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***From the Editor’s Desk***

It is an unprecedented time that the world is going through. Covid-19 has changed the lives of people across the globe and brought many things to a stand-still. However, one thing that has remained safe from the clutches of this pandemic is the exchange of ideas and dialogue on growth, learning and education. This experience is sure to leave a mark on many, but with a different perspective, we can try to make it a positive one. With this aim in mind, we are proud to present the eighth issue of the Amity Law Journal.

This Journal provides a window of opportunity to look into the multifaceted nature of law and helps one to appreciate the versatile depth of legal matters by exploring its application in different fields. Some of these fields include subject matter such as Distributed Generation Systems, Artificial Intelligence in Market Competition, The Aviation Industry in India, The Protection of Women and Children in International Armed Conflicts, Online Dispute Resolution, and various other matters related to law.

As the Law pushes forward and crosses new boundaries, the only constant thing during this time, is change. As a part of the community, legal or otherwise, it is imperative that we keep ourselves updated on the goings-on of the world around us. It is our hope that the Amity Law Journal provides to be a medium to facilitate the same.

The editorial committee acknowledges and thanks the authors from different countries, who, even during this challenging time have shown a tremendous amount of persistence, resolve and enthusiasm for research. This journal would not have been possible without them. The editorial committee also places its deep sense of gratitude to the reviewers for their percipient opinions that have shaped the quality of the papers and enabled the journal to be brought out in its present form.

We hope that this Journal will prove to be an invaluable reference, an interesting guide, and a rich source of notice and direction, to personalities from legal and non-legal back grounds alike.

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**THE CIVIL JURISDICTION OF THE NATIONAL INDUSTRIAL COURT UNDER THE 1999 CONSTITUTION OF THE FEDERAL OF NIGERIA (THIRD ALTERATION) ACT 2010 AND PRE-2010 FUNDAMENTAL RIGHT LABOUR SUITS**

*David Tarh-Akong Eyongndi\**

**Abstract**

*This paper reviews the Court of Appeal decision in Standard Chartered Bank v. Adegbite where the court held that the jurisdiction of the National Industrial Court (NIC) in Sections 254C(1)(a)(d)(g) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act and 7(1) (a) (i) and 11 of the National Industrial Court Act, 2006, the NIC does not have exclusive original jurisdiction over fundamental right enforcement proceedings arising from employment disputes commenced at the High Court prior to the enactment of the 1999 CFRN (Third Alteration) Act. Thus, such matters, in the absence of Sections 254C of 1999 CFRN (Third Alteration) Act providing for abatement, do not abate and the Courts specified in Sections 251, 257 and 272 of the 1999 CFRN pursuant to Section 46 of the same Constitution notwithstanding Section 254C (b) the 1999 CFRN (Third Alteration) Act have jurisdiction. This paper adopts the doctrinal methodology, it argues that this decision clearly defeats the intendment of the draftsmen, and has created a specie of labour cases known as “pre-1999 CFRN (Third Alteration) Act 2010 fundamental rights labour cases “appealable to the supreme Court contrary to the Supreme Court decision in Skye Bank v. Iwu where all labour matters ought to end at the Court of Appeal. it recommends that Section 254C should be further amended to include abatement of all pending suits and same transferred to the NIC to give effect to the intention of the legislature in enacting the 1999 CFRN (Third Alteration) Act 2010.*

**Keywords:** *Jurisdiction of Court, Decree, Court of Law, Justice, National Industrial Court, Nigeria*

**I INTRODUCTION**

Dispute is an inevitable aspect of human existence and it transcends all areas of human relations.[[1]](#footnote-1) However, the occurrence of dispute should not be the end of human interaction.[[2]](#footnote-2) Thus, disputes must be settled for continuous human interaction. The State as the regulator of human affairs having executive, legislative and judicial powers, have set up the courts as institution for the settlement of disputes arising from human interactions be it political, social, contractual, employment, religious, etc. The State through the instrumentality of the law, create court and the law (statute) which in turn, creates the particular court provides its jurisdiction. Section 6(5) of the 1999 CFRN contains a list of courts described as superior court in Nigeria.[[3]](#footnote-3) Prior to the enactment ofthe 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, the NIC was not listed as one of the superior courts under the 1999 Constitution which had generated a lot of judicial controversies. Several legislative efforts (such as the promulgation of the Trade Dispute (Amendment) Decree No. 47 of 1992 and the enactment of the NIC Act 2006) had been taken to cure this defect yet the controversies persisted. As a result, in 2010, the National Assembly pursuant to its constitutional powers and function, enacted the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 which *inter alia,* listed the NIC as one of the superior courts of records in Nigeria, gave it exclusive civil original jurisdiction notwithstanding sections 251, 253 and 272 of the 1999 CFRN over labour disputes and matters pertained in chapter IV of the Constitution. Despite this clear provision explicating the intention of the legislature that the NIC as opposed to any other court, should have and exercise original civil jurisdiction in all labour matters including those pertaining to chapter IV of the 1999 CFRN this position has been unsettled. Thus, the Court of Appeal in *Standard Chartered Bank Nigeria Ltd. v. Ndidi Adegbite[[4]](#footnote-4)* held that cases that commenced before the enactment of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010[[5]](#footnote-5) involving labour disputes pertaining to chapter IV of the 1999 CFRN, (1999 CFRN (Third Alteration) Act) 2010 the NIC does not have exclusive original jurisdiction. The rationale is that the amendment does not include a provision that all such commenced matters before courts other than the NIC abates and should be transferred to the NIC, hence the prevailing substantive law as at the time of the accrual of the dispute is what prevails. Since section 46 of the 1999 CFRN enjoins anybody whose fundamental human right is about to be infracted or has been, to apply to a High Court within the State for its enforcement, section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act cannot revoke that right without an abetment of proceedings provision despite the fact that where there are two conflicting provisions in a statute the later prevails. The issues are, has this pronouncement not defeated the intention of the legislature in enacting the 1999 CFRN (Third Alteration) Act and a setback to the exclusive original civil jurisdiction of the NIC? Would a further amendment of section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act be a possible way out of the quagmire precipitated by the decision of the Court of Appeal on the civil jurisdiction of the NIC? These issues form the crux of this article.

This article is divided into four parts. Part one contains the general introduction. Part two examines the civil jurisdiction of the NIC along its developmental process. Part three discuss the decision in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite[[6]](#footnote-6)* with regards to its effect on Nigeria’s labour jurisprudence. Part four juxtaposes the Supreme Court decision in *Skye Bank Ltd. v. Victor Iwu[[7]](#footnote-7)* and the Court of Appeal decision in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite[[8]](#footnote-8)* contending that the later has created a specie of labour cases known as “Pre-Third Alteration Act labour cases” which contrary to the SC decision in *Iwu’s Case*, could be appealed to the Supreme Court instead of terminating at the Court of Appeal. Part five contains the conclusion and recommendations based on the findings in the preceding sections.

