

# CRITICAL ANALYSIS OF LAWS RELATING TO MAINTENANCE AND SETTLEMENT OF PROPERTY UPON BREAKDOWN OF MARRIAGE

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## ABSTRACT

*In traditional African society, divorce was seldom permitted but today, the rate of divorce is alarming. Many factors contribute to this<sup>1</sup>. The economic and financial benefits that come into existence upon marriage quite often suffer demise upon the breakdown of that marriage. In a purposeful and happy marriage, issues of maintenance and settlement of property rarely form subjects of discussion between the parties. However, upon breakdown of the marriage, each party<sup>2</sup> becomes anxious about his or her future and the future of the children of the marriage. In Nigeria, there are three main forms of marriage<sup>3</sup> and these are contracted under different systems of laws. Consequently, the rights, duties and privileges that flow from them differ considerably. The aim of this paper therefore is to critically examine the ability of the various laws to cope adequately with the very important issues of maintenance and settlement of property upon breakdown of marriage and make proposals and suggestions, where necessary, for a change or reform.*

Keywords: Marriage, Breakdown, Divorce, Dissolution, Alimony, Maintenance.

## Introduction

Marriage is a universal institution which is recognised and respected all over the world. As a social institution, marriage is founded on and governed by the social and religious norms of society. Consequently, the sanctity of marriage is a well-accepted principle in the world community<sup>4</sup>. Marriage is therefore the root of the family and society. Marriages in Nigeria take place under three recognised legal systems and these are Statutory, Customary, and Islamic laws. While statutory law marriages are monogamous in nature as defined by Lord Pense in *Hyde v Hyde*<sup>5</sup> as “the voluntary union for life of one man and one woman to the exclusion of all others”, Customary and Islamic law marriages are polygamous in nature<sup>6</sup>.

**Keywords:** Marriage, Breakdown, Divorce, Dissolution, Alimony, Maintenance,

## Sources of Laws

Nigeria operates a federal system of government. The laws governing statutory marriage are made by the National Assembly. Breakdown of Statutory marriage and other ancillary matters

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<sup>1</sup> The factors include adultery, financial insecurity, violence, childlessness, influence of in-laws etc.

<sup>2</sup> Particularly the wife.

<sup>3</sup> Statutory, Customary and Islamic.

<sup>4</sup> E. I. Nwogugu: Family Law in Nigeria by HEBN Studies in Nigerian Law, Third Edition, p. 4.

<sup>5</sup> (1866) L.R.I.P & D 130 at 133.

<sup>6</sup> These can be defined as the union for life of one man and one or several women.

thereto are under the Exclusive Legislative List of the 1999 Constitution of the Federal Republic of Nigeria<sup>7</sup>. This means that the laws governing matrimonial causes are made by the National Assembly. Therefore, Nigeria being a federation of thirty-six (36) States with a Federal Capital Territory, Abuja, none of the federating States<sup>8</sup> can legislate on dissolution of statutory marriage and incidental matters. The Houses of Assembly of the various States of the federation can therefore legislate on marriages contracted under Customary or Islamic laws. The Laws that govern the formation, dissolution of statutory marriage in Nigeria and matters incidental thereto include:

1. The Matrimonial Causes Act<sup>9</sup> (hereinafter referred to as ‘the MCA’ or ‘the Act’) which governs statutory marriage, its breakdown, and ancillary matters thereto.
2. The Marriage Act<sup>10</sup>
3. Matrimonial Causes Rules, 2003, made pursuant to the Matrimonial Act and guides the procedure for the institution of a matrimonial cause.
4. The Married Women’s Property Act, a statute of general application in Nigeria.
5. The Received English Law consisting of common law, doctrine of equity and statutes of general application which were in force on 1<sup>st</sup> January, 1900.

## **An Overview of The Types Of Marriages**

### ***Statutory Marriage***<sup>11</sup>

Where a man and a woman agree to contract a statutory marriage, all the laid down procedures contained in the Marriage Act<sup>12</sup> must be followed. Thereafter, the Registrar of Marriages will issue a Marriage Certificate known as “Registrar’s Certificate”<sup>13</sup>. The celebration of the marriage can take place either in the Marriage Registry<sup>14</sup> or in a Licensed Place of Worship<sup>15</sup>. Section 13 of the Marriage Act empowers the Minister of Internal Affairs to grant license<sup>16</sup> authorizing the celebration of a marriage between the parties named in the license by a Registrar or by a recognised Minister of religion, upon proof made to him by Affidavit that all conditions precedent have been fulfilled<sup>17</sup>. The Minister may delegate the powers bestowed on him by the Section to the Permanent Secretary, Federal Ministry of Internal Affairs<sup>18</sup>.

Marriage is designed to be a union for life but when it fails, and the parties find it difficult to live together, the result is either separation or divorce. It was held in *Harriman v Harriman*<sup>19</sup> that the

<sup>7</sup> See Second Schedule, Part 1, item 61 of the Exclusive Legislative List in the Constitution of the Federal Republic of Nigeria, 1999 (CFRN).

<sup>8</sup> and FCT, Abuja

<sup>9</sup> CAP M7, Laws of the Federation (LFN) 2010.

<sup>10</sup> CAP M6, LFN, 2010.

<sup>11</sup> This is also known as Marriage under the Act.

<sup>12</sup> See Sections 7, 8, 10 and 11 (1) Marriage Act, CAP M6, LFN, 2010

<sup>13</sup> See form C in the 1<sup>st</sup> schedule to the Marriage Act. This Certificate entitles the Parties to get married.

<sup>14</sup> Sections 27 and 28 supra.

<sup>15</sup> Sections 6, 21, 22, 24 and 25 supra.

<sup>16</sup> As in form D in the 1<sup>st</sup> schedule to the Marriage Act.

<sup>17</sup> The conditions include obtaining necessary consent, if any, that there are no lawful impediments to the marriage. The Minister may dispense with giving of notice and with the issue of Registrar’s certificate.

<sup>18</sup> Marriage Act, (Delegation of Powers) Notice (LN 44 of 1973).

<sup>19</sup> (1989) 5 NWLR (Pt. 119) 6 at 15 paragraph G-H.

only ground for dissolution of statutory marriage in Nigeria as provided in section 15(1) of the Matrimonial Causes Act<sup>20</sup> is that ‘the marriage has broken down irretrievably’, the subparagraphs of section 15(2) are only various species of the break-down, a Petitioner who satisfies the court on any one or more of those facts, would be entitled to a finding that the marriage has broken down irretrievably and consequently, be entitled to a decree dissolving same. The subsections do not constitute separate grounds based on which dissolution can be granted.

