

MARITAL PROPERTY UNDER CUSTOMARY LAW IN NIGERIA: A CRITICAL APPRAISAL OF ROBBING THE NIGERIAN WOMAN OF HER RIGHT

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ABSTRACT

This paper offers a concise examination of the different forms of marriages in Nigeria, the concept of marital property and the incidence of robbing the married woman of her rights. It further x-rays the depravity suffered mostly by the wife of a marriage particularly customary marriage. Additionally, it scrutinizes the purport of a man solely laying claims to a marital property, with such property having being registered and/or conveyed in his name alone. The information obtained was subjected to a contextual analysis. It throws light on the diverse forms of marital property and names culture as the major bane of a seamless marital property acquisition system in Nigeria. This paper suggests ways to circumvent the incidences of robbing a spouse of her right to a marital property which includes amongst others having a well-drafted pre-nuptial agreement, operating a joint bank account and keeping an updated and unbroken track record of all monies expended in the acquisition together with improvements on a marital property. It finally concludes by recognizing that the challenges of law in developing an appropriate paradigm on marital property system or assimilating global standards directly into the domestic legal framework and judicial jurisprudence in Nigeria is that these issues strike at the heart of patriarchy across cultures and recommends that the symbiotic relationship between the husband and the wife of a marriage which depicts the changing realities of global best practices should be the appropriate index for the establishment of a balanced marital property system in Nigeria.

Keywords: Marriage, Marital property, Gender imbalance, Justice, Nigeria.

INTRODUCTION

Marriage is simply the conjugal relationship between a husband and his wife or wives for life to the exclusion of all others. The conjugal union creates privileges and commitments between them. In Nigeria, regardless of the various forms of marital rites conducted, the consistent features of everyone engaging in a nuptial is the procurement of the proof of such marriage and the fulfilment of its prerequisite. Statutory marriages, traditional marriages and devout marriages (mostly called religious marriages) are the three basic types of marriages in Nigeria.

The basic laws regulating marriages in Nigeriaⁱ. The **Marriage Act** as a federal law regulates the contract, celebration of statutory marriages in **Nigeria** and spells out the fundamentals for a valid marriage; the **Matrimonial Causes Act** regulates and considers matters arising from statutory marriages in **Nigeria**, including divorce, separation, custody, and maintenance; while the Matrimonial Causes Rules spells out the procedural steps to determining a marriage including divorce, separation, custody and maintenance. More so, the relevant customs and traditions of the contracting parties regulates customary marital rites in Nigeria. What happens when a man lays a sole claim to a marital property registered in his own name, but acquired and developed with the efforts and contributions of both spouses particularly when one of the spouses cannot and/or does not have a record of his/her contribution? The above question inspires this dispassionate research on this paper.

A CONCISE DISTINCTION BETWEEN THE VARIOUS FORMS OF MARRIAGES IN NIGERIA

Marriage under the Act

A marriage under the Act is basically a voluntary union of one male and one female to be married in line with statutory prescriptions. In a more simpler term, a marriage under the Act is a monogamous marriage. Examples include marriages done at the court registry and marriages conducted in a church by an episcopally ordained priest

The Supreme Court of Nigeriaⁱⁱ defined statutory marriage as the legal union of a couple as spouses. In other words, it is *"the voluntary union for life of one man and one woman to the exclusion of all others."*

In Nigeria, for a marriage under the Act to be valid, such a marriage:

1. must be contracted by persons of marriageable age;
2. must be steered by, or before a person authorised to register marriages in the district;
3. must be recorded in the marriage index and endorsed and/or signed by each spouse and two witnesses (as well as the Registrar);
4. You must give the required notice before the ceremony.

However, before issuing the Registrar's Certificate, the Registrar must satisfy himself of the followingⁱⁱⁱ:

1. That at least one of the parties has lived within the region in which the marriage is intended to be celebrated at least fifteen days preceding the granting of the certificate;
2. That each of the parties to the intended marriage (not being a widower or widow) is twenty-one years old, or that if he or she is under that age, the requisite consent has been obtained in writing and is annexed to such affidavit;
3. That there is no impediment of kindred or affinity or any other lawful hindrance to the marriage;
4. That neither of the parties to the intended statutory marriage is married by customary law to any person other than the person with whom such marriage is proposed to be contracted.

Thus, in order to prove the existence of a marriage under the Act, the petitioner must place before the court the evidence of the nuptial as stipulated by section 32 of the Act which provides that:

"Every certificate of marriage which shall have been filed in the office of the registrar of any district, or a copy thereof, purporting to be signed and certified as a true copy by the registrar of such district for the time being, and every entry in a marriage registrar book, or copy thereof certified as aforesaid, shall be admissible as evidence of the marriage to which it relates, in any Court of justice or before any person having by law or consent of parties authority to hear, receive, and examine evidence."

Thus, it is clear from the wordings of section 32 of the Marriage Act that marriage under the Act can be proved by:

- (1) A certificate of marriage filed in the office of the Registrar of the district or;
- (2) A copy of the certificate signed and certified as a true copy of the certificate by the Registrar.
- (3) An entry in the marriage register book or copy thereof certified as a true copy^{iv}.

