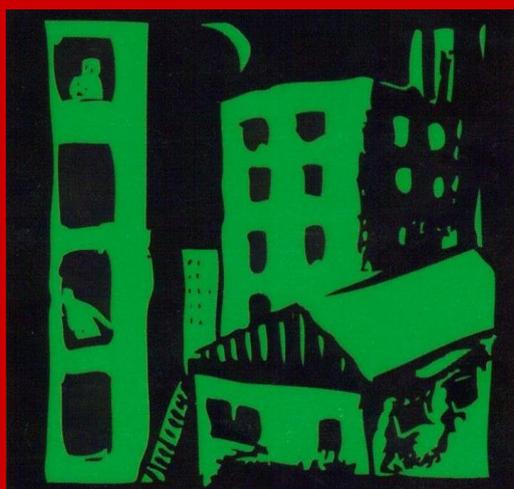


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**Normative  
intersectionality in  
married women's  
property rights in  
southern Nigeria**

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**ABSTRACT**

*The fate of marriage gifts during a customary law divorce is significant for the interaction of legal orders in sub-Saharan Africa, especially in the context of scholars' fixation with conflict of laws. In analysing this fate, this article introduces normative intersectionality as*

*a theoretical framework for a nuanced understanding of how laws and socio-economic forces interact in post-colonial settings. Normative intersectionality rejects a legal positivist view of rights, which neglects people's adaptation of indigenous norms to socio-economic changes. In this sense, normative intersectionality is useful for addressing the traditional Igbo law of matrimonial property, which regards a married woman's property rights as subsumed in her husband's rights. Using the division of marriage gifts in Southern Nigeria as a case study, the article draws attention to how legal orders speak to, rather than against, each other, and in so doing, stresses the adaptive character of indigenous laws. It argues that normative intersectionality illumines the interplay of gender equality, property rights and legal pluralism. Accordingly, it urges judges to use the imitative nature of legal pluralism in post-colonial settings to remedy entrenched systems of injustice and inequality, which often hide under the banner of tradition.*

**Keywords:** Adaptive legal pluralism, marriage gifts, African customary law, matrimonial property rights.

## 1. INTRODUCTION

What happens to a couple's marriage gifts in the event of a customary law divorce in southern Nigeria?<sup>1</sup> Marriage gifts are items of material value received by a bride from her family and friends to ease her marital experience.<sup>2</sup> Their fate during marriage dissolution is an important question for law and society scholarship in Africa, especially in the context of legal pluralism and conflict of laws.<sup>3</sup> Yet, oddly enough, their fate has not been addressed in any major scholarly work, even though the majority of African women contract customary law marriages, which are still regarded as an alliance between two kinship groups.<sup>4</sup>

In providing an answer, we introduce the concept of normative intersectionality. Ever since Kimberlé Crenshaw created "intersectionality" in 1989 as a critique of difference and explanation of race and gender interaction,<sup>5</sup> it has spread beyond critical race and gender theories.<sup>6</sup> It is now used as an analytic framework for explaining how

<sup>1</sup> By southern Nigeria, we mean, primarily, south-east Nigeria, where the Igbo tribe is located. This area comprises of Imo, Abia, Anambra, Enugu and Ebonyi states. Predominantly Christian, it has a population of about twenty million with a generally homogenous demography.

<sup>2</sup> A detailed explanation of marriage gifts is provided in part 2.

<sup>3</sup> See Bennett TW *Application of customary law in southern Africa: the conflict of personal laws* Cape Town: Juta (1985); Cuskelly K *Customs and constitutions: state recognition of customary law around the world* Bangkok: International Union for Conservation of Nature (2011).

<sup>4</sup> Mair LP *African marriage and social change* New York: Routledge (1969).

<sup>5</sup> Crenshaw K "Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics" (1989) 1 *University of Chicago Legal Forum* 139 at 139.

<sup>6</sup> See, for example, the works of Jordan-Zachery JS "Am I a black woman or a woman who is black? A few thoughts on the meaning of intersectionality" (2007) 3(2) *Politics & Gender* 254 at 256. Anthias F "The material and the symbolic in theorizing social stratification: issues of gender, ethnicity and class"

interconnected systems of power affect people on the margins of societal influence.<sup>7</sup> In its broadest conceptualisation, intersectionality perceives indices of social stratification such as race, wealth, gender, age, religion and disability, as interwoven elements that create a discernible pattern of power. Thus, rather than isolate these indices, the focus should be on their interaction and consequences. By applying intersectionality to law, specifically the interaction of legal orders, we seek two objectives.