Though the Matrimonial Causes Act confers jurisdiction on the High Court of any State of the Federation and that of the Federal Capital Territory, Abuja, to hear and determine matrimonial proceedings instituted under the Act<sup>21</sup>, ancillary reliefs such as Maintenance can be enforced by a court of summary jurisdiction<sup>22</sup>. In *Omotunde v Omotunde*<sup>23</sup>, it was held that it is the domicile of a party to the matrimonial proceedings that confers jurisdiction on the High Court. Therefore, where the domicile of a Petitioner is not established, the court will lack jurisdiction to decree dissolution of the marriage<sup>24</sup>. The Matrimonial Causes Act provides that a person domiciled in any State of the Federation is domiciled in Nigeria and may institute proceedings under the Act in any State of the Federation<sup>25</sup>. By operation of law, a married woman on marriage takes on the domicile of her husband and consequently the court with jurisdiction to adjudicate on divorce and incidental matters is the court of the domicile of the husband<sup>26</sup>. However, the court has the power, based on the rule of *forum conveniens*<sup>27</sup> to transfer a case to any other State High Court, if it is in the interest of justice that that other State High Court should deal with the matter<sup>28</sup>.

Once a court, upon proper assumption of jurisdiction, makes an order of dissolution of the marriage, ancillary reliefs such as maintenance and settlement of property can be determined by the same High Court<sup>29</sup>.

### ***Customary Law Marriage***<sup>30</sup>

Nigeria is a multi-cultural society with three major ethnic groups<sup>31</sup> and hundreds of other ethnic groups. Each ethnic group has its own custom on marriage, dissolution of marriage, maintenance, and settlement of property on breakdown of marriages. Marriages contracted under these native laws and customs are as legal as those contracted under the Act. The Marriage Act and the Matrimonial Causes Act expressly recognise marriages contracted under or in accordance with any native law and custom<sup>32</sup>. Though each ethnic group has its own marriage

<sup>20</sup> Supra; hereinafter referred to as ‘the MCA’.

<sup>21</sup> Section 2(1)MCA

<sup>22</sup> Section 114(1) MCA defined court of summary jurisdiction as a Magistrate Court or District Court.

<sup>23</sup> (2001) 9 NWLR (Pt. 718) 252.

<sup>24</sup> See also *Osibamowo v Osibamowo* (1991) 3 NWLR (Pt. 177) 85; *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349.

<sup>25</sup> Section 2 (3) MCA.

<sup>26</sup> *Koku v Koku* (1999) 8 NWLR (Pt.616) 672; *Omotunde v Omotunde* supra. But see Section 7 (a) & (b) MCA on the domicile of a deserted wife.

<sup>27</sup> This is a Latin term which means convenient forum or venue.

<sup>28</sup> Section 9 MCA.

<sup>29</sup> Section 70 MCA.

<sup>30</sup> This is also known as Marriage under Native Law and Custom or Traditional Marriage and are largely polygamous. There is no limit to the number of wives a man can marry.

<sup>31</sup> Yoruba, Hausa and Igbo

<sup>32</sup> Sections 35, 46 & 47 of Marriage Act and section 69 of MCA.

customs, there are some generally accepted customs that are common to most ethnic groups, which make customary law marriage valid and these include capacity of the parties to marry, consent of the parties<sup>33</sup>, parental consent<sup>34</sup>, payment of bride price<sup>35</sup>, solemnization and handing over of the bride to the groom in the presence of the two families and witnesses and the acceptance and taking away of the bride to her husband's house<sup>36</sup> and consummation.

Traditionally, marriage is considered a lifelong relationship which is indissoluble. This accounts for the reason why disputes between couples are usually settled by the families. This in turn precludes divorce. But where after intervention by the families, divorce becomes inevitable, there are no grounds that can necessitate divorce. There are however, some factors that can lead to divorce. These include adultery<sup>37</sup>, impotency of the husband, sterility of the wife, ill-treatment and cruelty, domestic violence, desertion etc. A customary law marriage may be dissolved either judicially, that is, by an order of an appropriate court such as Customary Court or Magistrate Court or by non-judicial divorce, that is by mutual agreement of both parties before their families, where attempt at reconciliation fails or by unilateral action of one of the parties to the marriage to end the marriage<sup>38</sup>. Dissolution of a customary law marriage is achieved by the refund of bride price by the woman or her family to the husband's family<sup>39</sup>.

### ***Islamic Law Marriage***

An Islamic law marriage is the lawful union of a man and a woman based on mutual consent. It possesses almost the same features as a customary law marriage<sup>40</sup>. The requirements for a valid Islamic marriage include consent of the parties<sup>41</sup>, parental consent, payment of bride price<sup>42</sup> and solemnization<sup>43</sup>. According to Bani and Pate, before an Islamic law marriage can be considered legal, certain duties must be fulfilled by the husband and these include giving the wife her dower<sup>44</sup>. Mode of payment of the dower depends on the agreement between the parties<sup>45</sup>. Another important duty is that of maintenance of the wife. It is the duty of the husband to provide feeding, clothing, shelter, healthcare and other necessities for the wife<sup>46</sup>.

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<sup>33</sup> *Osamwonyi v Osamwonyi* (1972) 10 S.C 1.

<sup>34</sup> *Okpanum v Okpanum* (1972) 2 ECSLR 561

<sup>35</sup> Marriage rites are completed upon payment of bride price. See *Eze v Omeke* (1977) 1 ANSLR 136.

<sup>36</sup> *Omoga v Badejo* (1985) NCNLR 1075.

<sup>37</sup> Particularly of the wife

<sup>38</sup> E. I. Nwogugu supra pages 231-232.

<sup>39</sup> *Nwangwa v Ubani* (1997) 10 NWLR (Pt. 526 at 559).

<sup>40</sup> It is polygamous in nature. The man may take up to four wives.

<sup>41</sup> An exception to consent of parties is where the father has the right to conclude marriages on behalf of his infant sons and virgin daughters (Iljbar). The child has the option to repudiate the marriage upon attainment of puberty. A father loses his right of Iljbar where he allows his daughter to choose a husband from among her suitors.

<sup>42</sup> Saduquat or Dower. See the 1971 Borno Declaration of customary law marriage and also the Sokoto State Marriage Expenses (Regulation Law) 1981.

<sup>43</sup> The marriage must be solemnized by a Mallam in the presence of at least two upright Moslem witnesses.

<sup>44</sup> The dower may be money, jewelleries or other materials.

<sup>45</sup> May be paid in instalments or may be deferred. The duty of giving the wife her dower must not be jettisoned.

<sup>46</sup> Lawal Mohammed Bani and Hamza A. Pate: Role of Spouses under Islamic Law, published in International Affairs and Global Strategy, in www.iiste.org. Assessed on 11<sup>th</sup> November, 2016.

Again, Bani and Pate<sup>47</sup> are of the view that the basis of divorce under Islamic law is the inability of the spouses to live together rather than any specific cause (or guilt of a party) because of which the parties cannot live together. Ideally the purpose of marriage is to foster love, compassion etc but where these cannot be achieved, provisions are made for divorce by either of the parties to the marriage. Divorce signifies the separation or termination of the relationship. Divorce under Islamic law marriage in Nigeria may be by the act of either of the parties<sup>48</sup> or by decree of a Court. The husband pronounces the phrase 'I divorce you'<sup>49</sup> to his wife. A man may divorce his wife three times, taking her back after the first two. After the third *tallaq*, they cannot get back together until she marries someone else<sup>50</sup>.