However, the Minister may, if he shall think fit, dispense with the giving of notice upon proof being provided to him by an affidavit that there is no legal impediment to the proposed marriage and that all necessary consent, if any, has been obtained for such marriage, as well as with the issuance of the certificate of the Registrar, and may grant his license, which shall be in accordance with Form D in the First Schedule, authorizing the celebration of a marriage between the parties named in such license by a Registrar, or by a recognized Minister of some religious denomination or body^v.

Customary Marriage

Customary marriage is a nuptial union between a man and a woman or women conducted in accordance with the marital rites of the couple's families. It is the identification of the traditions of a couples' culture and this act is carried out by the couple and their families.

Traditional nuptial carries with it very deep connotations. It transcends merely journeying to your spouse's town to get wedded. This accounts for the very many proprieties and traditional rites that accompanies it. It involves a dowry imbursement of the bride by the groom, a family introduction and an endorsement of the marriage among many others.

Marriage symbolises an agreement between the families lending their support and approval to the nuptial of their children. Customary marriage is primarily intended to create a bond between the couple's families. Hence in Africa, it is believed that marriage is a contract with unseen covenants that binds the families. It is a merger of cultures, especially marriages between persons from different cultures and regions.

In explaining how to prove traditional marriages and the effect of a failure to prove same, Amiru Sanusi, (JCA) in *Anionwu & Anor v. Anionwu & Anor*^{vi} had the following to say:

“... Numerous decided authorities of this and the apex Courts abound on how customary marriage could be proved. Notable among these cases is the case of *Agbeja vs. Agbeja* (1985) 3 NWLR (Pt. 11) 19 where it was held that in proof of customary marriage the evidence of the Head of the family is desirable to prove

receipt of dowry but that an eye witness account of the transaction is essential. It was further held that before there can be a valid customary marriage dowry must be paid to the bride's family. In the instant case no such evidence was led, hence a vital and essential ingredient of customary marriage was not proved by the cross-appellants as none of their defence witnesses gave evidence on such vital element which is a pre-requisite in a valid customary marriage. It is worthy of note, that the 2nd defendant/cross-appellant who claimed to be the wife of L.O.V. Anionwu by virtue of their customary marriage in 1974 though she was present in Court throughout the period the defence opened its case as shown in the record, did not deem it proper to testify. To me, she should be the best and most important witness to testify on when, how and where the marriage (if any) took place and on the amount paid to her or her family as dowry. This, unfortunately she did not do. The evidence led through DWs 1 and 2 also fell short of proof of a bride price paid to the head of the 2nd defendants' /cross-appellant's family or to herself which the law says is the first step of a valid customary marriage. See *Nsirim vs. Nsirim* (supra). The learned trial judge is therefore correct in his finding that the cross-appellant did not prove the 1974 customary marriage.”

From the above, to prove customary matrimony, the following must be done:

- a) The payment of dowry to the bride’s parents and the receipt of same and the reality of the marriage must be proved with an eye witness account of the transaction;
- b) The proof of cohabitation between the spouses in the instance of a traditional marriage under a custom and tradition.

In *Osamwonyi v. Osamwonyi*^{vii} the Apex Court per Atanda Fatai-Williams, (JSC) stated that every customary marriage must be followed by cohabitation as there can be no customary marriage without the parties living together. The cohabitation must commence from the beginning of the conjugal union, after the parties shall have cohabited, the wife may obtain leave to visit her parents for a short period.

The central attributes of a customary marriage include:

- i. Parental consent, consent of the intending couple and age;
- ii. Bride price or perhaps dowry;

- iii. Prohibited degrees of consanguinity and;
- iv. The capacity and ability to marry under customary law.

Moslem marriage just like customary marriage, is polygamous as if the male wants, he can marry up to four wives. It shares most of the features of customary marriages already stated.

The basic prerequisites of a binding Moslem law marriage are: consent of the parties, parental consent and payment of the saduquat (i.e. bride price or perhaps dowry solemnization).

Marriage can also be conducted in a church presided over by an episcopally ordained man of God. Such a marriage, simply transmutes as a mere customary marriage or as a marriage contracted under the doctrines of the contracting place of worship. It cannot be construed as a marriage under the Marriage Act. This is the position which is affirmed by the Court of Appeal in *Agbakoba v. A-G, Federation & Anor*^{viii} when it held that:

“The depositions of the Appellant reveal that he is a devout Christian of the Catholic denomination. Also revealed is the fact that, he and his wife decided to cement their union in the Catholic Church, and under the Marriage Act. If they decided to simply opt for a marriage in the Catholic Church, with divine blessings pronounced on them that would suffice as a marriage under the Catholic Church. They would be recognised as a married couple within the tenets of the Catholic Church, and all benefits accruing, as well as any rules governing such marriages, shall bind them. I do not see any provisions in the Marriage Act that pronounces a marriage contracted in accordance with the Catholic Church marriage rites as invalid. The Marriage Act has no connection with the Catholic Church marriage rites. These marriages are on two parallel lines. Thus, while such marriage celebrated within the Catholic Church, without compliance with the Marriage Act, may be recognized as a valid marriage within the Catholic Church, it will not be recognized as a statutory marriage. See *Nwangwu v Ubani* (supra); *Anyaegbunam v Anyaegbunam* (supra). The depositions of the Appellant demonstrate that he and his wife took the decision to wed under the Act but in a Catholic Church, duly licensed under the Act. That way, they received both divine blessings pronounced

upon their union and a statutory marriage in one fell swoop. I see no compulsion revealed here. As a result of this decision to wed under the Act and under the umbrella of the Catholic faith, matters of divorce, which I must add, the Appellant did not state he was contemplating, would be governed by the Act.’^{xix}