First, we emphasise law's interdisciplinary character, a character that questions the doctrine of legal certainty, which dominates judicial approaches to adjudication.<sup>8</sup> Perceiving law as essentially interdisciplinary enables jurists to transcend legalistic views of rights, and to connect rights more effectively to their unique social contexts. Secondly, we present marriage gifts as an analytical tool for the interface between gender equality, women's property rights, and interaction of laws. As legal anthropologists know too well, law cannot be divorced from its social context. Thus, the environment in which people articulate and apply social norms, the obliging and constraining influences on these norms, and the enforcement mechanisms of norms, are intertwined. In this interconnected sense, customary norms of property and the social institutions surrounding these norms are "conditioned by culture and social organisation" in mutually reinforcing ways.<sup>9</sup>

We illustrate this assertion with female genital cutting. Campaigners against this cultural practice sometimes find that their biggest obstacle is not opposition from men. Rather, it is opposition from elderly women, whose resistance counters the agency of young girls opposed to the practice. With their resistance, these elderly women serve as structural support for perpetuating genital cutting.<sup>10</sup> Another example is how women sustain the custom of bride-wealth payment through their non-exercise of agency against this custom.<sup>11</sup> These two examples demonstrate the mutually reinforcing ways through which customary norms and cultural institutions condition each other. Underlying this cultural conditioning is the interplay of power, property and philosophy within historical contexts. Arguably, the manner in which scholars and policy makers approach this interplay goes a long way in explaining the role of law in social change

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(2001) 52(3) *The British Journal of Sociology* 367 at 376; Maynard M "'Race', gender and the concept of 'difference' in feminist thought" in Afshar H & Maynard M (eds) *The dynamics of 'race' and gender* London: Taylor & Francis (1994); Yuval-Davis N *Gender and nation* London: Sage(1997); Collins PH *Black feminist thought: knowledge, consciousness, and the politics of empowerment* New York & London : Routledge (2001).

<sup>7</sup> Brittney C "Intersectionality" in Disch L & Hawkesworth M (eds) *The Oxford handbook of feminist theory* Oxford: Oxford University Press (2016) at 385-391.

<sup>8</sup> See, for example, South Africa's Law of Evidence Amendment Act 45 of 1988.

<sup>9</sup> Selznick P "'Law in context' revisited" (2003) 30 *Journal of Law and Society* 177 at 177.

<sup>10</sup> Gangoli G, Gill A, Mulvihill N & Hester M "Perception and barriers: reporting female genital mutilation" (2018) 10 *Journal of Aggression, Conflict and Peace Research* 251 at 257-258.

<sup>11</sup> Diala JC *The interplay of structure and agency: the negotiation process of bridewealth payment in south-east Nigeria* (unpublished PhD thesis, University of Cape Town, 2018).

across space and time.<sup>12</sup> Accordingly, presenting law as an intersectional creature offers some advantages to law and society scholars.

### 1.1 Why normative intersectionality?

By privileging the role of values in the interaction of legal orders, the concept of normative intersectionality enhances law's liberation from legal positivist or rule-minded shackles, which law acquired from its historical roots of conquest, imperialism, and colonialism.<sup>13</sup> As a historical offspring of conquest, law did not initially tolerate values. Rather, it leaned towards the idea that the validity of a given norm is dependent on its sources, rather than its merits. Accordingly, pre-20th century jurists operated with a theoretical separation of law and morality – the so-called “what law is and what it ought to be”.<sup>14</sup> Unfortunately, this legal positivist mindset discounted the place of values in the concept of legality, thereby influencing jurists like Henry Maine to believe that African customary law is not real law.<sup>15</sup> Today, no scholar seriously discounts the value of values in legal interpretation.

Secondly, normative intersectionality emphasises the adaptive character of law, especially customary law. This adaptive character is needed urgently to curb entrenched systems of social inequality, which usually thrive on tradition or established usage. All too often, the interaction of legal orders in sub-Saharan Africa raises perceptions of conflict of laws.<sup>16</sup> Arguably, these conflicts arise from judicial neglect of the ways people adapt indigenous norms to socio-economic changes.<sup>17</sup> In a way similar to that in which the original conceptualisation of intersectionality deemphasises difference and identity politics, normative intersectionality draws attention to how legal orders speak to, rather than against, each other. Thus, instead of emphasising conflict of laws, attention should be focused on the normative consequences of indigenous laws' dialogue with State laws. In this dialogic sense, indigenous values guide normative adaptations, while inequality prompts people's agency for legal change.

