes absolute, none of the parties can validly get married to a third party either under statutory law or customary law. A Decree shall not become absolute unless the court is satisfied that proper arrangements have been made for the welfare and advancement of the children of the marriage where there are any.

Effects of Divorce on Parents and Children

Children from divorced homes have a high propensity for crime because of poor parental upbringing.⁴⁷ For the parents, it affects all those involved for the rest of their lives as it is always a disaster with a chain of events which include relocation, changed relationship and change of lifestyle.

Judicial Separation

Judicial separation also known as legal separation is an alternative to divorce. Where an order of legal separation (or judicial separation) is granted, the couple's ceases to cohabit; they live apart but still remains legally married to each other. In a judicial separation, the couples are estopped from remarrying, because such separation does not affect the rights, status and obligations of the parties to the existing marriage. Under judicial separation, the petitioner does not need to prove that the marriage has broken down irretrievably rather the petitioner just needs to prove facts as provided under Section 15 of the Matrimonial Causes Act.⁴⁸

Effect of Judicial Separation

A decree of judicial separation or legal separation when ordered by the court relieves the parties of their legal duty or obligation to live together. However judicial separation is not a final order, and it can be applied for at any time of the marriage and can be altered, modified and discharged upon the consent of both parties to cohabit with each other.

Restitution of Judicial Separation

A decree of restitution of judicial separation is usually instituted where a spouse to a marriage refuses to cohabit and render conjugal duties to the petitioner without just cause or lawful excuse.⁴⁹ For a court to order the restitution of conjugal rights there must be sincerity on the part of the petitioner that he/she desires that conjugal right be rendered to him or her by respondent and that the petitioner is willing to render same to the respondent.⁵⁰ A party who refuses to comply with the decree may be guilty of desertion.

Jactitation of Marriage

The word 'Jactitation' is gotten from the Latin word '*Jactare*' which means to discuss or boast of.⁵¹ A decree of Jactitation is instituted where a respondent has falsely boasted and persistently asserted that marriage has taken place between the respondent and petitioner. The purpose of the institution of decree of jactitation of marriage is to silence the false and malicious allegation of the respondent. Only a party who claims to have been misrepresented can petition for a decree of jactitation of marriage. In essence, a friend, relative, or any other person aggrieved by the false boasting cannot petition for the decree of jactitation of marriage. A petition for a decree of jactitation of marriage must state the dates on which

⁴⁵Section 58(1) (b) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

⁴⁶Section 59 of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

⁴⁷RE Emery, '*The Truth about Children and Divorce*' (2010)<<http://emerydivorce.com/howdivorceaffectschildren/php>>accessed on 15th October, 2020. accessed on 14th, June 2020

⁴⁸Cap M7 Laws of the Federation of Nigeria 2004.

⁴⁹Section 47 of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

⁵⁰Section 49 of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

⁵¹P Clarke, '*Standard, Jactitation of Marriage*' Law and Legal Definition' US Legal INC (2013)1<<http://definitions.usgal.com/jactitationofmarriage>> accessed 15th June 2020.

and the time and places at which the respondent is alleged to have boasted and asserted that a marriage had taken place between the petitioner and the respondent, should contain the particulars of the assertions and also state that the petitioner is not married to the respondent and that the petitioner has not acquiesced in the alleged boasting and assertions.⁵²

Ancillary Relief- Maintenance and Custody of Children

Part IV of the Matrimonial Causes Act deals with the making of orders for maintenance, custody and settlement. In *Osemabor v Osemabor* it was held, inter alia, that an application for maintenance, custody and settlement cannot be brought when there is no matrimonial dispute or proceeding between the parties to the marriage.⁵³

Maintenance

Section 70(1) of the Matrimonial Causes Act empowers the court to award maintenance to the children or a party to a marriage.⁵⁴ While section 70(2) of the Matrimonial Causes Act provides that in making an order for maintenance, the court must always have regard to the means, earning capacity, the conduct of the parties to the marriage and other relevant circumstance.⁵⁵ In awarding maintenance to the children of the marriage, the children are expected to be at the relevant time, members of the household of the husband and wife, whether adopted or legitimated by marriage or not.⁵⁶ A child of twenty-one years however will not be entitled to maintenance except in special circumstances.⁵⁷