**II THE EVOLUTIONARY JOURNEY OF THE NIC AND ITS CIVIL JURISDICTION**

The NIC as a court of special jurisdiction has gone through a tumultuous evolutionary journey since its inception as a tribunal. The advent of Europeans in the area now known as Nigeria brought about paid labour as various business concerns were established. The establishment of these business concerns such as Leventis Group, Royal Niger Trading Company, Chanrai Group, etc. necessitated the creation of a legal and institutional framework for dealing with workers agitations.[[9]](#footnote-9) In recognizing this fact, the colonial government in 1941 promulgated the Trade Dispute (Arbitration and Inquiry) Ordinance for settlement of trade disputes within Lagos. This Ordinance was only applicable in Lagos and there was no permanent structure for settling trade disputes rather, there was only *ad-hoc* and the government could only intervene in trade disputes upon the invitation of a party or parties.[[10]](#footnote-10) In 1957 another Ordinance which was aimed at mending the defects in the earlier Ordinance was promulgated and it was known as Trade Disputes (Arbitration and Inquiry Federal Application) Ordinance.[[11]](#footnote-11) This 1957 Ordinance became applicable within the whole country. In its effort to improve on the trade dispute settlement mechanism, the Federal Military Government (FMG) promulgated two decrees in 1968 and 1969. These are the Trade Disputes (Emergency Provisions) Decree 1968 and Trade Disputes (Emergency Provisions) (Amendment) Decree 1969.[[12]](#footnote-12) The 1969 Decree expressly prohibited strike and lockout and punished partakers with a term of imprisonment without an option of fine, and made it mandatory for parties to report within fourteen days of its occurrence to the Inspector General of Police (IGP) The Decree interestingly, established a permanent tribunal for the settlement of trade disputes known as Industrial Arbitration Tribunal.[[13]](#footnote-13) In 1976, the Trade Dispute, Decree No. 7 was promulgated to address certain inherent shortcomings in the 1969 Decree.[[14]](#footnote-14) This Decree per sections 19 and 20 thereof for the first time established a permanent court known as the National Industrial Court to adjudicate over trade disputes.

The 1979 Constitution of the Federal Republic of Nigeria came into force and by virtue of section 274 thereof, the Trade Disputes Decree was deemed an existing law and continued to exist as an Act of the National Assembly and concomitantly metamorphosed into the Trade Disputes Act. This Act was amended by the Trade Dispute (Amendment) Decree No. 47 of 1992 which ostensibly elevated the NIC to a Superior Court of Record.[[15]](#footnote-15) Pursuant to its purported elevation to the status of a superior court of record with exclusive jurisdiction in labour matters; the Decree held-sway because under the military, Decrees supersedes the unsuspended part of the Constitution. However, when the 1999 Constitution like its 1979 counterpart was made; the NIC was conspicuously omitted among the Superior Courts of Records listed in section 6(5) thereof. This led to the querying of the constitutionality and superior status of the NIC vis-à-vis the State High Court. Thus, disputes that ought to be ordinarily litigated at the NIC were still taken to the regular court as in the cases of *Maritime Workers Union of Nigeria v. Nigerian Labour Congress[[16]](#footnote-16)* and *Kalango v. Dokubo.[[17]](#footnote-17)* In 2006 in a bid to settle the protracted jurisdictional challenges that have trailed the NIC, the National Assembly enacted the National Industrial Court Act (NICA). This Act fortified the jurisdiction of the NIC; its section 7 gave it exclusive original civil jurisdiction over labour matters. In order to finally seal the jurisdictional debacle of the NIC, the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 was enacted. Section 254A (1) of the Act established the NIC, section 254C gave the NIC exclusive original civil jurisdiction over labour matters notwithstanding the provisions of section 251, 257 and 272 of the 1999 Constitution. By section 254C (1) (d) the NIC has the exclusive jurisdiction to adjudicate over labour disputes pertaining to Chapter IV of the Constitution.

Section 254C of the 1999 CFRN (Third Alteration) Act provides the exclusive original civil jurisdiction of the NIC. It has and exercises exclusive original civil jurisdiction over every labour, employment, trade dispute, industrial relations, workplace matters, condition of service such as health, safety, welfare of labour, etc[[18]](#footnote-18), matters pertaining to the administration and application of any labour legislation such as Trade Dispute Act, Labour Act, Employees’ Compensation Act, etc.[[19]](#footnote-19) It also exercise this jurisdiction over any dispute relating to or connected with the interpretation and application of the provisions of Chapter IV of the Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer’s association etc.[[20]](#footnote-20) it also exclusively adjudicates over any issue relating to national minimum wage of the federation or any part thereof, unfair labour practice or international best practices in labour, employment and industrial relation.[[21]](#footnote-21) Any matter relating to or connected with any personnel matter arising from any free trade zone in the federation or any part thereof as well as disputes relating to the determination of any question as to the interpretation and application of any collective agreement; award or order made by an arbitral tribunal in respect of a trade dispute or trade union dispute, terms of settlement of any trade dispute; trade union dispute or any trade dispute, trade union Constitution, the constitution of an association of employers or any association relating to employment, labour, industrial relations or work place and child labour, child abuse, human trafficking etc.[[22]](#footnote-22)

By virtue of section 254C (2), notwithstanding anything to the contrary in the Constitution (particularly section 12 thereof that requires domestication for international treaties to become enforceable in Nigeria) the NIC has the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty, or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith. In fact, it can be safely argued that the circumference of the civil jurisdiction of the NIC is elastic as can be gleaned from the provisions of section 254C (1) (a)-(m) of the 1999 CFRN (Third Alteration) Act.

**III STANDARD CHARTERED BANK NIG. LTD. V. ADEGBITE AND THE NIC CIVIL JURISDICTION**

The brief and succinct facts of this case are as follows. The Appellant employed the Respondent as an Account Relationship Officer. In the course of her employment, she applied for maternity leave which she was granted for the period of 7th February to 6th May 2005. On health grounds as it affect her new born baby, upon the expiration of the leave, she applied for an extension and she was granted. On the 3rd day of February 2006, she had separate meetings with her supervisors and one of the Appellant’s Executive Directors where she was informed that her performance appraisal was abysmal. On the 8th day of February, 2006, the Respondent resigned from the Appellant’s employ. On the 15th day of June, 2007, she filed a suit against the Appellant contending that the Appellant staff told her that her appraisal was poor and therefore inimical to her continuous employment with the Appellant and she was therefore technically compelled to resign, her resignation was not voluntary and in good faith and it amounted to wrongful dismissal. It was her contention that in evaluating her, the Appellant discriminated against her on the basis of her sex and the fact that she was a nursing mother and the Appellant wrongfully debited her account to the tune of N 1, 628, 209. 64. She therefore sought for several reliefs including a declaration that her dismissal from the Appellant’s employ was discriminatory and constitutional same having been done on the basis of her sex and status as a nursing mother and order directing the Appellant to pay her damages to the tune of N 50,000,000, refund of the money wrongfully deducted by the Appellant from her account, etc.

The Appellant denied that the Respondent was wrongfully dismiss as she admitted the facts of her poor performance based on the evaluation report during the meeting with her Supervisor and one of the Directors of the Appellant, thus, her resignation was voluntary. It also denied the allegation that it discriminated against the Respondent on the basis of sex and her status as a nursing mother and that the money deducted from her account was her pension and the mandatory nonrefundable National Housing Fund Scheme contribution. At the trial, the Respondent gave evidence and tendered several documents in proof of her case while the Respondent to the fact that in 2005, the Appellant gave her a target that was higher than her other team members who were neither women nor nursing mothers despite her legitimate absence from work pursuant to the leave and its extension granted her. The Appellant entered defence, call witness and tendered documents absolving itself of any wrongdoing but never controverter the fact that it gave the Respondent a higher target than her other team members. The Trail Court delivered its judgment in favour of the Respondent holding that she was discriminated against on the basis of her sex and her status as a nursing mother and that her resignation was not voluntary. It awarded her damages of N 5, 000, 000. The Appellant dissatisfied with the judgment appealed to the Court of Appeal while the Respondent also cross appealed on the quantum of damages contending that it was too small for the breach of her fundamental right to freedom from discrimination.