Thus, a customary marriage is not, on its own, invalid. It is accepted as a marriage, within the creeds of that particular faith, tradition and/or custom. However, it will not be recognized as a marriage under the Act. It is the couple that takes the decision of how they wish to be joined. There was therefore, no state intervention in the decision of the Appellant and his wife to take the steps that they did to cement their union.^x

DEFINITION OF MARITAL PROPERTY

The Black’s Law Dictionary^{xi} defines marital property as the property that is accumulated by the spouses during the marriage, also referred to as community property in some states. The law governs what is to be comprised in a marital property as well as an inheritance by a spouse. It could also include the property acquired during the marriage including gifts or inherited property given to one of the spouses.^{xii}

Marital property is described as any property that does not fall under the definition of separate property (*quod aliqua proprietas non cadit in definitione rerum separatarum*) and it is a property that is acquired by the parties in the course of their marital union, regardless of who actually owns the property.

Thus, real estate, bank books and retirement pensions are marital properties and they are of course subject to equitable distribution.

Thus, under regulatory reforms worldwide, in both common law countries and other countries, a number of approaches has being implemented with regards to marital property. The norm is to implement either a property separation scheme (property acquired by either spouse is still owned by the spouse) or a community property system (all property acquired during the marriage - except gifts - are equally owned by both spouses regardless of title or contribution).

Under the Marriage Act, married women have their property rights protected by the Act, thereby making them entitled to a share in the marital property, including their husband's properties and such properties are jointly owned and acquired property, while women married under customary law have little or no rights over their spouse's properties.

NATURE AND COMPOSITION OF MARITAL PROPERTY SYSTEM

A nuptial property system is a legal system regulating the marital property relationship existing between spouses. Its contents include the establishment, alteration and termination of all kinds of marital property systems, the ownership, management, usage, profiting from and disposal of prenuptial and postnuptial properties, the bearing of family expenses, the discharge of family debts, as well as reckoning or distribution of marital properties upon the dissolution of the marriage.^{xiii}

There are four common types of marital property systems. They include:

Separation of property

A legal system whereby all properties acquired by the spouses before they marry, together with all properties acquired during the marriage, remains the separate properties of the persons who bought them.

Partial community of property

Where properties acquired prior to the marriage are the separate properties of the purchaser and then properties and incomes gotten after the marriage are regarded as joint properties of the couple.

Full community of property

A system whereby all properties and incomes acquired by a party prior to the marital union, as well as those acquired during the marital union, automatically becomes the joint properties of the couple.

Deferred full or partial community of property

This system applies as at the time of the dissolution of the marriage. Prior to this time, separation of properties applies.

THE LEGAL IMPLICATIONS OF THE VARIOUS MARITAL PROPERTY SYSTEMS

Every marital or matrimonial property system has its consequences for property rights and the administration of property during and after marriage. In countries with partial community of property, there is the presumption of a joint ownership of properties. Societies with full community of properties operate a legal presupposition of joint ownership of properties during marriage and in practice, joint titling of immovable properties.

In Nigeria, the legal system regulating marital property rights flows from customary laws, domestic legislations and international human right laws. There is also a consistency and agreement on the rights of spouses that in the marriage, no marital property shall be jointly owned, and any entitlement to any such right must be firmly proven.^{xiv} Going by the joint construction of the stipulations as contained in the Matrimonial Causes Act 2004,^{xv} the Married Women Property Act 1882^{xvi} (MWPA), the Married Women Property Laws of the states in the Western part of Nigeria^{xvii} and other laws, the courts are enjoined, in relation to marriages contracted under the Act, to exercise discretion in the settlement of property disputes. Thus, section 17 of the MWPA is to the effect that in any question relating to the husband and wife as to title or possession of property, either party may apply to the court and the court may make such order with respect to such property in dispute as it thinks fit. The exercise of this judicial discretion has often been used to validate entrenched cultural and gender unresponsive strict property laws.

In its strict sense, matrimonial property system does not exist in Nigeria. Parties can jointly own properties or determine in pre- or post-nuptial agreement how properties acquired in the marriage should be shared. Such an agreement is enforceable at the pleasure of the court depending on what is fair and just in the peculiar circumstances presented before the court for adjudication.

The courts have however steadily exercised judicial discretion to endorse separate property rights with stringent property law principles.^{xviii} Therefore, irrespective of what form of marriage there is, the default marital property system in Nigeria is a separate property system, regulated by stringent property law principles.^{xix}

Nigeria treats properties owned by spouses individually as separate and this therefore could be taken as a separate property system. However, in divorce cases, it could be ordered that the settlement of properties be for the interest of the other party or offspring of the marriage.