The Act gives the court the discretionary power to order and assess maintenance of a party and to make an order that it deems proper for the maintenance of a party to the marriage, having regard to the means, earnings capacity and conduct of the parties to the marriage and all other relevant circumstances.⁵⁸ All other relevant circumstances which the court may consider in ordering maintenance may include the standard of living to which the parties are accustomed, the requirement of the petitioners and even the public interest or demand.⁵⁹

Custody of Children

The Matrimonial Causes Act fails to define custody however in *Otti v Otti* the Court of Appeal defined custody as 'essentially concerning control and the preservation and care of a child's person, physically, mentally and morally, it also includes responsibility for a child with regard to his or her needs, food, clothing, instruction and the like'⁶⁰ Under the common law the father was automatically the custodian of his legitimate children. The womenfolk naturally saw this as unjust. Gradually, throughout the early part of this century, the mother (particularly of a child of tender years) came to be considered as the more appropriate care-giver, unless she had been disqualified by reason of her conduct⁶¹. By virtue of section 71(1) of the Matrimonial Causes Act⁶² in proceedings with respect to the custody, guardianship, welfare, advancement or education of the children of a marriage, the court shall regard the interest of those children as the paramount consideration. In other words, in awarding custody of a child, the court will consider the care of the child's person morally, physically and mentally. In determining the best interest of a child, a child of tender age he is deemed to be better off in the care of the mother. In the case of *Damulak v Damulak* it was held that what constitutes paramount welfare of the child in custody cases is a composite of many factors such as the emotional attachment to a particular parent, mother or father, the inadequacy of facilities such as educational, religious or other opportunities for proper upbringing because what the court deals with is the lives of human beings and ought not to

⁵²N Tijani, 'Matrimonial Causes in Nigeria, Law and Practice' (Lagos: Resistance Law Publishers, 2007) p. 116.

⁵³(1976) 4 CCHCJ 1215,

⁵⁴Cap M7 Laws of the Federation of Nigeria 2004.

⁵⁵Cap M7 Laws of the Federation of Nigeria 2004

⁵⁶Section 69(c) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004.

⁵⁷Section 70(4) of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004.

⁵⁸*Griffith.v.Griffith*(1974) 1 WLR 1350

⁵⁹*Damulak v Damulak* (2004) 8 NWLR (pt 874) 151 CA.

⁶⁰[1992] 7 NWLR (pt 252) 187

⁶¹S C Ifemeje, 'Contemporary Issues in Nigerian Family law' (Enugu: Nolix Educational Publications, 2008) p. 136

⁶²Cap M7 Laws of the Federation of Nigeria 2004. ,

be regulated by rigid formula.⁶³The court may grant any of the following custody, Divided Custody, Joint Custody, Sole Custody and Split Custody.

4. Available Schemes For Family Dispute Resolution

The primary concept behind family dispute resolution is for peace and tranquility due to the fact that most of societal problems emanate from family separation. In Nigeria, the process of effectuating family disputes particularly on matrimonial dispute is usually executed through Adjudication Schemes (litigation). However, various shortcomings were found with the scheme. These include unnecessary delay caused by congestion of court, high cost of litigation, confrontational nature of litigation amongst others. Many countries, for instance England, Australia, India and United States of America have resorted to Non- Adjudication Schemes such as Conciliation, reconciliation, negotiation, mediation and arbitration in resolving family disputes.

Adjudication Schemes Approach For Family Dispute Resolution (Litigation)

It is the most formal mechanism for family dispute resolution and it involves bringing a law suit in court. In Nigeria, family disputes particularly matrimonial disputes can only be settled through litigation, some of the features of Litigation are; it is adversarial. It makes room for rigidity and technicalities in solving dispute, it is mostly conducted in public and there is always a win-lose solution. However, this scheme is fraught with many inconveniences and unpleasant experiences such as the slow pace of litigation, expensive legal fees, court attitude and its confrontational nature. Thus, there is need for urgent public sensitization on the efficacy of non- adjudication schemes vis -a -vis litigation in family dispute resolution.