One of the grounds of appeal of the Appellant was that the learned trial judge erred in law when she[[23]](#footnote-23) assumed jurisdiction and proceeded to enter judgment in favour of the respondent (claimant at High Court of Lagos State)on the 12th day of October, 2012 as per the reliefs contained in the respondent’s writ of summons and statement of claim dated 15th June, 2007 and 12th June, 2007 respectively, in direct violation of the provisions of section 254C (1) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 and sections 7 and 11, National Industrial Court Act, 2006, Cap. N 155, Laws of the Federation of Nigeria, 2010. By this ground of appeal, the Appellant was contending that as at 4th day of March, 2010 when the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 came into force, the High Court of Lagos State ceased to have jurisdiction over the subject matter pursuant to section 46 of the 1999 CFRN as same has now been vested in the NIC to the exclusion of any other court and the matter ought to have abated pursuant to sections 7 and 11, National Industrial Court Act, 2006.

The Court of Appeal held that section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 upon it coming into effect, did not sequestrate the jurisdiction of the High Court of Lagos State to be seised of matters contained in Chapter IV of the 1999 CFRN arising from labour and employment matters as the applicable law to a cause of action is the law prevailing as at the time the cause of action arose and not any other as was held in *Obiuwebi v. CBN*.[[24]](#footnote-24) Besides, having failed to expresses provide that upon its coming into effect, all matters pertaining to Chapter IV of the 1999 CFRN relating to matters of labour and employment, pending before any court other than the NIC abates, the provisions of sections 7 and 11, National Industrial Court Act, 2006.Which provides same cannot be legally invoked to repealed section 46 of the 1999 CFRN which is hierarchically superior and prevail rendering null and void section 7 and 11, National Industrial Court Act, 2006 as was held in *African Petroleum Plc. v. Akinnawo*.[[25]](#footnote-25) Hence, the point was resolved against the Appellant in favour of the Respondent.

This part of the decision of the Court of Appeal is what this article is concerned with as it has far reaching effects on the exclusive original civil of the NIC as far as Chapter IV of the 1999 CFRN is concerned. While it is conceded that the law existing as at the time the cause of action arose is the applicable law as has been repeated held in avalanche of judiciary pronouncements such as *Aremu v. Adekanye[[26]](#footnote-26)* *Ontario Oil & Gas Nig. Ltd. v. Federal Republic of Nigeria[[27]](#footnote-27)* and *Nurudeen Adewale Arije v. Federal Republic of Nigeria[[28]](#footnote-28)* it is obvious that the draftsmen had intended a contrary situation as far as section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act was concerned. However, the draftsmen failed to avert their minds judiciously to the subject of abatement of pending dispute and that an Act or any law under a democratic dispensation does not have retrospective effect. In fact, retrospective nature of law runs afoul to the ethos of democracy and it is a characteristic nature of military or totalitarian rule which subverts the will of the people. From the phraseology of section 254C (1) (a) of the 1999 CFRN (Third Alteration) Act, 2010, the draftsmen had intended that”

notwithstanding the provisions of sections 251, 257, 272 and anything contained in the Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to or connected with any dispute over the interpretation and application of the provisions of Chapter IV of the Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer’s association any other matter which the court has jurisdiction to hear and determine.

An important point is imbedded in the provisions above with regard to the exclusive original civil jurisdiction of the NIC. It is apposite *ipssima verba,* to note that sections 251, 257 and 272 relates to the jurisdictions of the Federal High Court, High Court of the Federal Capital Territory, Abuja and the State High Courts. These Courts are created by the Constitution and their jurisdiction can only be expanded or compressed by the law creating them and not just by an Act of the National Assembly *per se.* The gist is that where a provision of the Constitution is to be amended, for a purported amendment to be valid, it is not enough that the National Assembly enact an Act to that effect. Such an Act must be an Act of a constitutional dimension, i.e. that is must go through the process of constitutional amendment and not just the National Assembly alone exercising its powers and function of law making. The Bill must be sent to all the State Houses of Assembly to get the required percentage altering the particular portion of the Constitution as provided in section 9(2) (3) (4) of the 1999 CFRN which requires a resolution of supporting votes of not less than two third majority of the members of both houses of the National Assembly and approved by a resolution of the House of Assembly of not less than two-third of all the States for any matter not contained in Section 8 of the Constitution while matters in Chapter IV and section 8 of the 1999 CFRN requires a resolution supporting the proposal passed by not less than four-fifth majority votes of members of either Houses of the National Assembly supported by a resolution of the Houses of Assembly of not less than two-thirds of all the States.

Juxtaposing the above with Sections 7 and 11, National Industrial Court Act, 2006 makes the argument of the Appellant for their applicability untenable. For purposes of completeness the Section 7 of the NIC Act pertains to the jurisdiction of the NIC and is *in pari materia* with Section 254C (1) of the 1999 CFRN (Third Alteration) Act, 2010 however, due to it aptness, we take the liberty to reproduce *verbatim ad literatim the* provisions of section 11 (1) (2) of the NIC Act which states as follows:

In so far as jurisdiction is conferred upon the court in respect of the causes or matters mentioned in the foregoing provisions of this Act, the Federal High Court, the High Court of a State, the High Court of the Federal Capital Territory, Abuja, or any other court shall, to the extent that exclusive jurisdiction is so conferred upon the court, cease to have jurisdiction in relation to such causes and matters. Nothing in subsection (1) of this section shall affect the jurisdiction of the Federal High Court, the High Court of a State or of the Federal Capital Territory, Abuja to continue to hear and determine causes and matters which are part heard before the commencement of this Act and any proceedings in any such causes or matters, not determined or concluded at the expiration of one year after the commencement of this Act, shall abate.

The stage is now set for juxtaposing the constitutional efficacy of the NIC Act 2006 and the 1999 CFRN (Third Alteration) Act, 2010. Noteworthy is the fact that both Acts are Acts of the National Assembly but their legal efficacy differs. The NIC is an Act made by the National Assembly as an act of its ordinary legislative powers and function without any input whatsoever from any quarters. Thus, it can be described as an “ordinary Act” of the National Assembly in the discharge of it traditional functions. However, the later one is an Act of the National Assembly but with the input of four-fifth majority of the State Houses of Assembly and can be rightly categorized as an “Act of a Constitutional dimension.” In fact, it ranks *pari pasu* with the unsuspended part of the Constitution and its provisions where so expressed, supersedes any existing provision that runs contrary to it. Put differently, the Act is the Constitution and has the same supreme efficacy over every other law in Nigeria. It enjoins the supremacy efficacy of the 1999 Constitution contained in section 1 (3).

Thus, Section 11(1) (2) of the NIC Act, 2006 which the Appellant assiduously sought to invalidate the jurisdiction conferred on the Lagos State High Court by sections 46 and 272 of the 1999 CFRN with regards to Chapter IV of the same Constitution cannot achieve the intention expressed therein. The reason is, the said section 11(1) (2) of the NIC Act 2006, is subservient to section 46 and 272 of the 1999 CFRN. Thus, the draftsmen intention in section 11(1) (2) of the NIC Act, 2006, can only be legally effectuated pursuant to an Act of the National Assembly of the nature of the 1999 CFRN (Third Alteration) Act, 2010 and not just an ordinary Act. Having failed to transfuse into the provisions of the 1999 CFRN (Third Alteration) Act, 2010 the provisions contained in sections 11 (1) (2) of the NIC Act, 2006, the court was right in coming to the conclusion it did by placing reliance on the dictum of Ogakwu JCA in *Strand Nigeria Limited & Ors. v. Mr*. *Ngozi Ijeh[[29]](#footnote-29)* The trial having commenced before the commencement date of the 1999 CFRN (Third Alteration) Act, 2010, section 254C could not be evoked. This is *in tandem* with the decisions in *Mustapha v. Governor of Lagos State[[30]](#footnote-30),* and *National Union of Road Transport Workers & Anor. v. Road Transport Employee Employees Association of Nigeria.[[31]](#footnote-31)*

Thus, while the intention of the draftsmen in section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 is genuine and laudable, as same will ensure that the special nature and stature of the NIC with regards to any matter relating labour and employment irrespective of the nature of cause of action be ventilated at the NIC, the draftsmen by sheer ignorance or oversight, failed to properly effectuate this and same cannot be done through the back door. It is therefore pertinent that the National Assembly set in emotion, the judicial machinery to amend section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 to incorporate the provisions of section 11 (1) (2) of the NIC Act short of the permission of the matters to be concluded within a year or abate but for all pending matters commenced before the courts mentioned in section 251, 257 and 272 to abate without immediate effect from the date such an amendment becomes effective.