Thus, in so doing, the other spouse must be able to show that they have contributed to the purchase of the property in order to be entitled to any interest from it. The court can disregard it in part or wholly in the interest of what is fair and just where the parties have agreed on the property system in a pre- or post-nuptial agreement. The person whose name appears on the title document is regarded as the owner.

Thus, by implication, a couple is not treated as joint owners of a marital property such that there can be an equal division of properties upon a dissolution of marriage.^{xx} This legalistic property law standpoint does not properly conceptualize the property interests of the parties as it also creates discrepancies between the expectations of women and men alike.^{xxi}

NIGERIA AS A PATRILOCAL SOCIETY AND ITS EFFECT ON MARITAL PROPERTY

Most societies in Nigeria are patrilocal which term itself suggests a male-dominated society, where males are the ultimate power figures and holds principal and supreme power. Literally translated, patriarchy means ‘the rule of the father’. In a male-controlled family, it is the father who controls every economic, social and ethical choices concerning everyone else in the family. This term which is fully entrenched in the various customs and traditions in Nigeria has successfully gained entrance into the marital property system in Nigeria.

However, Nigeria’s commitment to human right standards has aligned towards global norms. In her commitment to several human rights treaties, Nigeria has accepted, at least in principle, that there is equal access and rights attached to marital property during marriage and at its dissolution.^{xxii} Thus, Nigeria must develop its needed reform not merely from legislative plagiarism but from informed imperative. In fact it might be found that there is really no need for a change from the separate property regime as it stands today. This would then be gender justice. This paper suggests an imperative for socio-legal family market research in order to capture the reasonable expectations of the couple towards gender justice.

GENDER IMBALANCE AND THE NEED FOR JUSTICE

Weitzman's study of America^{xxiii} discovered that men gained a 42% improvement, while women suffered a 73% decline. Bergman's research discovered that women do an average of 28.1 hours unpaid work per week in the home and men 9.2 hours per week.^{xxiv} In England, 40% of divorced women of over 65 years of age were so poor that they qualified for income support from the state in 2003 compared with the 1% of married women and 23% of divorced men in the same group.^{xxv} According to the United Nations, women perform 66% of global work, they produce 50% of the food, but earn meagre 10% of the income and own 1% of the property.^{xxvi} Marital failures therefore, seems disproportionately adverse to women's economic interest and social status and with such staggering statistical differences in developed societies like the United States of America and England, the need for empirical socio-legal analysis in Nigeria towards finding appropriate legal framework for the redistribution of marital property rights is critical. This is because marital issues, not usually canvassed in development planning has its own economic implications on women and development generally. This is because an undefined marital property rights results in gender imbalance and injustice. The problem is that human rights standards and social norms appears to be at a crossroad.

Thus, in the words of Nwogugu:

In Nigeria the realities of family property have changed substantially while the applicable law has remained the same. In the traditional Nigerian society, the husband was the breadwinner and provided not only the matrimonial home but also the resources for the upkeep of the family. The wife was in the main, the home keeper. With social changes the position has changed, particularly for the growing middle class. Wives not only keep the home but are, in many cases, employed, thereby making substantial contributions to the family income including the construction and maintenance of the matrimonial home, which is exclusively in the man's name. On the dissolution of the marriage the wife is jettisoned from the home and denied any interest therein.^{xxvii}

Thus, the myriad of problems women do encounter ascend from their snare within a socio-cultural and economic setting which makes them susceptible to exploitations and misuse which are neither solely political nor exclusively caused by states.^{xxviii} Nigeria's gender neutral and

socially unresponsive marital property system contributes to women's economic relegation and impairment. An empowerment is an added pep in a person's proclivity to make strategic life decisions in a situation where he was before being denied of his ability.^{xxix} Women's economic empowerment cannot happen without addressing both the 'money economy' as it were, and the 'care economy'. The recognition of women's unpaid work to sustain households and communities is an integral part of women's economic empowerment. This paper therefore argues that economic empowerment must include influencing decision making which understands domestic work as 'productive work' and thus gives room for a proper evaluation of such domestic work and then in addition giving a voice to all to determine their reasonable expectations in family life which is pertinent to a socially responsive marital property system. The question then is, what are the challenges towards achieving this necessary inclusiveness?

CULTURE AS THE MAJOR BANE OF A SEAMLESS MARITAL PROPERTY SYSTEM IN NIGERIA

Culture is identified as the chief impediment to a seamless marital property regime in Nigeria. Accordingly, this paper seeks to probe culture, as a key determinant of societal values and norms. When issues of law interrogating certain inequities in the family setting are raised, one typical response in a Nigerian/African society is that of cultural constraint or limitation. On this premise, it is thought that culture is autonomous, invariable and constant.^{xxx} Culture is an integral part of every society as it shapes "the way things are done" and it enhances our understanding of why things should be so.^{xxxi} Culture is a whole formation comprising of complex, distinctive spiritual, material, intellectual and emotional features that characterizes a society or a social group of people. It includes but not limited to the "modes of life, the fundamental rights of the human being, value systems, traditions and beliefs."^{xxxii} When it becomes customary law, then it is said to be a mirror of acceptable usage. Cultural value systems, traditions and beliefs dictates the property rights of both sexes with attendant implications on the marital property system. Men and women alike are confined within cultural values that organises gender roles and/or identities. These *inter alia* define how people relate in marriage. Cultural meanings given to male and female identities dictates what property or social rights can be exhibited in family structures. If the union disintegrates 'money economy'

then takes precedence over 'care economy'. Thus, this does not recognise gender role delineation neither does it protect individual interests in most cases.