Non-Adjudication Schemes Approach for Family Dispute Resolution

This approach is the best in resolving family disputes particularly on matrimonial disputes, it refers to all other means or method of resolving disputes outside the formal judicial process or litigation. Most of these schemes have been adopted in countries like United States of America, Australia and India in resolving family dispute. The schemes are as follows:

Conciliation: Conciliation is the process in which a neutral person meets with the parties to the dispute and explores how dispute might be resolved. In Nigeria, the right to resolve disputes by conciliation is recognized by the Arbitration and Conciliation Act⁶⁴However in India, conciliation is recognized and utilized in Delhi by the court themselves for resolution of matrimonial disputes.⁶⁵

Reconciliation: It is one of the major schemes recognized by the Matrimonial Causes Act for the settlement of matrimonial dispute, Section 11 of the Matrimonial Causes Act encourages the parties to embrace reconciliation.⁶⁶However the Act failed to provide procedural rules for enforcing it. In Malaysia Section 55 of the Law Reform (Marriage and Divorce Act) gives room for reconciliation in marital disputes.⁶⁷

Negotiation: Negotiation means to bargain or confer for the purpose of mutual agreement or to arrange by agreement.⁶⁸The most common advantages of negotiation are; it is easier and faster than litigation, it helps parties gain recognition of either issues or parties and through it, information about issues, interests and positions of other parties can be obtained. Negotiation is also recognized under Sulh in the Islamic legal system as a means of resolving marital dispute.⁶⁹

⁶³*Damulak v Damulak* (supra)

⁶⁴*Cap. A18 LFN 2004*

⁶⁵The Hindu Marriage Act 1955 and Family Courts Act 1984.

⁶⁶Cap M7 Laws of the Federation of Nigeria 2004

⁶⁷A H Nora, 'Reconciliation Provisions under English and Malaysian Family Law; A Comparative Overview' (2008) *The Law Review*, 104, 110-111

⁶⁸*Chambers English Dictionary* 7th Edn (Edinburgh W&R Chambers, Limited, 1990) pg961

⁶⁹Quran 4:128

Mediation: Mediation is a non-adjudicative method of binding dispute resolution involving a neutral third party to help the disputing parties to reach mutually agreeable solution. In Nigeria, mediation is not recognized as an alternative to litigation in matrimonial disputes. However, in the United States of America, matrimonial disputes like divorce are referred to mediation based on the parties' written agreement. Some of the features of mediation as a scheme for resolving family disputes are; It also allows couples to avoid the risks of trial, protects confidentiality, and decreases stressful conflict.

Arbitration: Arbitration is a mini trial where two parties refer their dispute to a third party known as an arbitrator. John Paris in his words referred to arbitration as the submission of dispute between two or more parties for decision by a third party of their choice⁷⁰. The importance of adopting this mechanism for family dispute settlement is that it has a binding nature effect and enhances good relationship between conflicting parties. Therefore, the most powerful incentive for parties to choose arbitration for resolving family disputes is undoubtedly their desire to obtain a forum that is sensitive to the real needs of the parties. The decision reached by an arbitrator is known as an award. This award is final and binding. In Nigeria the Arbitration and Conciliation Act regulates arbitration only on issues relating to commercial disputes without any recognized pointer to matrimonial disputes.⁷¹ Many countries however have employed arbitration as a scheme in settling their family disputes. For instance, in India arbitration body was set up in place with solitary duty of resolving marital conflicts. Example of such body is the Delhi Court Arbitration Centre under the aegis of the Delhi High Court which was inaugurated by the Chief Justice of India in 2009. Also, in the United States of America, The Uniform Law Commission adopted the Uniform Family Law Arbitration Act in 2016. The aim of the Act is to adopt a uniformed arbitration law as a mechanism for family dispute resolution without resorting to court.

5. Benefits of Arbitrating Family Disputes in Nigeria

Party Autonomy: it is at the volition of the parties to decide to go into arbitration, appoint their arbitrators,⁷² decide the place of arbitration⁷³ and rules that will guide the proceedings. Thus, the machinery of arbitration is set in motion by the parties. However, where parties have failed to make these provisions in their agreement, the default provisions of the law's regulation arbitration will take its course.⁷⁴ Party autonomy in arbitration as against litigation because it encourages equal treatment of parties and paved way for the decisions to be easily accepted by the parties.⁷⁵

The Outcome of Arbitration is binding on the disputing parties: The decision of an arbitrator is known as arbitral award; an award has the same status save in some respects with a judgment of a court. This is why an arbitral award has been regarded as constituting *res judicata* as far parties to the arbitral process are concerned. One distinct feature of Arbitrator from other non adjudication schemes is that it's decision final and binding.