Having successfully dissolved the marriage<sup>51</sup>, the question now is: what happens to the parties to the marriage and the children in terms of maintenance and settlement of property?

### **Maintenance as A Concept**

Maintenance can be described as financial support given by one person to another, usually paid because of a legal separation or divorce. Maintenance may end after a specified time or upon death, cohabitation, or remarriage of the receiving party<sup>52</sup>. It is a very problematic issue in divorce proceedings because most often, one of the first issues that parties to a divorce proceeding want advice on is the issue of maintenance. They find it a difficult concept to grasp in that the law can order them to financially maintain a former spouse.

There are many complexities involved in spousal maintenance, but its purpose is to meet the reasonable financial needs of the financially weaker party. The reality is that marriage can change the course of a person's life. Some people may give up a career to focus on bringing up the children, running the home or supporting an ambitious husband or wife. When the marriage ends, it is obvious that moving on, having given up their chances of a higher income is going to be extremely difficult without some sort of support or compensation<sup>53</sup>.

Basically, maintenance depends on the kind of marriage contracted by the parties. Maintenance under a statutory marriage must be in accordance with the provisions of the Matrimonial Causes Act. Sharia law governs Islamic law marriages. Maintenance of wife and children is mandatory. A husband is under obligation to maintain his wife and children despite the wife's financial status. In Customary law marriages, various customs impose a duty on the husband to maintain his wife and children, but such duty terminates upon breakdown of the marriage.

### **Alimony and Maintenance Distinguished**

Alimony means a court-ordered allowance that one spouse pays to the other spouse for maintenance and support while they are separated, while they are involved in a matrimonial

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<sup>47</sup> Dissolution of marriage (Divorce) under Islamic Law, published in journal of Law, Policy and Globalization-[www.iiste.org](http://www.iiste.org). Assessed on 11<sup>th</sup> November, 2016.

<sup>48</sup> The difference lies in the procedure.

<sup>49</sup> In Arabic '*tallaq*'.

<sup>50</sup> Lawal Mohammed Bani and Hamza A. Pate: Dissolution of Marriage (Divorce) Under Islamic Law, published in Journal of Law, Policy and Globalization supra

<sup>51</sup> Whether Statutory, Customary or Islamic law marriage.

<sup>52</sup> Black's Law Dictionary Ninth Edition, Bryan A. Garner, Editor-in-Chief.

<sup>53</sup> Spousal maintenance by Family Law Partners: [www.familylawpartners.co.uk](http://www.familylawpartners.co.uk). Assessed on 12<sup>th</sup> October, 2016.

lawsuit or after they are divorced<sup>54</sup>. The Matrimonial Causes Act has done away with the term ‘alimony’ and used the word ‘maintenance’ to describe payment of allowance to a spouse during or after a matrimonial proceeding<sup>55</sup>. Therefore, the appropriate term in the Nigerian legal context is ‘maintenance’.

### **Maintenance at Common Law**

At Common law, a husband is under a duty to maintain his wife and children. In *Baker v Sampson*<sup>56</sup>, it was held that the duty involved providing the wife with necessities such as food, clothing, medical expenses, and other basic needs, excluding luxury. This duty stems from the fact of co-habitation. According to *Bromley P.M*<sup>57</sup>, where co-habitation ceases<sup>58</sup> and the wife is not provided for and she does not have the means to take care of herself, she becomes her husband’s agent for purposes of obtaining necessities. It seems that a similar right now enjoys statutory force in Nigeria. Section 42(3) of the Matrimonial Causes Act provides that “where upon or in consequence of the making of a decree of judicial separation, a husband is ordered to pay maintenance to his wife, the maintenance is not duly paid, the husband shall be liable for necessities supplied for the wife’s use”. It seems that this right is limited to pledging his credit for goods and not for money. In *Albert Hutchinson v Madam Olajide*<sup>59</sup>, it was held that an action by a Money Lender for a deserted wife buying necessities is an action in subrogation to the right of the Supplier of goods. Therefore, he could only recover by proof of the purchase of specific necessities.

It appears that the main problem with this right is where the desertion and non-payment of maintenance is prolonged; the deserted wife may find it difficult to see a supplier of goods who will be willing to continue to give credit for her purchases. It will be a welcome development if Section 42(3) is given a more liberal interpretation to cover situations where a deserted wife is allowed to borrow the exact amount awarded for her maintenance.

### **Maintenance under the Matrimonial Causes Act (MCA)**

There is no doubt that the primary aim of most Petitioners in a divorce proceeding is to seek for an order of the court for the dissolution of the marriage. However, parties to a divorce proceeding also seek for an order of court for maintenance and other ancillary reliefs such as settlement and division of property<sup>60</sup>. It is quite common for courts to make orders for the maintenance of the spouse and children of the marriage as provided under the Matrimonial Causes Act<sup>61</sup>. This presupposes that the beneficiaries of the court’s orders for maintenance are the husband or wife and children<sup>62</sup> of the marriage. It therefore means that either party to the marriage can be ordered to pay maintenance to his/her spouse. In as much as this is considered as progressive indeed, this writer could not locate any case, in the course of this research where a

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<sup>54</sup> Black’s Law Dictionary supra.

<sup>55</sup> Section 70 MCA; *Olu-Ibukun v Olu-Ibukun* (1974) 2 S.C. 35.

<sup>56</sup> (1863) 14 CBNS 383.

<sup>57</sup> Family Law, 3<sup>rd</sup> Edition: London: Butterworth (1966) Page 157.

<sup>58</sup> Example is where the wife is deserted by her husband.

<sup>59</sup> 1970 N.N.L.R 31

<sup>60</sup> *Negbenebor v Negbenebor* (1971) NSCC 200; *Hayes v Hayes* (2000)3 NWLR (Pt. 648) 276.

<sup>61</sup> See Section 70 MCA

<sup>62</sup> See Section 69 MCA for the definition of who a child of the marriage is.

husband applied to court for a maintenance order against the wife. If this is the case, then it is submitted that the continued retention of the provision is of no benefit to the husband and should be amended accordingly.

The Act prescribes the award of maintenance by the court at two different stages in a matrimonial cause. It may be awarded during the pendency of a matrimonial proceeding or at the conclusion of proceedings<sup>63</sup>. The criteria for granting an order at either stage are the same. There is no automatic entitlement to spousal maintenance upon divorce. However, the Act gives the court the discretion to consider whether the needs of an Applicant require maintenance to be paid

to meet those needs and in so doing, the court is to have regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances<sup>64</sup>. If the spouse claiming maintenance has sufficient means and income to maintain him or herself, the Court will not grant the application. In *Mueller v Mueller*<sup>65</sup>, the Court of Appeal upheld the trial court's refusal to award N500, 000 to the wife on the ground that she admitted making up to N20, 000 per day from family business. The grant of a decree of divorce against a spouse is not a bar to that spouse being maintained<sup>66</sup>. But a spouse's serious misconduct may, however, deprive him or her of the right to be maintained<sup>67</sup>.