**IV JUXTAPOSING THE EFFECTS OF SKYE BANK LTD. V. IWU AND STANDARD CHARTERED BANK NIG. LTD. V. ADEGBITE**

This section juxtapose the decision of the Supreme Court (SC) in the case of *Skye Bank Ltd. v. Victor Iwu[[32]](#footnote-32)* where the SC held that all appeals arising from matters contained in the exclusive original civil jurisdiction (whether as of right or with leave) from the decision of the NIC terminates at the Court of Appeal by virtue of section 243 (3) and (4) of the 1999 CFRN (Third Alteration) Act, 2010 and the decision of the Court of Appeal in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite[[33]](#footnote-33)* wherein the Court of Appeal held that since the Third Alteration Act failed to provide for abatement of labour cases before any other court than the NIC before its coming into force, such cases would continue before such court so long as they deal with fundamental right issues arising from labour relations notwithstanding that section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 has vested exclusive original civil jurisdiction over such causes and matters on the NIC.

It is apposite to state that these cases have created a dichotomy on fundamental right labour cases which can for the purpose of convenience be categories as “Pre-1999 CFRN (Third Alteration) Act labour cases and Post-1999 CFRN (Third Alteration) Act Labour cases.” The practical effect of this dichotomy is profound when examined against the appellate jurisdiction of the Court of Appeal over labour disputes. In *Adegbite’s Case,* the Court of Appeal made it clear that labour fundamental right matters commenced at the High Court prior to the enactment of the 1999 CFRN (Third Alteration) Act would validly continue. Thus, appeals from such matters by virtue of section 241(1) (d) of the 1999 CFRN dealing with the appellate jurisdiction of the Court of Appeal from the High Courts, shall lie as of right to the Court of Appeal. Hence, such appeals from the High Court to the Court of Appeal, by virtue of section 233(1) (d) of the 1999 CFRN, shall lie to the Supreme Court irrespective of their nature of the dispute once the decision emanated through the appropriate Court.

By this, while labour matters (irrespective of the nature) from the NIC terminates at the Court of Appeal as the final court, fundamental right labour commenced at the High Court prior to the enactment of the 1999 CFRN (Third Alteration) Act can be appealed up to the SC contrary to the decision of the SC in *Skye Bank Ltd. v. Victor Iwu[[34]](#footnote-34)* which is *in tandem* with section 243(3) (4) of the 1999 CFRN (Third Alteration) Act. The justification of the above is that since such fundamental right labour matters did not emanate from the NIC to the Court of Appeal but the High Court to the Court of Appeal, it would be overzealousness to seek to apply the decision in *Iwu’s Case.[[35]](#footnote-35)* This outcome clearly defeats the mischief sought to be cured by section 243(4) of the 1999 CFRN (Third Alteration) Act with regards to appeals on labour matters. Unfortunately, the finality of the decision of the Supreme Court in the *Iwu’s Case* is being whimsically being questioned. This state of the law is undesirable as it engenders instability on an area of the law that certainty and stability is not only urgent but continuously necessary giving the nature and importance of labour to the economy of Nigeria and its total wellbeing.

**V CONCLUSION AND RECOMMENDATIONS**

The NIC as a specialized court is a product of necessity for the settlement of labour and related disputes in Nigeria. Its evolutionary journey has been very tumultuous as a lot of controversies have surrounded it jurisdictional status and stature. In an effort to curb the menace, several legislative steps from the military to the democratic eras have been taken and today, the NIC is a constitutional superior court of record with coordinate jurisdiction with the Federal High Court and State High Court. Under the 1999 CFRN (Third Alteration) Act, 2010, the jurisdiction of the NIC has been greatly enhanced. Unlike it hitherto position, the NIC now has both civil and criminal jurisdiction with the civil being exclusive. However, while its original civil jurisdiction is exclusive, with regard to matters relating to Chapter IV of the 1999 CFRN, the NIC cannot exercise this exclusive jurisdiction to the prejudice of the High Court and Federal High as the powers conferred on them by section 46 of the Constitution have not been revoked by section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 as the section failed to make provisions for abatement of actions commenced before the commencement date of the Act hence, such matters continue to subsists before those courts regardless. Also, section 11 of the NIC Act cannot be used to achieve the same result since same is subservient to sections 46, 251, 257 and 272 of the Constitution as was held by the Court of Appeal in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite.[[36]](#footnote-36)* Thus, in order to give effect to section 11 of the NIC Act, 2006, there is a need to amend the 1999 CFRN (Third Alteration) Act, 2010.

Based on this finding, it is recommended that in order to realize the intention of the draftsmen in amending the 1999 CFRN with regard to the jurisdictional quagmire of the NIC, the 1999 CFRN (Third Alteration) Act, 2010 should be amended by incorporating the provisions of section 11 of the NIC Act to the effect that all proceedings relating to Chapter IV of the CFRN arising from labour and employment matters pending before any court prior or after the commencement of the Act abates and must be transferred to the NIC forthwith.

**SHARING ASSETS ON DIVORCE IN ENGLAND AND NIGERIA: JUDICIAL AND OTHER APPROACHES**

*Adekile Oluwakemi Mary\**

**Abstract**

*The vexed question of how to exercise judicial discretion in sharing assets between couples on divorce remains at the front burner in family law. This is informed by the interpersonal nature of family and marriage. Case law abound in England and Nigeria which suggest a nagging need to close the gap between law and justice. Have the cases produced some principles from which some certainty can be observed? The cases have produced some popularly touted phrases that need clear conceptualisation. The work examines cases dealing with statutory marriage to determine the metaphorical reality of marriage “for richer or for poorer” in that vow of unity. The work discovers that a clear ideological difference exists between English law and Nigerian law on sharing property. Unlike English law, the concept of having a matrimonial property does not exist in divorce law of Nigeria. It recommends options to produce a more realistic approach. It concludes that there is need for the legislature to provide some steam to this intractable issue of spousal right to share property on divorce.*

***Key Words:*** *sharing, matrimonial property, Nigeria, equality.*

**I Introduction**

Sharing or dividing assets on divorce is central in the divorce process. While some jurisdictions provide a predictable framework through a property regime that parties enter into when getting married, some, like Nigeria and England, are bereft of an articulated regime beyond the ordinary incidents of law regarding property. How the courts in Nigeria and England have managed this delicately vexed issue of property claims in a changing landscape of marriage is important to legal development. What are the principles for sharing assets on marital breakdown in English law? What does the popularly touted yardstick of equality mean? Is equality ever departed from? Does the concept of sharing property on divorce even exist in Nigeria? What are the similarities between English law and Nigerian law on assets sharing on marital breakdown in view of Nigeria’s legal pedigree? The objective of this paper is modest. It aims to distil from English and Nigerian cases the basic principles of asset sharing/property readjustment, paying particular attention to the equality yardstick in England and settlement of property in Nigeria. It seeks to probe whether the sharing ideology of community as exists in England similarly operates in Nigerian law. By comparison it focuses on settlement of property under MCA 1973 of Nigeria. As a cautionary note the premise of the work is sharing of matrimonial assets and not determination of ownership disputes. To this end, the paper examines the meaning of “matrimonial property” or “family assets”; the components of equality as a yardstick and when equality is departed from; the factors that assist the courts in exercise of their discretionary justice; the ideology of settlement of property in Nigeria as a property readjustment order. It concludes with recommendations regarding the relationship between English and Nigerian cases.