Quick Dispensation of Justice: Another important attribute of arbitration is that it encourages for quick dispensation of justice, these important attributes cannot be over emphasized because arbitrating family disputes will prevent the family from unnecessary court processes which parties find alienating, it also protects the best interest of a child and reduces tension occasioned by children who are victims of stress and tension by lack of uncertainty as to the outcome of family issue.

Arbitration Arises from Agreement of Parties: Before an arbitration process begins, both parties sign an arbitration agreement that set out the issues to be arbitrated and understand that the arbitrator's decision will be binding. This is consensual, by this, adopting Arbitration will help parties reach an agreement and settle their dispute themselves. It will also prevent violence, hostility, rancor and families from losing their relationship after settlement exercise might have been over.

⁷⁰J. Paris 'The Law and Practice of Arbitration' Georgia Godwin Ltd, Great Britain 1974 pg1.

⁷¹Cap. A18 LFN 2004

⁷²Section 7 of the Arbitration and Conciliation Act Cap A18 LFN 2004

⁷³Section 7 of the Arbitration and Conciliation Act Cap A18 LFN 2004

⁷⁴Section 7 and Arbitration and Conciliation Act Cap A18 LFN 2004

⁷⁵ B T Adesina <https://wwwfile:///C:/Users/BARRISTER/Documents/SSRN-id3055677.pdf> accessed 11th March 2020

Confidentiality and Privacy: Arbitration is usually a private and confidential process for the resolution of disputes. One major characteristic of applying this Act for family disputes still remains confidentiality and privacy. Due to the delicate nature of family disputes as a result of the emotions attached to it, it is advisable to provide similar act by adopting a uniform law for arbitrating family disputes in Nigeria .

6. Challenges of Arbitrating Family Disputes in Nigeria

There are some challenges inherent in arbitrating family disputes in Nigeria. Some of these challenges may have the tendency discouraging parties from choosing arbitration as a better mechanism for resolution of family disputes in Nigeria. Some of these challenges are:

Enforcement of Award: An award in arbitration simply means the decision of the arbitrator; it is at par with judgment of the court. Section 31 of the Arbitration and Conciliation Act provides that ‘an arbitral award shall be recognized as binding and shall be enforceable upon application in writing to the court’⁷⁶. In such a case, a party against whom the award was made may fail to co-operate and impinge the award on the ground of misconduct of the arbitrator or that the award is improperly procured. This is likely to lead to protracted litigation thereby rendering the choice of arbitration seemingly less effective.

Possibility of Bias and Personal Belief about a particular Subject Matter: selection of arbitrators is to be done by the parties thus there is a high tendency of the arbitrator being biased or easily influenced by personal orientation and belief about a particular subject matter. For an instance, a female arbitrator may tend to award custody of the child to a female party as a result of her belief that women will take proper care of children and may tend to ignore the attitude of the female party and just believe that women should have custody of children. In other to prevent bias and personal belief about a subject matter in arbitrating family dispute, it is the opinion of the writer that the appointment of arbitrators should base strictly on experience and expertise.

Multiplicity of Applicable Family Law: Family Laws in Nigeria are characterized by legal pluralism. This is caused by the political, social and cultural systems in the country constituted from a multiplicity of autonomous but independent group. The diversity of ethnic, religious and social cultural groups also contributed to this. This gave room for different Laws governing family law in Nigerian for instance; statutory law, Islamic and customary law. Thus the practicability of arbitrating family disputes in Nigeria may lead to chaos in terms of determination of the laws to apply.

Challenge in Enforcing an Arbitration Clause: Most times, family disputes such as matrimonial disputes between couples cannot just be resolved without involving family members especially their parents. Sensitive issues like adultery mostly involve not only couples but family members. This makes it difficult for agreement to arbitrate. The Act provides that there must be an arbitration agreement for a family dispute to be resolved by arbitration. Arbitrating family dispute in Nigeria may not work and would make arbitration of family disputes difficult in most cases.

Lack of Skill and Knowledge of Arbitrators in the Aspect of Family Dispute: The privilege of allowing a party to select an arbitrator will lead to the selection of arbitrators who are not skilled and knowledgeable. Most of the may arbitrators lack the philosophy of family dispute, this will lead to impeachment of a good arbitral award for flimsy reasons or give an unjust or erroneous decisions which will be binding on the parties without even the parties noticing the defect in the decision. This will give rise to resultant effect of delay, thus saving of time and money enjoyed by the use of arbitration will be lost.