Thus, people are expected to behave in certain distinctive ways by way of culture and religion. Women are perceived as mere reproductive and nurturing beings and in some cultures as part of a man's hereditaments, whereas the male folks are perceived as productive beings. Nevertheless, as life evolves so also do events and occurrences in the modern world. Today, we now see situations where a wife earns far more than her spouse or the wife alone works to fend for the home and also situations, where the husband works with the wife in fending for the home. All these have slightly altered the age-long perception and have subtly defined and influenced the marital property system in most cultures. The patrilocal culture cuts across Nigerian societies generally and this remains the crux resulting in the inability of our society to develop a workable and viable legal framework to regulate marital property system in Nigeria so as to align with global best practices. The recognition and adoption of the change of jurisprudence to property rights of parties is now key to developing a viable legal framework for marital property system in Nigeria. A recognised patriarchal rule recognises the variances of the parties and their choices even though legal jurisprudence identifies the mutable standards. A formidable step of jurisprudence for change is the synergetic bond methodology identified below:

Men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early mobile years in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather its nest precisely because he is not required to spend most of his time in sitting on it. In such a state of affairs a system of separation of goods between married people is singularly adapted to injustice. Community of goods or at the least in the acquisitions and accumulations is far more appropriate. And as one leaves the sphere of those who enjoy investment property to those whose property largely consist of the home and its contents, a regime of separation is utterly remote from social needs.^{xxxiii}

This very trite statement above by the learned author aptly describes the flinching, changing and mutable certainties of our time which calls to question some of these cultural, patriarchal and important practices by Nigerian societies and with the opening up of the market economy, material and cultural lives has enhanced tremendously.^{xxxiv} Thus, the law must respond to this in an engaging manner^{xxxv}

THE IMPROPRIETY OF DEALING WITH MARITAL PROPERTY WITHOUT THE PRIOR CONSENT OF THE OTHER SPOUSE

The husband or wife cannot dispose of and/or alienate a marital property without the prior consent or concurrence of the other party under a statutory marriage. The husband and wife concurrently own the matrimonial property in the sense that their rights or estate in the property are unseverable without the endorsement of the other. This joint nature of the title manifests itself in two basic elements which are the four unities and the right of survivorship otherwise known as "*jus accrescendi*" in legal parlance. The four unities of time, title, interest and possession means that no party can point to any part of the property as his or hers. Each of them no doubt has the same identical interest in any part of the marital property and they both derive their title from one source by way of owning the marital property from the same point in time.

The above scenario entails what constitutes a joint ownership in a marital property system in ordinary parlance between a married couple, children of the same parents or members of the same family.

However, the "Unity of Marriage," which acknowledges the indestructibility or non-severability of the rights of survivorship, is the fifth unity and it differs from the other four unities in a number of ways. As earlier stated, the legal fiction that a husband and his wife are one and that neither party can by his or her solo act defeat the survivorship claim of the other spouse is further emboldened by the unity of marriage, particularly when the parties are legally and sacramentally married. Thus, by the concept of constructive trust, a purported alienation of a disputed marital property is null and void without the consent of the Respondent as a co-owner^{xxxvi}.

The Court of Appeal aptly captured the above scenario^{xxxvii} when it stated that in deciding whether a spouse can defeat the survivorship interest of the other spouse held as follows:

Now upon a careful consideration of the submissions of the learned Counsel for the respective parties and as I had earlier on observed on the concepts of constructive trust and tenancy by the entirety, I reiterate that just like the concept of co-ownership or joint ownership, the husband and wife concurrently own matrimonial property in the sense that their rights or estate in the property are un-severable without the consent of the other... Although I am unable to see my way through the efficacy of the learned Counsel for the Respondent's submission that Section 43 of the Constitution of the Federal Republic of Nigeria has over-ridden the concept of co-ownership of property, I am however in tandem with the learned Counsel that by the concept of constructive trust, the purported alienation of the property in dispute is null and void without the consent of the Respondent as co-owner.