A careful and comprehensive reading of Sections 70(1),(2),(3) and 114(1) (c) of the MCA respectively will reveal that the Act contemplates that for a court to make orders as to maintenance there must be a subsisting matrimonial proceeding<sup>68</sup>. The cumulative effect of the above provisions is that an action for maintenance can only be commenced or instituted under the Act if it is ancillary or incidental to a pending or concluded main relief. As observed by Honourable Justice Dalhatu Adamu JCA (as he then was) in *Patrick Ugba v Veronica Ugba*<sup>69</sup> "it seems that the reason for this restriction is because of the need to preserve the sanctity of the marriage institution and to avoid its possible breakdown or cause any disaffection between or amongst the members of the family during the subsistence of the marriage. The ancillary relief cannot be brought independently when the marriage is still subsisting between the spouses". However, it is hereby suggested that the sections be given a liberal interpretation by the courts to include a situation where an application for maintenance can be made independent of any of the decrees mentioned in the Act, particularly where the applicant does not want to be divorced or separated from his/her spouse.

### **Judicial attitude to claim for maintenance**

Previously, Nigerian courts were not comfortable with the application of the concept of maintenance in Nigeria<sup>70</sup>. The idea of maintenance of a wife was seen as a direct conflict with our social and cultural background. To this extent, Nigerian Judges were not comfortable with

<sup>63</sup> Section 70(1) and (2) MCA.

<sup>64</sup> Section 70(1) and (2) MCA.

<sup>65</sup> (2006) 6 NWLR (Pt. 977) 629,

<sup>66</sup> Section 70 (3) MCA

<sup>67</sup> See *Cunningham v Cunningham* (1965) Q.D.R. 210. In this case, the wife committed adultery in the matrimonial home with a week-end visitor. The court granted a decree of divorce but refused the wife's application for order of maintenance because her conduct was the reason for the divorce.

<sup>68</sup> As stipulated in Section 114(1) (a) MCA.

<sup>69</sup> (2009) 3 NWLR (Pt. 1127) 108.

<sup>70</sup> This can be deduced from some judicial pronouncements as highlighted herein.

the application of the concept of maintenance in Nigeria. In *Akinsemoyin v Akinsemoyin*<sup>71</sup>, the Judge held inter alia that “the history of maintenance in England is different from the history here. We have inherited a statutory provision based on the custom of the people of England, which are not only unknown in this country but is in contradistinction to our own. The English man who receives dowry from his wife’s family has got a pecuniary benefit from the marriage, part of which the law requires him to return on the dissolution of the union. The Nigerian man is not so blessed. He pays donation *proper nuptias*...Anthropologists call it bride price. Now it will be ridiculous and indeed unreasonable to expect a man who has gone into all that expenses in order to get married to be over burdened with maintenance for the woman unless there are exceptional circumstances warranting it”<sup>72</sup> In other instances, some Judges were reluctant or even out rightly opposed to the granting of application for maintenance. In *Okafor v Okafor*<sup>73</sup>, the trial Judge stated “since it is the trend under the Matrimonial Causes Decree to facilitate the dissolution of marriages, a wife, eager to have all links with her husband broken should not keep alive any financial link with a man she no longer regards as her husband, a man she no longer owes any marital obligation, including the obligation to maintain. Why should there not be a complete dissolution including the dissolution of all erstwhile financial bonds and obligations?”.

The question is, would their lordships have held a different view if the husbands were the Petitioners? Such criticisms are misplaced and were conceived in the vision of culturally/socially stagnant Nigeria. Present day social realities leave no doubt that maintenance has an important role to play in matrimonial proceedings<sup>74</sup>.

The Matrimonial Causes Act has put both the husband and wife on an equal pedestal as far as maintenance is concerned, wherein a woman may be ordered to pay maintenance to her husband and children of the marriage<sup>75</sup> upon the husband’s application and the court’s discretion. The power of the court to order maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of 21 years unless the court is of the opinion that there are special circumstances which justify the making of such an order in that direction<sup>76</sup>. Bearing in mind that the focus of this work is on spousal maintenance and settlement of property upon break down of marriage, this writer could not locate any case, in the course of this research where a husband applied to court for a maintenance order against the wife.

The order for maintenance can be granted during the pendency of or after the conclusion of a matrimonial proceeding. In both situations, the Act enjoins the court, in making the order, to have regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances<sup>77</sup>. An order for maintenance pending suit is provisional in nature. In *Olu-Ibukun v Olu-Ibukun*<sup>78</sup>, it was held that “the purpose is to ensure that the Applicant spouse is not left a destitute but remains well provided for, according to the standard of living of the parties during the course of the proceedings”.

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<sup>71</sup> (1971) NMLR 272.

<sup>72</sup> Per Thompson, J at p. 275.

<sup>73</sup> Suit No. O/6D/71 (unreported) High Court, Onitsha of 13<sup>th</sup> November, 1977.

<sup>74</sup> E. I. Nwogugu supra pages 261-262.

<sup>75</sup> Section 70 MCA

<sup>76</sup> Section 70 (4) MCA.

<sup>77</sup> Section 70 (1) & (2) MCA.

<sup>78</sup> (1974) 2 SC 35.

The grant of maintenance is at the discretion of the court and as stated by Lord Mansfield, in *R v Wikes*<sup>79</sup> “a proper exercise of discretion should be done according to law not humour, it is to be not arbitrary, vague or fanciful, but legal and regular”. This position was cited with approval by Nsofor J.C.A in *Erhahon v Erhahon*<sup>80</sup>. Though the Act laid down certain criteria<sup>81</sup> for the award of maintenance pending the disposal of suit and at the conclusion of proceedings, it did not state the factors to be considered by the courts in the exercise of discretion. In *Damulak v Damulak*<sup>82</sup>, the court interpreted ‘means’ of parties to mean the capital assets of the parties including contingent and respective assets.

In *Ibeawuchi v Ibeawuchi*<sup>83</sup>, the Court of Appeal, in dealing with maintenance order, referred to the income, properties owned by each party and financial resources as the party’s income. The Court also indicated that account should be taken of the ‘financial needs and responsibilities’ which are likely to affect the party’s means.

In *Anyaso v Anyaso*<sup>84</sup>, the Court took into account, the fact that the Respondent holds a mere West African School Certificate and was a senior staff in a manufacturing company before the husband made her to resign her appointment as a result of which she became unemployed. The Court equally considered the inflationary pressure on the cost of living, the husband’s assets, that is, his manufacturing companies, saloon cars and houses for purposes of assessing maintenance. The trial Judge, after a careful consideration of the materials placed before him, awarded the sum of four thousand, five hundred Naira (N4, 500) per month as maintenance to the wife and the only child of the marriage. In as much as the court has the responsibility to determine from evidence before it, the exact amount to be fixed by it, for the maintenance order and how it is to be effected, the sum of four thousand, five hundred Naira (N4, 500) is grossly inadequate in view of the unchallenged and uncontroverted evidence of the wife that each of the husband’s companies makes over twenty million Naira (N20 million) per annum. Although the Act does not require the Court to act on the income of the parties alone rather on their means, earning capacity and conduct of the parties, it can be argued that though the companies, cars and houses do not represent the man’s income, his business is a parameter for determining the earning capacity of the parties as provided under the Act.