7. Prospects of Arbitration

Notwithstanding the challenges facing arbitrating family disputes in Nigeria, the presence of prospects abound in the choice of arbitration has scored great popularity and eminence in resolution of family

⁷⁶ Cap A18 LFN 2004

disputes all over the globe. One of such prospects is the United States of America where Arbitration was adopted as a mechanism used in settling their family disputes. This mechanism has been drafted by the Uniform Law Commission Executive Committee and enacted as the ‘Uniform Family Law Arbitration Act’.⁷⁷ The objectives of the Act are; to ensure that family disputes are settled in a flexible manner by means of arbitration and to promote uniformity of laws in arbitrating family dispute as a subject matter among the States that enact it. Also, the Chartered Institute of Arbitrators (CIARB) created a non- profit organization called Institute of Family Law Arbitrators (IFLA). This organization has a scheme known as the IFLA Scheme which went viral five (5) years ago in March 2012. The IFLA has reportedly handled over fifty (50) family arbitrations as at the year 2016.⁷⁸ The establishment of the IFLA was preceded by the setting up of the Family Law Arbitration Group Scotland (FLAGS) to further arbitration under the Scottish Arbitration Act 2010; In recent years institutions conducting or regulating family arbitration have also emerged in Germany, Spain, Australia, and Canada. The establishments of all these organizations in different countries have helped the development of family arbitration in these countries and also goes further to prove that was an arbitration is a scheme available for easy access and fair financial terms for dispute resolution.

In Nigeria, arbitrating family disputes had always existed as heads of families always hear complaints from younger couples and from his kindred and upon hearing complaints would give awards which are diligently obeyed⁷⁹ however, it lacks statutory backing. Thus it is worth stating that arbitrating family dispute will help to prevent violence, hostility, rancor and families from losing their relationship after settlement exercise might have been over. It will also help in resolution of disputes quickly and limit the possibility of technical justice

8. Conclusion and Recommendations

The dispensation of justice in Nigeria today is plagued with delay such that the various courts are inundated with cases which last for several years before they can be determined by courts. Long adjournments, cumbersome and rigorous procedure, difficult and ambiguous rules of evidence and other several artificial obstacles are largely responsible for the delay of family disputes in court. This has therefore caused families in dispute a lot of havoc, hatred, despises, shame and eternal separation making the children from such circumstance an object of hopelessness with every negative infusion. These shortcomings have led to adoption of arbitration for family dispute resolution by many countries because it makes resolution of disputes quick and remove the possibility of technical justice. Therefore there is a need to employ arbitration for settlement of family dispute. The following recommendations are made for effective implementation of arbitrating family disputes in Nigeria: Awareness of Family Law Arbitration should be created in Nigeria. This awareness can be created through experts organizing seminars from time to time for judges and legal practitioners, this will help in improving their knowledge on the benefit of the Act and also aid in perfecting their skills by bringing about a more skilled output in their practices as family law experts. The Nigerian Legislators are advised to sanction or endeavor to incorporate the use of arbitration in our Matrimonial Causes Act. They are to make laws stipulating and guiding the resolution process but such laws are not meant to affect the flexibility of the process but to curtail the excesses of arbitration neutrals. Arbitration awards are to be given the force of law making it enforceable just like court judgments. Eradication of Delay in Family Matters in Nigerian Courts: one of the disadvantages of using traditional system of the court in settling family dispute is that it lacks the means for quick dispensation of justice. However, Arbitration gives room for peaceful settlement without causing so much damage to the family but will harmonize the family. Eradication of delay could be solved by the legislative body enacting a law for arbitrating family dispute in Nigeria with a time frame stipulated for the disposal of application instituted by the parties particularly as to the enforcement of arbitration awards.

⁷⁷The Uniform Family Law Arbitration Act 2016

⁷⁸ Wendy Kenett, ‘Its Arbitration, but not as we Know it: Reflection on Family Law Dispute Resolution (2016) <https://doi.org/10.1093/lawfam/ebv017> accessed 12th March 2021

⁷⁹S Gadzama, ‘Development and practice of ADR and Arbitration in Nigeria’ (2013) 1 some conference papers>> accessed on 22nd July 2020.