There is a presumption that both parties jointly own a property at least, while the marriage subsists and that the party that survives the other automatically inherits such a property and has the power to administer it, the way he or she wants. This principle applies more often in statutory law marriages or monogamous marriages. Most incidents of joint ownership occurs where a husband and wife contribute to purchase and/or develop a property. Such a contribution may be financial or material, provided that it is substantial and ascertainable. The reverse is the case where no contribution is proved and unless the spouse or persons claiming contribution under a spouse is able to provide convincing proofs of a direct and substantial contribution to the purchase of the property, such a spouse cannot lay claim to joint ownership of the property. This is particularly so where the property in question was purchased in the individual name of the husband or wife. In some other cases, a husband may purchase a property in his spouse's name and vice versa. In such instances, the law would presume an intention to gift the said property. This is called presumption of advancement. Presumption of advancement can be rebutted by proving that no gift was intended and where there is proof of interest by one's mother in the property, then such can arise. The mere fact that one's mother was married to the father at the time the property was developed is inadequate to declare that that property belonged or devolves naturally on them without an extrinsic evidence to support such claim.

Be that as it may, persons who claim that such property is jointly owned between their mother and father have a duty to furnish the court with such evidence, either by means of a financial or material contribution by their mother and by that, the failure to establish same via an acceptable means of proving title to an interest on the property, then that particular paragraph of relief will fail in its entirety.^{xxxviii}

Therefore, a woman has the right of possession to her late husband's property and no member of her husband's family has the right to dispose her of it or otherwise, while she is still alive. This is further emphasized by the court, when it held that:

“The impropriety of such a custom which militates against women particularly, widows, who are denied their inheritance, deserves to be condemned as being repugnant to natural justice, equity and good conscience. As it holds for the widow, it also holds for the widower!”^{xxxix}

As the legal framework now stands, a spouse from a traditional marriage may be in great disadvantage and left without any remedy should the marriage breakdown, when the property (landed and other fixed assets including cash in bank) are all registered in the name of one of the spouse's. In that case, except that the other spouse can prove by verifiable evidence that he or she made substantial contributions to the acquisition, expansion and improvement on the subject matter in dispute, he or she would have no claim whatsoever and howsoever to the property. For instance, in a situation where the house that the couple reside in, the cars, shares *etcetera* are acquired and/or registered in the husband's name and the wife has no record whatsoever of her contribution towards the acquisition in a customary marriage, then she will not and cannot lay claim to any of the properties in the event that the marriage breaks up. Same principle also applies, where the cash inflow in the marriage is channeled to the husband's personal bank account. The husband can unilaterally deal with and decide whatever happens to those properties and may even alienate same to a third party without prior notice and consent of his wife. This happens where either the husband or the wife is educated, more educated and possibly more experienced than the other spouse or alternatively where the husband or the wife wields an unbearable influence on the other spouse.

HOW TO CIRCUMVENT THE INCIDENCES OF ROBBING A SPOUSE OF A RIGHT TO A MARITAL PROPERTY UNDER THE CURRENT SYSTEM

To circumvent the incidence of robbing a spouse of a right to a marital property, there is the need for the following:

A Well Drafted Pre-Nuptial Agreement

A pre-nuptial agreement is a legally binding contract between a couple just before they marry. In the pre-nuptial agreement, the couple addresses such issues as to marital properties. It is an agreement made by a couple just before they marry concerning possession and ownership of their respective properties should the marriage break down. **The intending couple enters into a pre-nuptial agreement just before going into marriage whereby, they firmly establish their respective rights to the properties of the marriage and sustenance of a party in the event that the marriage breaks down irretrievably or where death occurs.** This type of contract has long been used by parties who want to spell out the terms and conditions of any future divorce (if at all it occurs) just before they get married.

A pre-nuptial agreement, ante-nuptial agreement or pre-marital agreement is a written agreement made by a couple prior to a marriage or a civil union that allows them to choose and manage many of the legal rights that they will receive upon marriage as well as what will happen if the marriage ends in divorce or death. Such terms agreed upon provides certainty and clarifies the marital rights couples go into in a written pre-nuptial agreement so as to replace many of the default marital laws that would otherwise have applied in the event of divorce, such as the laws that governs the division of properties, retirement benefits, savings and the right to seek alimony. The waivers of a surviving spouse's right to obtain an elective share of the estate of a deceased spouse are sometimes included in pre-marital agreements.

The Act^{x1} provides that with regards to an application for the benefit of all or any of the parties to the marriage as well as the children of the marriage of the entirety or a portion of the property dealt with by ante-nuptial or post-nuptial agreements on the parties to the marriage, or either of them, the court may, in proceedings under this Act, make such order as the court considers just and equitable. Now, to avoid having to divide their property as a court could rule, a couple may decide that before getting married, there is the need on how to manage their properties

before and after the wedding ceremony and in such instances, the court will respect and uphold the terms of such party's agreement.

The agreements are often referred to as ante-nuptial, pre-nuptial or pre-marital agreements (agreements made by a couple to manage their affairs before marriage, during marriage and after marriage matters) or post-nuptial, post-marital agreements (agreements made by a couple to manage their after-marriage matters).

The ante-nuptial or post-nuptial agreements made by the parties to a marriage (a husband and his wife) concerning the marriage and whether they were made just before the marriage was contracted or thereafter, are taken into consideration by the court.^{xii} A pre-nuptial and post-nuptial agreement is a smart approach for a future bride to protect her rights to her properties and to have child custody, particularly in the event of a divorce. The pre-nuptial agreement stipulations do not have to be accepted by the court; but rather, the court is allowed to do so when deciding how to handle problems that may arise during the marriage. Thus, by this agreement, the spouses are at par with what a partner owns and what they own as co-owners.