**1.1. What is Matrimonial Property**

The central issue in most divorce claims where property claims are in contention is whether the property is or is not “matrimonial property” or “family assets”. There is no statutory reference or definition of the term in Nigeria. In 1970 the House of Lords in *Pettitt* v *Pettitt[[37]](#footnote-37)* deprecated the use of the term “family assets.” It considered it “a useful loose expression” and that “family assets were not a special class of property known to law”. This was reiterated by Viscount Dilhourne in  *Gissing* v *Gissing*.[[38]](#footnote-38) Today, a value shift has occurred and the House has recognized that “family assets” “family property” “matrimonial property” or like expressions do exist as a class in law. Baroness Hale in *White* v *White[[39]](#footnote-39)* used the term “family assets.” According to her, these are assets generated by the family: the family home, family savings, income from joint business of the couple but excludes assets generated by sole efforts of a spouse. English cases have held that the property to be shared must be matrimonial property. Non matrimonial property cannot be shared in short marriages.[[40]](#footnote-40) Non-matrimonial property means assets that are not ‘family assets’, or not generated by the joint efforts of the parties. This includes property acquired before marriage, gifts and inheritances during the marriage. The majority decision in *Miller v Miller[[41]](#footnote-41)* and *McFarlane* *v McFarlane*[[42]](#footnote-42) regards business assets as generated by sole effort of one person unless both work in the business. With respect to business assets, Lord Nicholas dissented saying business assets should be shared in order not to discriminate against a home maker. His approach buttresses the earlier decision of Lord Denning in *Nixon* v *Nixon*.[[43]](#footnote-43) Lord Denning held that a wife was entitled to a share in the matrimonial home and in the husband’s business where she had worked. Lord Nicholls also included the matrimonial home as matrimonial property even if one party had brought it into the marriage. According to Lord Diplock matrimonial property is:

“property, whether real or personal which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels’ but without intending any connotation as to how the beneficial proprietary interest in any family asset was held.”

These conceptualization has provided some element of certainty in an otherwise uncertain terrain in English law. Given this conceptualization in England and the non-conceptualization in Nigeria, as will be seen later, what implications does it have on sharing of assets in divorce?

**II How are Matrimonial /Family Assets Shared?**

It is evident from case law that the principles regulating the readjustment of property on divorce are clearly a creation of the proactivity of the English courts. On their parts the English courts have stepped into the gap created by statute which failed to create a template of distribution. The social and policy issues have been considered in the line of cases of *White v White,*[[44]](#footnote-44) *Miller v Miller[[45]](#footnote-45)* and *Macfarlane v Macfarlane.*[[46]](#footnote-46)First it must be noted that only matrimonial assets are shared. Baroness Hale in *White v White[[47]](#footnote-47)* was not prepared to share non family assets on the grounds that “it simply cannot be demonstrated that the domestic contribution, important though it had been to the welfare of the family as a whole, has contributed to their acquisition.” The settled law is the flexible approach of Baroness Hale: distinction must be made between family assets and non-family assets, family assets meaning assets acquired by joint efforts. This position of determining family assets as based on joint efforts does not settle the inquiry. Joint effort is a matter of varied interpretation: must the effort be proportional, directly referable to the assets or would general contribution to the marriage suffice? These issues are further addressed by looking at the equality yardstick.

**2.I. The Equality Yardstick**

English courts have held that matrimonial property must be shared equally thereby creating a yardstick of equality. In *Miller* v *Miller*[[48]](#footnote-48) and *MacFarlane* v *MacFarlane*[[49]](#footnote-49) it was said that the yardstick is an aid, not a rule. According to Baroness Hale in *White v White[[50]](#footnote-50)* matrimonial assets are governed by the equality yardstick and divided equally unless there is a good reason for not doing so. Non family assets are not subject to the equality yardstick and may be kept by the person who generated them but in very long marriages the court may well decide to divide them equally. The case of White is significant in many respects: in its definition of matrimonial property/ family assets and creating the equality yardstick; it is also significant for pursuing equality of outcomes which ensures that there is no bias against any party. The statement of the Court of Appeal in *Charman* v *Charman*  (No. 4)[[51]](#footnote-51) is potent:

Property should be shared in equal proportions unless there is good reason to depart from such proportion and that the source of the property will be relevant to the decision as to whether there is good reason to depart from equality.

In *Miller v Miller*[[52]](#footnote-52) the couple were married for three years. At the time of the divorce the assets of the husband were worth £17 million pounds. The trial court awarded the wife £5 million. The Court of Appeal confirmed this award on the ratio that the husband had caused the marital breakdown by running away with another woman and that he had caused the wife reasonably to expect a generous provision in the event of a divorce. At the House of Lords, both arguments were rejected as irrelevant. The House decided that even though it was a short marriage, she had a right to an equal share in the assets acquired during the marriage. The husband received £20 million from their sale of a company he had built up and the wife received £5 million for a three year marriage.[[53]](#footnote-53)

In *Macfarlane v Macfarlane*[[54]](#footnote-54) the wife had given up a lucrative career in the course of the marriage in order to look after the children and family while the husband continued to pursue his career. They were before the divorce court 16 years after the marriage; their assets as worth 3 million which they agreed to share. They could not agree on the periodical payments. The House of Lords ordered £250, 000 pounds per year from the husband’s earning of over £750, 000 per annum. This ensured fair compensation of the wife for losses created during the marriage.

The yardstick of equality is generally applied to matrimonial property; the outcome is that the property is divided into two equal halves or disproportionally to generate equal outcomes. The distinction between matrimonial and non-matrimonial property is maintained. However, this distinction is blurred in lengthy marriages. Equal division of all assets, matrimonial or non-matrimonial, is usually applied to marriages of 20 years or more. Baroness Hale and Lord Nicholls agreed that in a case of lengthy marriages, whether the assets were family assets or matrimonial assets would become increasingly irrelevant and it would be likely the courts would likely divide everything the couple had in half.

**2.2. Equality of Outcome and Non Discrimination**

The line of English cases has shown that equality does not necessarily mean equal division but equality of outcomes. One can deduce that the House recognises the need for equality to be equitable. In *Miller’s case* the husband’s assets had increased during the marriage and £5 million was a fair share of the assets. Accordingly, the amount was way short of equal division. It was geared at equality of outcome. The Matrimonial Causes Act 1973 of England and the Marriage (Same Sex Couples) Act 2013 of England contain the exercise of discretion by English Courts listing also a number of relevant factors rather than guiding principles directing the court to take all relevant circumstances of the case into account in exercising discretion’. English courts, in departing from the yardstick of equality are to consider such factors as:

(a) the income, earning capacity, property and other financial resources;

(b) the financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future

(C) the standard of living enjoyed by the parties before breakdown of the marriage;

(d) the age of the parties and duration of the marriage;

(e) any physical or mental disability of either party to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family including any contribution like looking after the home or caring for the family;

(g)the conduct of each of the parties, if that conduct is such that in the opinion of the court it would be inequitable to disregard;

(h) in nullity proceedings the value of any lost benefits.[[55]](#footnote-55)

The factors are treated of equal value. An examination of these factors reveals that the philosophy is to produce equality of outcome. The English courts have over the years developed some principles to assist in interpreting the Act. These include: welfare of the child as first consideration:**[[56]](#footnote-56)**the policy of clean break; looking at the needs of the parties especially housing needs; and the yardstick of equality.