In *Olu-Ibukun v Olu-Ibukun*<sup>85</sup>, the Supreme Court held that a man’s house and money in his bank account are not income and should not be considered in awarding maintenance. It is submitted that though these may not be regarded as income in the proper sense, there is no reason they should not be considered as evidence of a spouse’s financial standing when making order for maintenance. This is because the rent accruing from the house together with interest from the money in the bank can be regarded as income.

On the issue of conduct of parties, the Court of Appeal in *Damulak v Damulak*<sup>86</sup> held that:

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<sup>79</sup> 4 Burr. 2839.

<sup>80</sup> (1997) 6 NWLR (Pt. 510) 667 at 689-690.

<sup>81</sup> Means, earning capacity, conduct of parties and to all other relevant circumstances

<sup>82</sup> (2004) 8 NWLR (Pt. 874) 156.

<sup>83</sup> (unreported) Appeal No. FCA/E/5/82 of 22<sup>nd</sup> September, 1988; See also E. I. Nwogugu supra page 257.

<sup>84</sup> (1998) 9 NWLR (Pt. 564) 150

<sup>85</sup> (1974) 2 SC 35.

<sup>86</sup> Supra.

- (1). “if the wife’s conduct borders on serious depravity, this may result in the reduction or even total elimination of a proper maintenance;
- (2). if the conduct of the husband is immoral or perfidious, which conduct is objectionable, the wife must be given full maintenance but must not be enriched by the reason of that condemnable conduct;
- (3). punitive damages in the form of maintenance on the ground of the depravity of the husband should not be awarded;
- (4). however, where the immoral conduct of the husband or his marital behaviour has adversely affected the financial status or the standard of living of the parties, this is a factor to be taken into consideration;
- (5). where the Petitioner is adjudged guilty of misconduct evidence may be given with a view to persuading the court to take a lenient view of the Petitioner’s misconduct<sup>87</sup>”.

On ‘all other relevant circumstances’, the Court, in *Damulak v Damulak*<sup>88</sup> was of the view that issues like standard of living to which the parties are accustomed, the requirements of the Petitioner/Applicant and even the public interest or demand must engage the attention of the court<sup>89</sup>.

### **Principles to Be Considered in The Award of Maintenance**

In assessing maintenance, the Act<sup>90</sup> gave the Court the discretionary power to order and assess maintenance of a party. In *Nanna v Nanna*<sup>91</sup>, it was held that “assessment of maintenance is not likened to a claim for special damages where the claimant must strictly prove his entitlement to such award before same can be awarded by the court”. According to Tobi J.C.A (as he then was) in *Menakaya v Menakaya*<sup>92</sup> “the assessment of awards in matrimonial causes is neither an exercise of guess-estimate or guess-work but one based on the established principles of law which must be applied in the circumstances of the case. The major principles are:

- (a) the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future;
- (b). the financial needs, obligations and responsibilities, which each of the parties has or is likely to have in the foreseeable future;
- (c). the standard of living enjoyed by the family before the breakdown of the marriage<sup>93</sup>;
- (d). the age of each party to the marriage and the duration of the marriage<sup>94</sup>;

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<sup>87</sup> Aderemi, J.C.A (as he then was) at pages 172-173.

<sup>88</sup> supra

<sup>89</sup> Aderemi, J.C.A at page 173.

<sup>90</sup> Section 70 (1) & (2) MCA.

<sup>91</sup> (2006) 3 NWLR (Pt. 966) 1.

<sup>92</sup> (1996) 9 NWLR (Pt. 472) 256.

<sup>93</sup> See also *Oluwa v Oluwa* 1980 7-9 CCHCJ 239.

<sup>94</sup> See also *Ajayi-Ajagbe v Ajayi-Ajagbe* (1978) CCHCJ 183; *Krystman v Krystman* (1973) 3 All E. R. 247.

- (e). any physical or mental disability of either of the parties to the marriage;
- (f). the contribution made by looking after the house or caring for the family.

It is the Court's duty to apply the above principles, as to the parties, as far as it is practicable and having regard to their conduct, just to so do, in the financial position in which they would have been, if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other. The Court must take into account the above principles where applicable, in the circumstances of the case<sup>95</sup>.

In *Lumsden v Lumsden*<sup>96</sup>, it was held that "maintenance is intended to provide for the needs of the wife and not to mark disapproval of the husband's conduct. In some cases, the misconduct of the wife has been treated as relevant to her claim for maintenance. In other cases, the court would be entitled to err on the side of generosity where the husband's conduct towards the wife has broken up the marriage". The Court of Appeal in *Hayes v Hayes*<sup>97</sup> took a guide from the *Lumsden*'s case and in giving a literal construction to the provisions of the Act<sup>98</sup>, was of the view that the sum to be awarded for maintenance of the Appellant and child of the marriage shall be determined by, among other factors:

- (a). the stations in life of the parties;
- (b). their respective means;
- (c) the existence or non-existence of a child or children of the marriage;
- (d). the conduct of the parties<sup>99</sup>.

An order for maintenance can only be based on evidence presented to the Court by the parties. The onus is on the Applicant to prove the claim for maintenance. Therefore, a party that intends to succeed in his/her claim for significant sum as order for maintenance, must be able to provide credible evidence showing that the other spouse's income would sufficiently cover his/her claim for maintenance. It is only when the true figures are available and proven that a proper order can be made. Consequently, where an Applicant for an order for maintenance does not know the other spouse's income, it will be difficult for the Court to make a fair and proper order. In *Adejumo v Adejumo*<sup>100</sup>, the Court of Appeal held that 'a literal interpretation of Section 70(1)<sup>101</sup> will reveal that the sum to be awarded for the maintenance of a wife and child of the marriage shall be determined, inter alia by –

- (a). the means of the parties, which has been interpreted to mean the capital assets of the parties including contingent and respective assets<sup>102</sup>,
- (b). the earning capacity of the parties,

<sup>95</sup> See also Rayden on Divorce (12<sup>th</sup> edition) p. 715 at paragraph 11.

<sup>96</sup> (1963) 5 FLR 388.

<sup>97</sup> (2000) 3 NWLR (Pt. 648) 276

<sup>98</sup> Section 70 (2) MCA

<sup>99</sup> Per Aderemi J.C.A. (as he then was)

<sup>100</sup> (2010) LPELR-3602.

<sup>101</sup> MCA

<sup>102</sup> See also *Damulak v Damulak* supra at pp 171-172.

- (c). conduct of the parties to the marriage,
- (d). other relevant considerations, which may include:
  - (i). the existence or non-existence of children,
  - (ii). Age of the children,
  - (iii). Station in life of the parties and their life styles
  - (iv). Inflationary aspect of cost of living.