Pre-nuptial agreements are designed to prevent the other spouse from obtaining a sizeable percentage of the couple's properties including those properties acquired before the marriage and the income generated by those properties during the marriage in the painful event of a divorce. A pre-nuptial agreement also serves to deter people from choosing a spouse primarily on the basis of that person's wealth. The purposes of a pre-nuptial agreement are still valid today but rising rates of divorce has given these contracts new usages, such as:

- i. For the purposes of preventing one party from taking on or being held accountable for the debt of the other party.
- ii. To determine the distribution of a party's property after their demise.
- iii. For the purpose of outlining each party's marital financial rights.
- iv. To prevent disagreements or protracted legal challenges after divorce.
- v. To guarantee that family properties remain within the family.

However, a pre-nuptial agreement cannot handle certain challenges and they often differ depending on the wishes of the parties. More frequently, any asset or property jointly obtained is regarded as marital property and they are not covered by a pre-nuptial agreement. In addition,

state laws may have an impact on the specific matters that a pre-nuptial agreement may cover.

Common pre-nuptial terms may include:

- i. Money from unrelated businesses for one or both parties.
- ii. The control of joint and individual credit accounts or bank accounts.
- iii. Retirement benefits.
- iv. The distribution of real and personal properties after the demise of a spouse including life insurance.
- v. The cost of a spouse's secondary education.
- vi. The control of household expenses.
- vii. Filing status, income, deductions and claims on tax filings.
- viii. How to pay taxes owed and how to distribute tax returns among themselves as a couple.
- ix. Investments into specific projects or properties.
- x. How alimony will be calculated in the event of a divorce.

Certain ideas that will not and cannot be comprised in a pre-nuptial agreement include:

- a. The information on any illegal activity, as this could result in the termination of the entire agreement.
- b. Issues pertaining to child support or custody.
- c. Anything perceived as promoting divorce such as financial incentives for doing so.
- d. Rules or regulations specifying personal matters of behaviour or personal relationships of a spouse.
- e. Any other non-financial issues.

CONCLUSION

I humbly agree with the learned author^{xlii} who asserted that in Nigeria the challenges of law in developing an appropriate legal rule on property systems or assimilating global best practices directly into our domestic legal framework and judicial jurisprudence is that these issues strike at the very heart of patriarchy which cuts across cultures and any attempt of law to enthrone a change of jurisprudence to the property rights of the parties, such will need an empirical integration. Therefore, in order to fashion out an adept legal framework for marital property system in Nigeria, the symbiotic relationship between a couple which depicts the changing

realities of global best practices that, men can only earn their incomes and accumulate capital by virtue of the sharing of responsibilities between themselves and their wives should be promptly considered by the court as to the roles of women in the acquisition, possession and ownership of marital properties before and during the marriage and as such it should be given the prominent attention that it deserves.

ENDNOTES

- ⁱ The Marriage Act, the Matrimonial Causes Act, Laws of the Federation of Nigeria (LFN), 2004 and the Matrimonial Causes Rules.
- ⁱⁱ *Amobi v. Nzegwu & Ors*, (2013) LPELR-21863 (SC) per Olukayode Ariwoola (JSC), *Hyde vs. Hyde and Woodmansee* (1866) LRP & D 130, per Lord Penzance.
- ⁱⁱⁱ Section 11(1) of the Marriage Act.
- ^{iv} *Obi & Ors v. Bosah & Ors* (2019) LPELR-47243(CA)
- ^v *Obiozor v. Nnamua* (2014) LPELR-23041(CA)
- ^{vi} (2009) LPELR-8754(CA) p. 60-62 Paras. C-A
- ^{vii} (1972) LPELR-2789 (SC) p. 9-9 Paras A-C
- ^{viii} (2021) LPELR-55906 (CA).
- ^{ix} Per Onyekachi Aja Otisi, (JCA), p. 47-48 paras. A-C.
- ^x *Agbakoba v. A-G, Federation & Anor* (2021) LPELR-55906 (CA), per Onyekachi Aja Otisi, (JCA) (p. 51-51 paras. A-C).
- ^{xi} (2013) LPELR-21863(SC) p. 61-61 paras. D-E.
- ^{xii} Lord Nicholls in *Miller v. Miller and Macfarlane v. Macfarlane* (2006) 2 FLC 213; (2006) UKHL 24, 20
- ^{xiii} C. Wei, "Recent Developments in the Marital Property System of the People's Republic of China" *International Survey of Family Law* (Jordan Publishing Ltd, Bristol, 2006) 145 at 148. C. Mc. Crudden, "Legal Research and Social Sciences." *Law Quarterly Review*, (2006), Vol. 122, 632 at 637 and 648.
- ^{xiv} *Adaku v. Edward Nwosu* [1992] 2. F.N.R. 78.
- ^{xv} Wherein section 72 of the Matrimonial Causes Act Cap. M7 LFN, 2004 aptly provides that in proceedings under the Act, the court may order either party to make for the benefit of all or any of the parties and children of the marriage such a settlement of property as the court considers just and equitable in the circumstances of the case.
- ^{xvi} A statute of general application applicable to some states of the federation which are yet to enact their own MWPL.
- ^{xvii} For example, the MWPL of Lagos State, Laws of Lagos State, 2003.
- ^{xviii} See *Nwanya v. Nwanya* (1987) 5 NWLR (pt. 241) 373; *Mohammed Idrisu v. Obafemi* (2007) 11 NWLR (pt. 884) 369; *Essien v. Essien* (2009) 9 NWLR (pt. 1146) 306; *Egunjobi v. Egunjobi* (1976) 2 FNR 78.
- ^{xix} By strict property law principles, the title to a property is placed on the legal owner as reflected in the title document.
- ^{xx} The literature on this is rich and extensive. See M. Ayua, , "Land and Property Rights of Women in Northern States of Nigeria" in *Women and Law in West Africa: Situational Analysis of Some Key Legal Issues Affecting Women* (A. Kuenyehia, ed. 1998) 237 and 239. O. Adekile, "Towards a Socio-Legal Approach to the Protection of Widows in Africa" *The Nigerian Journal of Public Law, University of Lagos, Vol. 2.* (2013) 4, 8 and 12, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3111325> accessed 1 February, 2023; E. Nwogugu, *What Next in Nigerian Family Law?* (NIALS, Lagos, 2006) 26.
- ^{xxi} Occasionally, resulting trust is used as the basis for the reallocation of property rights.