Non-discrimination is meant to produce equality of outcome. The House of Lords held that there should be no bias against home maker in favour of breadwinner in the application of equality yardstick.[[57]](#footnote-57) This is as demonstrated in *White v White*. The awards must be checked against the yardstick of equality. This is necessary to get a fair outcome. Lord Nocholls stated thus:

[T]here is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles . . .If , in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets, there should be no bias in favour of the money earner and against the home maker and child carer.”[[58]](#footnote-58)

Non-discrimination was reiterated in Mc Farlane’s case. It held that division of property may even involve element of compensation where the homemaker had given up a career to do so as to take care of the home. In the attempt to divide equally the focus is not on achieving fairness at the time of divorce only but also in the foreseeable future.[[59]](#footnote-59) In *Macfarlane* for instance, the couple ‘s assets was worth £3 million and the husband was earning £1 million a year. If assets are equally divided, each would get £1.5m. After a few years the husband would be many times wealthier than the wife. To avoid this the House of Lords approved an order of substantial periodic payments from the husband to the wife.[[60]](#footnote-60)

**2.3 Deviation from Equality Yardstick**

Since equality is a yardstick instances of deviation are common. These deviations include instances where there are surplus assets, where there is a stellar contribution from a spouse and in situations of short marriages. A close scrutiny of the case law will depict what the objective of the process entails.

*2.3.1. Surplus Assets*

In White, Lord Nicholls limited his comments on equality yardstick to cases where there are surplus assets. Without this limitation, there were concerns that equal sharing would prejudice lower income cases because it has a debilitating effect on the primary carer who would in effect get less. Therefore, equal division will not be done where the assets are insufficient to meet the needs of the parties; in such situations the needs of the parties would prevail.[[61]](#footnote-61) But where assets are sufficient to meet their needs, the sharing principle would apply: accordingly, in big money cases, where there is sufficient property to meet needs of parties, it is only marital property that can be shared.

*2.3.2. Steller Contribution*

Equality (sharing marital assets in equal halves) will also not be followed where one party makes “extraordinary contribution”, “stellar contribution” or their effort is regarded as containing a “spark”, “force” or “seed of genius.” For example in *Cowan v Cowan*[[62]](#footnote-62) the contribution of the husband was regarded as “stellar” or “really special” justifying departure from equality.[[63]](#footnote-63) The case of Charman (No. 4)[[64]](#footnote-64) significantly looked at the outcome of special contribution in relation to awards. The couple were married for twenty eight years. Neither brought capital into the marriage. While the husband worked in the insurance business the wife stopped work when they started expecting their first child. The husband became very wealthy. In 2004 the wife petitioned for divorce and applied for financial and property settlement. The husband and wife’s assets were assessed at £8 million and £123million respectively. The wife conceded that the husband had made “special contribution” which was significant enough to justify departure from equal division of their assets. She proposed 55/45% in the husband’s favour. The trial judge awarded 63.5% to the husband as proportional to his special contribution. He ordered him to pay the wife £40million plus the £8million to make £48million. The husband appealed, praying that the wife should get £20 million. The Court of Appeal unanimously disagreed. Sir Mark Potter stated that special contribution should normally give to one who has made it at least 55% of the assets. However, it would be unlikely to entitle that party, after a very long marriage, to receive more than twice as much as that party and therefore the maximum the special contributor was likely to receive was 2/3 or 66.6% of the assets. In the light of what the trial judge awarded him, the difference was not significant enough to uphold the appeal.

*2.3.3. Short Marriages*

In *Sharp* v *Sharp*[[65]](#footnote-65) the misconception that property is shared equally in all cases was cleared. The couple had cohabited for two years and married for four years before the divorce. The couple were in their early 40s and had no children. The High Court decided that her former husband should get half of the fortune she built up during their marriage. The marital assets of £5.45m pounds was equally divided with each getting £2.7million. On the wife’s appeal against equal sharing, the Court of Appeal upheld the appeal and gave Mr Sharp £2m pounds on the basis that the marriage was short, parties kept their finances separate during marriage and they each had their own career. According to Justice Macfarlane “the husband made no contribution to the source of the wife’s businesses and this is not the case where . . .the husband is said to have contributed more to the life or welfare of the family than the wife”. Therefore for short marriages fairness requires that the claimant does not share in the other’s non matrimonial property.[[66]](#footnote-66)

**III Sharing/ Readjustment of Assets in Nigeria**

The starting point is to identify the nature of the property involved. The decision from England maintain distinction between matrimonial and non-matrimonial property. Matrimonial property is divided between the parties. Unfortunately, Nigerian statutes do not define the term matrimonial assets or property even though case law uses indiscriminately. For example, in *Oghonoye* v *Oghonoye*,[[67]](#footnote-67) Aderemi JCA spoke of “. . . joint matrimonial property.” The Nigerian Court of Appeal inthe case of *Mueller* also referred to the disputed property as “joint matrimonial property which belongs to the parties jointly”. These cases did not define or conceptualise the terms. However, one could deduce from the facts of cases that the courts consider the efforts put into the property as critical. Where parties jointly made substantial financial contributions to the property it can be regarded as joint property. It is a fundamental equitable principle that joint contribution to property creates a joint interest irrespective of where formal title is located. The lack of a matrimonial property as a term of art therefore leaves the judge a much wider field to exercise discretion: he must decide the status of the property and the proportion of interest in order to allocate accordingly under the Married Women Property Act if it’s a claim on ownership. Within this context. It is not the object of law in Nigeria to give parties interests in assets that they have not given consideration for. What is the framework for property readjustment in Nigeria then?

**3.1. Settlement of Property**

This is a property adjustment order available to spouses of statutory marriages under section 72 of the MCA of Nigeria. The section states 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 of the marriage, such 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 circumstances of the case.

By section 73(1) (j)the court may discharge the order if the person for whose benefit it is made remarries or if there are any just cause for doing so; modify the effect of the order or suspend its operation. Settlement of property can be made for the benefit of the spouse or child of the marriage. [[68]](#footnote-68) The property to be settled may be sole or joint property, it could be held in possession or reversion, and may be subject of post nuptial or ante nuptial settlement. Section 73(d) and (e) provide that the court in exercising its powers under the Act may “order that any necessary deed or instrument be executed, and that the documents of title be produced or such other thing be done as are necessary to entitle an order to be carried out effectively or to provide security for the due performance of an order”.

Accordingly, property adjustment order of settlement could be a permanent or variable order to the recipient. Whilst the MCA gives equal access to spouses of statutory marriage to access the court during divorce proceedings. It does not confer matrimonial homes and matrimonial property rights on spouses. In fact, it operates an ideology of separate property. Section 72 speaks of “property belonging to either or both parties.” The only factors the courts are to consider are in section 72 “as the court considers just and equitable in the circumstances”. The basis of the award is discretionary apart from the terms of the award.

Some judicial interpretation / application of the section is not devoid of misconception by the courts who attach conditions not stipulated by the Act. The ideology that has been judicially recognized is that of providing the claiming souse a roof over the head. In *Menakaya v Menakaya*[[69]](#footnote-69)the court did not award settlement but rather lump sum maintenance order (a financial order)despite the fact that the husband had six properties.

In *Kafi* v *Kafi*[[70]](#footnote-70) the court ordered property to be settled on the wife with condition that the deed of transfer contain a condition that the property be not transferred in the lifetime of the respondent. The basis of settlement was evidence that the wife respondent contributed to the development of the husband’s property by supervising construction, fetching water for builders, buying building materials, feeding workers; she also contributed to the success of the husband’s the business. It is of note that despite the fact of having six properties the husband challenged the award. Thankfully the Court of Appeal dismissed his appeal. In *Akinboni* v *Akinboni* [[71]](#footnote-71) the court ordered settlement in favour of the wife and children as long as they are of good behaviour. A restriction like these on property settlement are at variance with the ideology of the statute to provide a home for the spouse and children of the marriage. Section 72 requires that the court should consider what is “fair and just” in the light of circumstances. The statutory limitation is as to the order of award and not as to the holding of the property. The purport to give a permanent home to the recipient is defeated by putting conditions of good behaviour as a restriction. There are other conditions in section 73 MCA, relating to the variation of orders for ancillary reliefs, due to factors of change in circumstances like remarriage but which are hardly sought in practice.