In this case, the Appellant claimed that he earned N31, 277.86 per month as salary but the court awarded N31, 666.7 monthly to the wife and her child as maintenance on the ground that evidence on record showed that the Appellant has two houses, lives in one of the houses while the second house is given out on rent. He deliberately refused to disclose to the court, the rental income he generates from the house, which could have been of assistance to the court in assessing his correct means. The actual rent for the said second house is a fact within the personal knowledge of the Appellant, which he failed to disclose to the court.

This clearly brings to the fore, problems connected with orders for maintenance. Courts can only make orders based on accepted evidence adduced at the trial of the parties' respective incomes. It is only when the true figures are available to the Applicant and placed before the court that the court can make orders based on those figures. The effect is that, if an Applicant for maintenance orders does not know the other party's actual salary and other incomes, the Court will not be in the position to make an order that will be favourable to the Applicant. It is therefore suggested herein that where a spouse is in paid employment, the Court, upon application by the party seeking for maintenance, should compel the employer to disclose his/her actual income, to enable the court to make a fair and proper order. Where a party is self-employed, he/she is not likely to disclose his/actual income, the Court should be able to hold as relevant, his/her possessions and life style in assessing his/her income.

### **Maintenance Under Customary Law**

The customs of the various ethnic groups in Nigeria impose a duty on a husband to maintain his wife. Failure to carry out this duty can be a ground for divorce. Unfortunately, this duty does not have any statutory force. Though the Marriage Act<sup>103</sup> expressly recognises marriages contracted under or in accordance with any customary law<sup>104</sup>, the parties to such marriage are denied the legal incidents and material privileges conferred by the Matrimonial Causes Act on spouses of statutory marriages. The Matrimonial Causes Act made it clear that 'marriage' within the meaning of the Act does not include one entered into according to Muslim rites or other customary law<sup>105</sup>. Thus, the Act excludes the application of its provisions to spouses of Islamic and Customary law marriages. One of the benefits conferred on spouses of statutory marriages, which are not applicable to spouses of customary law marriage is maintenance.

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<sup>103</sup> *supra*

<sup>104</sup> See section 35 Marriage Act.

<sup>105</sup> See section 69 MCA

According to Olagunju R. I, “under customary law, the husband’s duty of maintenance is usually limited to the period of co-habitation. It should be understood that periods when the husband and wife of customary law marriage live apart as a result of spouse’s job being at different localities or areas are still considered to be periods of co-habitation between them but if they live apart because the wife is in desertion, there is no generally recognised duty of man to provide for the wife<sup>106</sup>”.

Upon breakdown of a customary law marriage, the husband’s duty to maintain his wife terminates. There is no clear practice of the concept of maintenance under native law and custom, as there appears to be no record of any particular ethnic group where the practice of spousal maintenance during or after divorce is recognised. There is also no law in existence in Nigeria whereby a customary law husband can be compelled to contribute towards the maintenance of his ex-wife. It therefore follows that in the absence of any legal obligation, the only redress available to the woman, lies in the husband’s discretion and the intervention of family, particularly where she has children for him and the children are in her custody.

It is indeed a negation of purpose that a man, who has deserted his family or divorced his wife, may with impunity relinquish his duty to maintain them. This customary law practice is one that surely creates social problems and should be remedied. Consequently, it is hereby suggested that since there is a customary law duty on a man to maintain his wife during the subsistence of the marriage, the Customary Courts should be empowered to handle ancillary reliefs such as maintenance and settlement of property upon breakdown of a customary law marriage. If a Court of summary jurisdiction<sup>107</sup> can be empowered to enforce orders made by a High Court on maintenance, then a Customary Court can equally, by legislation, be made to make and enforce a similar order. The continued absence of legislation in this regard is unjustifiable and highly unfair especially to the woman caught in the web of desertion or divorce.

### **Maintenance Under Islamic Law**

According to Ambali, “it is a duty on the husband, who has attained the age of puberty, to provide foodstuff, soup, clothes and accommodation in accordance with the prevailing custom, for his wife who is not indisposed and who possesses the capacity to discharge her conjugal responsibility. The quality of the maintenance must be based on a scale commensurate with his purse, her status, the level of urbanization and the cost of living in the community where both parties live”<sup>108</sup>. The right of women to accommodation at the expense of the husbands, after their separation as a result of a divorce or death up to the end of waiting period<sup>109</sup> is guaranteed<sup>110</sup>. The right of a woman to claim separate maintenance allowance ceases when she lives under the same roof with the husband who maintains the home. It stops when they separate in a manner that they cannot renew the marriage within the stipulated period of ‘*Iddah*’. Such circumstances for the forfeiture of maintenance include the third divorce in succession or three divorces

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<sup>106</sup> Olagunju R.I. ‘Concept of Maintenance: A legal Analysis on Tripartite Comparison, Vol. 3/2, Kogi State University Bi-Annual Journal of Public Law, page 311.

<sup>107</sup> Section 114(1) MCA defined court of summary jurisdiction as a Magistrate Court or District Court.

<sup>108</sup> M. A. Ambali, *The Practice of Muslim Family Law in Nigeria* p. 236 (Princeton publishing Company, Lagos 2013).

<sup>109</sup> *Iddah*

<sup>110</sup> *supra*. Page 240.

pronounced three times angrily within a moment. Other forms are the separation initiated at the instance of the woman<sup>111</sup>.

### **Settlement of Property Under The Matrimonial Causes Act**

Disputes over a matrimonial home and other joint property of the parties are usually incidental to the matrimonial cause. The same High Court where the divorce proceedings are brought has jurisdiction over settlement of property on breakdown of marriage. Settlement of property has always been a thorny issue in matrimonial proceedings. The power of the court to make settlement of properties for the benefit of either of the parties to the matrimonial cause and the children of the marriage is contained in Section 72(1) of the Matrimonial Causes Act which provides that “the court may, in proceedings under this Act, by order require the parties to the marriage or either of them, to make, for the benefit of all or any of the parties to, and the children<sup>112</sup> of the marriage, such a settlement of property to which the parties are, or either of them is entitled (whether in possession or reversion) as the court considers just and equitable in the circumstance of the case”.

This means that there are two types of properties that must be settled, joint or marital property and separate property. Joint or marital property consists of properties acquired during marriage, which is subject to distribution or division at the time of marital dissolution<sup>113</sup>. Generally, it is property acquired after the date of the marriage and before a spouse files for separation or divorce. Separate property refers to any property that does not fall into the category of joint property.

The main limitation in making an order for settlement of property is that there is no provision under the Act regarding the factors to be considered for the exercise of court’s power. All that the court is required to do is to ‘consider what is just and equitable in the circumstance of the case’ and for the benefit of all or any of the parties thereto. The Court will have regard to what is fair and equitable<sup>114</sup> based on the evidence adduced by parties at the trial in acquisition of the properties involved in the settlement of property in matrimonial proceedings<sup>115</sup>.