^{xxii} See section 12 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) and the treaties converging from it including Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Adopted by the 2nd Ordinary Session of the Assembly of the Union held in Maputo, Mozambique on 11 July, 2003); see Articles 1, 2, 5 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December, 1979 with its subsequent entry into force on 3 September, 1981 in accordance with Article 27(1) of the aforementioned Convention); see Articles 16 and 17 of the Universal Declaration of Human Rights (UDHR) as proclaimed by the United Nations General Assembly in Paris on the 10th day of December, 1948; see also Articles 2, 3 and 10 of the International Covenant on Economic, Social and Cultural Rights adopted on the 16th day of December, 1966 by the United Nations General Assembly Resolution 2200A (XXI) but came into force on the 3rd day of January, 1976 in accordance with Article 27 of the Covenant.

^{xxiii} L. Weitzman. *The Divorce Revolution*, (New York: The Free Press, 1985).

^{xxiv} B. Bergman, *The Economic Emergence of Women*, (New York: Basic Books, 1986).

^{xxv} J. Herrin, *Family Law* (England: Person Education Ltd; 2007). cf. Stationery Office (2000) *Social Inequalities* (London: The Stationery Office).

^{xxvi} The United Nations, *The Global Gender Gap Report 2016* <www.weforum.org> accessed 1 February, 2023.

^{xxvii} E. Nwogugu, note 20.

^{xxviii} E. Schneider, "The Violence of Privacy", 23 *Connecticut Law Review* (1992) 975 and C. Bunch, "Women's Rights as Human Rights: Towards a Revision of Human Rights," 12 *Human Rights Quarterly* (1990) 487.

^{xxix} N. Kabere, 'Resources, Agency, Achievements: Reflections on the Measurement of Women's Empowerment in *Discussing Women's Empowerment-Theory and Practice*, ed. A. Sisask, Sida Studies No. 3, Swedish International Development Agency, Stockholm 17-59.

^{xxx} O. Adekile, "Towards the Development of a Marital Property Regime for Nigeria: A Case for Socio-Legal Research for Gender Justice. Department of Private & Property Law, Faculty of Law, University of Lagos (2017) 1-18 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3111340> accessed 13 February, 2023.

^{xxxi} It is recognised that culture has many perspectives. it more than often represents intellectual and creative products including literature, music, drama and painting; culture is used to describe the beliefs and practices of another society, particularly where these are seen as closely linked with tradition or religion. However, the meaning of culture is inexhaustive.

^{xxxii} (Adopted at the World Conference on Cultural Policies, Mexico, 1982) and used in on-going discussions on culture and development.

^{xxxiii} E. Nwogugu, note 20.

^{xxxiv} C. Wei, note 13.

^{xxxv} O. Adekile, note 30.

^{xxxvi} *Rimmer v. Rimmer* (1952) All E.R. 863 per Lord Denning.

^{xxxvii} *Okere v. Akaluka* (2014) LPELR-24287 (CA) per Ignatius Igwe Agube, (JCA) (at 71-75 paras. G-D).

^{xxxviii} *Onyia & Anor v. Nwaigwe* (2021) LPELR-55692 (CA) per Ita George Mbaba, (JCA) (28-31 Paras. C-E).

^{xxxix} *Anekwe & Anor v. Nweke* (2014) LPELR - 22697 SC; *Nzekwu v. Nzekwu* (1989) 3 SCNJ 167.

^{xl} Section 72(2) of the Matrimonial Causes Act.

^{xli} *Oghoyone v. Oghoyone* (2010) 3 NWLR (Pt 1182).

^{xlii} See note 30 and 35.