The Nigerian judiciary run shy of giving divorcing spouses permanent rights in each other’s assets unless evidence exists of a legal beneficial claim. The matrimonial relief of settlement or maintenance are available under the MCA; neither confers equal sharing or equality of outcomes or minimal loss. They are needs assessed orders. Entitlement to the asset purely on the basis of marriage or contributions are out of the question.

The ideology behind settlement of property in Nigeria is not that of a party claiming his legal rights to an asset but a consideration borne out of equity and justice to ensure that minimal arrangement is made for welfare. Settlement connotes a recognition of the legal entitlement of the settlor spouse to the asset, whether solely or jointly with the claiming spouse or any other.[[72]](#footnote-72) The exercise of discretion by Nigerian judges demonstrates that settlement of property is regarded as the privilege/ licence to occupy the other spouse’s property.

The MCA principle of settlement of property is unknown to customary and Islamic marriages. This is not unusual considering that settlement relates to landed property. Such property is governed by closed rules of tenure under customary law. That the family or community has exclusive ownership and never an individual unless there is partition is trite law.

Unless joint interests can be established by principles of property law, in which case the claim is a claim as of right to the asset as beneficial owner. Neither statute nor courts promote a claim to joint ownership based on domestic or other non -financial contribution.

Accordingly, Nigerian courts do not operate the equality principle like English law. Upon divorce, parties in statutory marriage seek maintenance and settlement of property for the benefit of the spouse and or children37. They do not seek such for customary and Islamic marriages. It is of note that Nigerian courts have a general power of the court to do justice like the English courts under section 73(l) the court has general power to:

“Make any order (whether or not of the same nature as those mentioned in the preceding paragraphs of this subsection, and whether or not it is in accordance with the practice under any other enactment or law before the commencement of this Act) which it thinks it is necessary to make to do justice.”

This is a lame dock in the hands of Nigerian courts. The section is hardly used. Powers to order sale, to do equal division and all others may be accommodated under this omnibus power. The time has come to utilise this in the changing world of marriage.

**IV Options**

Redistribution of property on divorce is problematic. [[73]](#footnote-73)Policy considerations are critical to any coherent legal formulation of rules or principles. The desire for certainty on one hand and fairness on the other appear mutually exclusive. This cannot be avoided bearing in mind the interpersonal nature of family law. What options are viable towards a holistic approach to some of the issues raised in property rights?

In Nigeria, what should be the starting point in adjudicating spousal claims the face of changing world of marriage? Should the law continue insist on separate property with no co-mingling at all as is now the case? The following options have been considered to some issues of spousal property rights in other jurisdictions. Could they be used in Nigeria?

**4.1. Creating a Property Regime by Legislation**

This demands community of property but it has failed with the English society, except for the judicial enthronement of deferred community as seen in the cases above. In contrast, continental countries embrace community of property regime. Nigeria might do well to interrogate the aspirations of her people in order to determine the workability of statutory creation of property regime. Given the patriarchal nature of the society legislation has mostly been used to force positive change in the value system. In family matters this has often met with stiff resistance from the least expected quarters, even legislators themselves. A good example is the Gender and Equal Opportunities Bill 2010 that has continued to fail in the National Assembly due to is considered entrenchment of new grounds.[[74]](#footnote-74) However, this is still the likely direction in the long run.

**4.2. Creating a Concept of Family Home**

Nigeria could explore the option of creating a concept of family home by statute which will enjoy community of property. However, while it is an attractive option it is not practical approach: it in fact creates more problems: questions regarding location of such homes considering the land tenure system: homes built in consanguine villages or family lands of either spouse may be subject to extended family or community interests. It will be difficult for a wife to enjoy property interest in property located in husband’s family or communal land unless it is monetized on divorce. The socio-cultural nature of marriage type, a polygamous marriage may have to consider the interests of other spouses as well.[[75]](#footnote-75) Moreover there seems little official support for this approach going by the position of the Nigeria Law reform Commission:

“We consider it appropriate that even within marriage there should be a measure of individuality, otherwise either or both of the spouses could in the course of time begin to feel smothered and this situation could eventually destroy the marriage. To this end it is felt that while some property could be joint property of the spouses each should be able to own his or her separate property. Indeed, since the MWPA the proposed position could be said to have been assured for a long time in relation to women married under the Act.”

What the Commission regards as ‘joint property’ is not certain.

**4.3. Intended User**

The beneficial title to property is made to depend on intended use. This will demand a journey into the history of the marriage and the intendment of the parties towards the property at the time it was acquired. It creates the problem that is manifest for common intention constructive trust, which is the current approach to property ownership disputes in Nigeria.

**V Conclusion**

There are many differences between Nigeria and England in efforts to adjudicate family assets; in England since White and Macfarlane the starting point of sharing assets is equality. English cases have held that the property to be shared must be matrimonial property; non matrimonial property, which it construed as property acquired before marriage, gifts and inheritances during the marriage cannot be shared in short marriages. In Nigeria separate property operates as a basis of all claims; English judges have stepped into the gap of statute, Nigerian courts have failed to do so; the idea of matrimonial homes exists in England but not in Nigeria.

Attempts by Nigerian courts to step into the gap created by statute which lacks a policy and template for redistribution has been faulty being devoid of clearly articulated principles that are autochthonous to the realities of the Nigerian society. Social and policy considerations are not considered. If any philosophy can be deduced therein, it is that a party in divorce proceedings may be given a settlement of property in assets belonging to either or both parties. The determination of whether the property belongs to either or both is settled by principles of property law. This privilege arises as a needs based mechanism in the light of the stated considerations in section 72 and 73 of Nigeria’s MCA.

In Nigeria the concept of matrimonial and non-matrimonial assets, matrimonial home and the ideology of joint efforts giving rise to equal shares or communal interests are not encapsulated in settlement of property issue. It is suggested that there is need for an emergence of a distinction between matrimonial and non- matrimonial assets in Nigeria.