In *Mueller v Mueller*<sup>116</sup>, the Respondent, as Petitioner at the trial court, prayed for ‘equitable equal partition of property between the parties’. The Court of Appeal held that “equity is equality, partitioning of joint matrimonial property must be done on the basis of equity. After all equity favours true equality, both of rights and liabilities, dividing burdens and benefits in equal shares...in the principle of equity, the Respondent who was awarded two out of the three houses on the land should not be further awarded the undeveloped portion of the land”. The undeveloped portion of the land was therefore, in the principle of equity, awarded to the Appellant by the court.

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<sup>111</sup> Also known as ‘*Khul*’. See M. A. Ambali *supra* page 242.

<sup>112</sup> section 72 (3) MCA provides that “the power of the Court shall not be exercised for the benefit of a child who has attained the age of 21 years unless the court is of the opinion that there are circumstances that justify the making of such an order for the benefit of that child”.

<sup>113</sup> Black’s Law Dictionary *supra*.

<sup>114</sup> The idea of equity has always been associated with judicial decisions and emphasis that cases should be decided in a way which is fair and right so that justice is achieved between the parties-Rhodes Vivour, JCA (as he then was) in *Oghoyone v Oghoyone* (2010) 3 N.W.L.R. (Pt. 1182) 564 at 590.

<sup>115</sup>Rowland JCA (as he then was) in *Akinbuwa v Akinbuwa* (1998) 7 N.W.L.R (Pt. 559) 661.

<sup>116</sup> (2006) 6 NWLR (Pt. 977) 629.

The court has wide powers under section 72 MCA to order settlement of property. The nature of the order to be made and the exercise of the court's discretion are unfettered. The discretion should therefore be exercised judiciously. In *Akinbuwa v Akinbuwa*<sup>117</sup>, the trial court ordered that the wife be granted ownership and immediate possession of one half of the duplex bungalow with its boys quarters, both of which are to be partitioned and wall-fenced off the remaining buildings in the premises, whilst the Petitioner/husband retains ownership of the other half of the said duplex, as well as the remaining three buildings including the matrimonial home occupied by him. The court further ordered the Petitioner to renovate the property before handing it over to the wife, continue to be solely liable for any mortgage debt on the property. On appeal by the husband on allegation of improper exercise of discretion by the trial court, the Court of Appeal held that the trial court's findings were proper, that the judgment was fair, considering the evidence before the court.

The next point of importance contained in the section is that the property to be settled must be owned by the parties to the marriage either jointly or separately. Section 72 (1) MCA provides inter alia that such property must be one "to which the parties are or either of them is entitled (whether in possession or reversion) ...." In considering the above subsection, the court, in *Mueller v Mueller* held that 'between husband and wife, there is nothing wrong in buying property in the name of one of the parties. Such property remains matrimonial property which belongs to the parties jointly'<sup>118</sup>.

Despite the provisions of the MCA, the courts always consider, contribution of parties as the main consideration in an application for settlement of property. In *Essien v Essien*<sup>119</sup> the Court of Appeal restated the Supreme Court's decision in *Adaku Amadi v Edward Nwosu*<sup>120</sup> to the effect that direct financial contribution to the purchase price of a matrimonial home or to the repayment of the mortgage must be proved before joint property can be inferred. The court, in *Adaku Amadi's* case, refused the Appellant's case on the ground that she did not prove joint contribution.

Meanwhile, in *Kaffi v Kaffi*<sup>121</sup>, the wife gave evidence to the effect that 'she gave all necessary moral and financial support to the Petitioner, apart from performing all her domestic duties as a wife. The trial court found, from the evidence before it that the Respondent contributed towards the purchase of some of the lands on which the houses, now said to belong to the Petitioner were built and also towards the development of the said properties as well as to the success of the husband's business. The court held that the properties can be regarded as products of the parties' joint efforts. Consequently, the court in exercise of its powers, ordered an execution of a Deed of Transfer by the husband in favour of the wife, in respect of the property located No. 15, Adeola Adeleye Street, Ilupeju, Lagos State. On appeal, the Court of Appeal, in confirming the decision of the trial court added that the Deed of Transfer must provide that the property must not be disposed of in the life time of the Respondent so as to ensure that it remains the home of Respondent and her children<sup>122</sup>.

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<sup>117</sup> (1998) 7 N.W.L.R (Pt. 559) 661.

<sup>118</sup> *supra*

<sup>119</sup> (2009) 9 N.W.L.R. (Pt. 1146) 306 at 331-332.

<sup>120</sup> (1992) 6 SCNJ 59.

<sup>121</sup> (1986) 3 N.W.L.R. (Pt.27) 175.

<sup>122</sup> See also *Onabolu v Onabolu* (2005) 2 SMC 135.

From the above analysis, it is obvious that a court, when confronted with an application for settlement of property, the court will look at the evidence of the parties and consider each application based on the circumstances of each case. It seems that the section is designed to give protection to a spouse who cannot claim any proprietary right to occupy the matrimonial home or other property.

### **Ante-Nuptial or Post-Nuptial Settlements**

Section 72(2) MCA provides that “the Court may, in proceedings under the Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of the marriage, of the whole or part of the property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage or either of them”.

It seems that the net result of this provision is that the court would consider any ante nuptial or post nuptial agreement made by the parties, when making an order for settlement of property and if, in its opinion, the agreement is just and equitable, it will be upheld. ‘Ante nuptial agreement’, also known as ‘prenuptial agreement’ is an agreement made before marriage usually, to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse. Post nuptial agreement on the other hand is an agreement entered during marriage to define each spouse’s property rights in the event of death or divorce. The term commonly refers to an agreement between spouses during the marriage at a time when separation or divorce is not imminent<sup>123</sup>.

Though the Act recognises the rights of parties to execute prenuptial and post nuptial agreements, they are not common in Nigeria. However, the Court of Appeal in *Oghoyone v Oghoyone*<sup>124</sup> impliedly pronounced on the validity of such agreement when it held that the trial court was right to hold that the Respondent had a joint interest in a property belonging to the parties because it was not referred to in their prenuptial agreement. The appellate court missed the opportunity to make a pronouncement on the status of prenuptial agreement as provided in Section 72(2) MCA and its legal implication.

However, the issue of the status of prenuptial agreements fell to be considered by the Supreme Court of the United Kingdom in *Radmacher v Granatino*<sup>125</sup>. The Supreme Court, while dismissing the husband’s appeal held that ‘the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement’.

Section 72 MCA has some advantages. It can be used to secure a permanent home for a spouse and her children. Having a prenuptial agreement can protect a party’s separate property and reduce conflict in future.

### **Settlement of Property Under Customary and Islamic Laws**

Under customary law, both parties to the marriage can acquire property either before or during the marriage. A woman married under customary law is entitled to the provision of a home by

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<sup>123</sup> Black’s Law Dictionary, *supra*.

<sup>124</sup> (2010) 3 NWLR (Pt. 1182) 564.

<sup>125</sup> (2010) UKSC 42.

her husband if the marriage subsists. She is also entitled to use her husband's property but cannot dispose of it as her own. The right to be provided with a house by her husband terminates upon divorce. She is thus required to vacate the matrimonial home. She has no right to claim for settlement of property from her husband over a house even where she contributed to the acquisition of the property or the house is jointly owned with her husband<sup>126</sup>.