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   The fact that humans have various interests there is bound to be a clash of interests from time to time leading to conflicts. [↑](#footnote-ref-1)
2. Lew, J. D. M., Mistelis, L. A. and Kroll, S. M., Comparative International Commercial Arbitration (London, Kluwer Law International, 2003) 1. [↑](#footnote-ref-2)
3. Some of these courts in clued the Supreme Court, Court of Appeal, Federal High Court, High Court of the Federal Capital Territory, Abuja, State High Court, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of the States, Customary Court of Appeal of the States, etc. [↑](#footnote-ref-3)
4. [2019] 1 NWLR (9t. 1653) 348. [↑](#footnote-ref-4)
5. 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 settled the hitherto jurisdictional quagmire that had trailed the NIC. [↑](#footnote-ref-5)
6. [2019] 1 NWLR (Pt. 1653) 348. [↑](#footnote-ref-6)
7. [2017] 6 SC (Pt. )1. [↑](#footnote-ref-7)
8. [2019] 1 NWLR (Pt. 1653) 348. [↑](#footnote-ref-8)
9. Oji, A. E., and Amucheazi, O. D., Employment and Labour Law in Nigeria (Lagos, Mbeyi & Associates (Nig.) Ltd., 2015) 253. [↑](#footnote-ref-9)
10. Ibid. p. 254. [↑](#footnote-ref-10)
11. Akintayo, J. O. A., and Eyongndi, D. T., “The Supreme Court of Nigeria Decision in Skye Bank Ltd. v. Victor Iwu: Matters Arising” 9(3) The Gravitas Review of Business and Property Law, September, 2018) 110. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Oji, A. E., and Amucheazi, O. D., (No. 8) Op. cit. P. 254. [↑](#footnote-ref-13)
14. Ibid. P. 255. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. [2005] 4 NLLR (Pt. 10)270 at 282. [↑](#footnote-ref-16)
17. [2003] 15 WRN 32. [↑](#footnote-ref-17)
18. Section 245C (1) (a) of the 1999 CFRN (Third Alteration) Act, 2010. [↑](#footnote-ref-18)
19. Section 245C (1) (b) of the 1999 CFRN (Third Alteration) Act, 2010. [↑](#footnote-ref-19)
20. Section 245C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010. [↑](#footnote-ref-20)
21. Section 245C (1) (e) (f) of the 1999 CFRN (Third Alteration) Act, 2010. [↑](#footnote-ref-21)
22. Section 245C (1) (h) (i) (ii) (iii) (iv) (v) (vi) of the 1999 CFRN (Third Alteration) Act, 2010. [↑](#footnote-ref-22)
23. The use of the word “she” in description of the learned trial judge by the appellant in its notice of appeal runs contrary to the traditional description of judges as “learned brothers.” It is unethical for a lawyer to refer to a judge in an inappropriate nomenclature. [↑](#footnote-ref-23)
24. [2011] 7 NWLR (Pt. 1247) 465. [↑](#footnote-ref-24)
25. [2012] 4 NWLR (Pt. 1289) 100 at 116-117. [↑](#footnote-ref-25)
26. [2004] 13 NWLR (Pt. 891) 972. [↑](#footnote-ref-26)
27. [2015] LPELR-24651 (CA). [↑](#footnote-ref-27)
28. Suit No. CA/L/770/2009 judgment delivered on 6/11/2014. [↑](#footnote-ref-28)
29. Unreported Suit No. CA/L/790/2012. [↑](#footnote-ref-29)
30. [1987] 2 NWLR (Pt. 58) 539. [↑](#footnote-ref-30)
31. [2012] 10 NWLR (Pt. 1307) 170. [↑](#footnote-ref-31)
32. [2017] 6SC (Part 1) 1. [↑](#footnote-ref-32)
33. [2019] 1 NWLR (Pt. 1653) 348. [↑](#footnote-ref-33)
34. [2017] 6SC (Pt. 1) 1. [↑](#footnote-ref-34)
35. Ibid. [↑](#footnote-ref-35)
36. [2019] 1 NWLR (Pt. 1653) 348. [↑](#footnote-ref-36)
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    Gissing v Gissing [1969] 1 All ER 1043(CA), [1970] 2 All ER 780 (HL). [↑](#footnote-ref-37)
38. Ibid. [↑](#footnote-ref-38)
39. [2001]1 FLR 981. [↑](#footnote-ref-39)
40. Note that there is no statutory definition of these concepts. [↑](#footnote-ref-40)
41. [2006] UKHL 24. [↑](#footnote-ref-41)
42. Ibid. These cases are co-joined decisions of the House of Lords. [↑](#footnote-ref-42)
43. [1969]2 All ER 414. [↑](#footnote-ref-43)
44. Above note 3. [↑](#footnote-ref-44)
45. Above note 5. [↑](#footnote-ref-45)
46. Ibid. [↑](#footnote-ref-46)
47. Ibid. [↑](#footnote-ref-47)
48. Above note 5. [↑](#footnote-ref-48)
49. Ibid. [↑](#footnote-ref-49)
50. Above note 3. [↑](#footnote-ref-50)
51. [2007] EWCA Civ. 503. [↑](#footnote-ref-51)
52. Above note 5. [↑](#footnote-ref-52)
53. A classic example of equality of outcome. [↑](#footnote-ref-53)
54. Above note 5. [↑](#footnote-ref-54)
55. It is of note that in making financial orders of maintenance in Nigeria under the MCA similar factors are used. See the enumeration of these factors by the Nigerian Court of Appeal in Menakaya v Menakaya [1999] NWLR (pt. 472) 256. [↑](#footnote-ref-55)
56. Matrimonial and Family Proceedings Act 1984. Note that at a point in time English law had used policies like minimal loss principle which aimed at keeping parties in the financial position they would have been had the marriage not broken down. This was overruled. See M v B (Ancillary Proceedings: Lump Sum) [1998] 1 FLR 3 which the House of Lords approved in Piglowski v Piglowski [1999] UKHL 27 where child interest was recognized as paramount. [↑](#footnote-ref-56)
57. This is depicted in the case of White v White (above note 3) and Charman No. 4 above note 15. [↑](#footnote-ref-57)
58. Per Lord Nicholls in Charman above note15 [↑](#footnote-ref-58)
59. Baroness Hale in White v White above note 3. [↑](#footnote-ref-59)
60. Probert, R. 2009. Cretney & Proberts’ Family Law London, Sweet & Maxwell pp230- 231 identifies the challenges or problems of equality yardstick: that it’s a matter for parliament; that older wife would get less in the needs approach of White and that focusing on contributions rather than needs would avoid this. This is what Eekelaar called a shift from welfare based approach to entitlement based approach- contributions approach. Therefore, the spouse will be asking for “my share of the property” rather than the share of “his property.” Nigeria adopts the contributions / entitlement approach but the result is debilitating. There is also the challenge of inter comparison whereby you look at the lazy wife receiving same thing as the hardworking wife. English courts, in the light of Miller; Macfarlane use periodic payments to not only meet needs of parties but also to compensate for lost income. So after doing equal division, they also order periodic payment as seen in Macfarlane where Mrs Macfarlane was awarded the periodic payment to compensate her for the fact that shortly after the marriage she gave up a high paying job to care for the children, thereby being deprived of developing her career. [↑](#footnote-ref-60)
61. See the Miller and McFarlane case, above note 5. [↑](#footnote-ref-61)
62. Sharp v Sharp [2017] EWCA Civ. 408. [↑](#footnote-ref-62)
63. See Lambert v Lambert [2002] EWCA Civ. 1685. [↑](#footnote-ref-63)
64. Above (note 15). [↑](#footnote-ref-64)
65. Above note 27. [↑](#footnote-ref-65)
66. By this is meant assets that are not ‘family assets’, or not generated by the joint efforts of the parties, the duration of the marriage may justify a departure from the yardstick of equality. [↑](#footnote-ref-66)
67. [2010] 3NWLR (pt.1182) 564. [↑](#footnote-ref-67)
68. MCA, section 72(1). By section 72(3) the order cannot be made for benefit of child who has attained 21 years unless the court is of the opinion that there are special circumstances that justify the making of the such order. [↑](#footnote-ref-68)
69. Above (note 19). [↑](#footnote-ref-69)
70. (1986) 3 NWLR (pt. 27) 175. [↑](#footnote-ref-70)
71. (2002] 5 NWLR (pt. 761) 564. [↑](#footnote-ref-71)
72. S. 73(1) and (2). Where a person alleges contributions to particular property, financial or otherwise, the focus should therefore be the MWPA 1883 and local counterparts. [↑](#footnote-ref-72)
73. Cretney above (note 24) p. 322; Herring J. 2007. Family Law London, Pearson Educational Publishers. [↑](#footnote-ref-73)
74. This bill is meant to give effect to some human rights instruments like chapters ii and IV of the 1999 Constitution of Nigeria, international human rights on non-discrimination and the domestication of CEDAW and the African Charter. Getting it enacted into law since 2010 has been a herculean task. [↑](#footnote-ref-74)
75. This may be purely academic. Polygamous marriages are governed by customary law which does not recognize equality rights. [↑](#footnote-ref-75)