The matrimonial Causes Act expressly excludes the application of its provisions to marriages contracted in accordance with Muslim rites or other customary law<sup>127</sup>. According to Atsenua and Uzodike<sup>128</sup>, "under the customary laws of most of the Ibo tribe<sup>129</sup>, a woman is entitled on divorce, to remove all her personal properties acquired with her own money and out of her sole efforts and also properties which she brought into the matrimonial home at the time of the marriage. She cannot take away property given to her by her husband, which he intended her to use in the matrimonial home. She is not entitled to lay claim on any landed property whether or not such property was acquired through the husband's sole effort or through their joint efforts. The irrebuttable presumption is that the whole landed property belongs to her husband".

With respect to Islamic law, the husband, while divorcing the wife, should leave room for possible reconciliation. During the waiting period or Iddah, she can still claim the right to be housed by the husband but her right ceases if after the expiration of this period, no reconciliation is effected. She will however be entitled to a gift from her husband to console her. It is not clear whether this right can be enforced but it is clear that a claim to a share of the husband's estate is totally out of the question<sup>130</sup>.

Islamic Law requires that during the period that the wife is serving her Iddah, the husband must continue to maintain her in all respects. It is unlawful to ask her to leave the matrimonial home during that period. A divorced wife can successfully sue and recover all the withheld entitlements from the husband. In *Mrs. Sherifat Abdulrazaq v Alfa Abdulrazaq Ibrahim*<sup>131</sup>, the Sharia Court of Appeal confirmed the Area Court's judgment whereby the Appellant was awarded the sum of three thousand Naira (N3, 000) per month for three months for her maintenance during the waiting period and one thousand five hundred Naira (N1, 500) per month for that period for her accommodation because the husband did not allow her to stay in the matrimonial home during the waiting period<sup>132</sup>.

## Conclusion

The Matrimonial Causes Act provides for maintenance both during and after the proceedings for divorce. The criteria<sup>133</sup> for the award of both types of maintenance are the same. The Act conferred equal rights on the spouses to seek for maintenance from each other and did away with

<sup>126</sup> Settlement of property under customary law, Grace Adikema-Ajaegbo, The Lawyers chronicle. [www.thelawyerschronicle.com](http://www.thelawyerschronicle.com). Assessed on 12<sup>th</sup> October, 2016.

<sup>127</sup> Section 69 MCA.

<sup>128</sup> Ayodele Atsenua and E.N.U. Uzodike: Women's Rights Within the Family Context: Law and Practice'. Edited by Akintunde O. Obilade, Baton Rouge: Faculty of Law, University of Lagos and Southern University Law Centre.

<sup>129</sup> Ibo tribe is found in South Eastern Nigeria.

<sup>130</sup> Ayodele Atsenuwa and E.N.U. Uzodike supra.

<sup>131</sup> KWS/SCA/CV/AP/14/2011.

<sup>132</sup> See also *Rashidat Lawal v Musbau Lawal* KWS/SCA/CV/AP/IL/06/2013.

<sup>133</sup> Means, earning capacity and conduct of the parties to the marriage and any other relevant circumstances.

the confusing terminologies of ‘alimony’ and maintenance by using the word ‘maintenance’ even when alimony in the conventional sense is intended<sup>134</sup>.

Maintenance during and after divorce is one of the benefits conferred on spouses of statutory marriage, which does not avail spouses of Customary and Islamic law marriages. Though customary and Islamic law marriages are as legal as marriages under the Act, women married under native law and custom do not have enforceable rights to maintenance. According to Unoka<sup>135</sup> “unlike the wife married under the Act, who may on desertion by her husband apply to the court for an order for maintenance against the husband, the customary law wife has no right of maintenance should she and her husband live apart following a dispute”. In *Sherifat Abdulrazak v Alfa Abdulrazak Ibrahim*<sup>136</sup>, it was held that “under Islamic law marriages, the right to maintenance is only enforceable in limited circumstances, where the wife is not allowed to observe her waiting period in her matrimonial home.

Since there is a customary law duty on a man to maintain his wife during the subsistence of the marriage, it suggested hereby that the Customary and Sharia Courts should be empowered to handle ancillary reliefs such as maintenance and settlement of property upon breakdown of a Customary and Islamic law marriages. If a Court of summary jurisdiction<sup>137</sup> can be empowered to enforce orders made by a High Court on maintenance, then a Customary Court and Sharia court can equally, by legislation, be made to make and enforce similar orders. The continued absence of legislation in this regard is unjustifiable and highly unfair especially to the woman caught in the web of desertion or divorce.

Settlement of property under the Act is based on what the court considers to be ‘just and equitable in the circumstances of each case, for the benefit of any or all of the parties and children of the marriage’<sup>138</sup>. Despite this provision, direct financial contribution has remained a major consideration by the courts in an application for settlement of property brought by a spouse. This attitude is not in tandem with the spirit of Section 72 MCA. It is hereby suggested that the issue of matrimonial home should be settled on the spouse who has greater need of it<sup>139</sup> or be equitably shared between the parties, notwithstanding in whose name the property was acquired or who paid for it. This is borne out of the fact that there are situations where a spouse makes a lot of sacrifices including self-denial to ensure that the other spouse achieves his or her goals and aspirations. These efforts in turn may lead to the acquisition of properties by the spouse. It is only proper that the spouse who made sacrifices that indirectly led to the acquisition of the properties by the other spouse be given a share of the fruit of that effort, should the marriage eventually break down.

There is no law that provides for settlement of property for marriages conducted under both Customary and Islamic laws. Indeed, the Matrimonial Causes Act expressly excludes the application of its provisions to spouses married according to Muslim rites and customary laws. Under customary law marriage, the woman is expected to return the bride price to the man upon divorce. She is not entitled to any property except her personal belongings. She is not even

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<sup>134</sup>Fatayi-Williams JSC in *Olu-ibukun v Olu-ibukun* supra.

<sup>135</sup> Unoka M.C. Family Law, Ibadan Spectrum, 2003, page 235.

<sup>136</sup> KWS/SCA/CV/AP/14/2011.

<sup>137</sup> Section 114(1) MCA defined court of summary jurisdiction as a Magistrate Court or District Court.

<sup>138</sup> Section 72 MCA.

<sup>139</sup> Particularly the spouse who has custody of the children.

entitled to any house even if it was jointly built with the husband. She loses the right to be provided with a home by her husband. This custom smirking of injustice. This discrimination should be ended. There is the need to make laws to protect the interest of spouses of both Customary and Islamic law marriages, in respect of maintenance and settlement of property upon marriage breakdown.

In view of the above, both the Marriage Act and the Matrimonial Causes Act need to be amended or reformed in the areas mentioned above. The discretion given to the courts in issues of maintenance and settlement of property is too wide, it creates uncertainties and does not capture the essence of what is 'just and equitable'. There should be clear provisions in the Act spelling out the factors that should guide the court in arriving at its decisions when confronted with the issues of maintenance and settlement of property upon marriage breakdown.