Finally, normative intersectionality cloaks law with an activist or justice-oriented outlook, which it needs to cope with unforeseen situations in our rapidly evolving

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<sup>12</sup> For similar argument, see Diala AC “Legal pluralism and social change: insights from matrimonial property rights in Nigeria” in Rautenbach C (ed) *In the shade of an African baobab: Tom Bennett's legacy* Cape Town: Juta (2018) 155.

<sup>13</sup> See, for example Robertson LG *Conquest by law: how the discovery of America dispossessed indigenous peoples of their lands* Oxford: Oxford University Press (2005); Mellinkoff D *The language of the law* 2 ed Oregon: Resource Publications / Wipf & Stock Publishers (2004).

<sup>14</sup> Hart HLA “Positivism and the separation of law and morals” (1957) 71 *Harvard Law Review* 593.

<sup>15</sup> Mantena K “Law and ‘tradition’: Henry Maine and the theoretical origins of indirect rule” in Lobban M & Lewis A (eds) *Law and history: current legal issues vol 6* Oxford: Oxford University Press (2004).

<sup>16</sup> Lehnert W “The role of the courts in the conflict between African customary law and human rights” (2005) 21(2) *South African Journal on Human Rights* 241.

<sup>17</sup> For a similar argument, see Diala AC “The concept of living customary law: a critique” (2017) 49 *Journal of Legal Pluralism and Unofficial Law* 143.

world. In an age of globalisation, law is increasingly mobile, and mobile law is adaptive law.<sup>18</sup> This flexible perception of law requires a theoretical framework with a holistic view of not just the interaction of laws but also how social actors determine this interaction. Indeed, the interconnected socio-economic elements that drive normative behaviour ought to form the fulcrum of policy approaches to law. For definitional purposes, therefore, normative intersectionality may be described as an analytical framework for uncovering the interplay of laws and socio-economic forces in a population or social field.<sup>19</sup>

Seen in the above context, normative intersectionality sheds light on the relationship between the tripartite issues of gender equality, women's property rights, and interaction of laws within a legal system. Against the background of increasing global recognition that human rights are indivisible, interconnected, and interdependent, these tripartite issues are beginning to dominate the agenda of development agents in Africa.<sup>20</sup> As we explain below, the interaction of laws, commonly referred to as legal pluralism, stands out from these three issues.

## 1.2 The adaptive nature of legal pluralism

At its most basic understanding, legal pluralism means the interactive coexistence of laws and normative systems in a population or social field.<sup>21</sup> In Africa, this interaction usually involves statutory, customary and religious laws in one social field. While statutory laws are the transplanted European laws that mutated into State laws after colonialism, religious laws are largely products of conquest, and sometimes double as indigenous or customary laws.<sup>22</sup> The importance of legal pluralism lies in the emergent constitutional world order, which is accompanied by coercive international human rights laws that increasingly erode classic understandings of State sovereignty. There are two broad types, which we will explain in detail because their typologies turn on the colonial legal legacy and theoretical understandings of law in sub-Saharan Africa.<sup>23</sup>

In the African context, legal pluralism is usually understood as the coexistence of customary and religious laws with state laws. In this coexistence, the degree of autonomy enjoyed by customary law characterises the nature of African legal pluralism. Here, strong or deep legal pluralism is said to exist when customary law enjoys

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<sup>18</sup> Von Benda-Beckmann F, von Benda-Beckmann K & Griffiths A (eds) *Mobile people, mobile law: expanding legal relations in a contracting world* Aldershot: Ashgate (2005).

<sup>19</sup> These socio-economic forces are notably religion, occupation, income, wealth, influence, and status.

<sup>20</sup> Donnelly J "Human rights, democracy, and development" (1999) 21 *Human Rights Quarterly* 608 at 614.

<sup>21</sup> Griffiths J "What is legal pluralism?" (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1 at 2; Merry SE "Legal pluralism" (1988) 22 *Law and Society Review* 869 at 871.

<sup>22</sup> An example is Islamic law, which Fulani sheikh, Uthman dan Fodio, established in large parts of Northern Nigeria in the early 19th century.

<sup>23</sup> For a "theoretical, historical, and comparative purview of legal pluralism" in an African context, see Gebeye A "Decoding legal pluralism in Africa" (2017) 49 *The Journal of Legal Pluralism and Unofficial Law* 228.

considerable autonomy, that is, when it operates with very minimal State regulation.<sup>24</sup> However, this type of legal pluralism is rare because of the systematic manner colonial authorities set out to discipline customary law.<sup>25</sup> Conversely, weak or State legal pluralism exists when the State acknowledges and, in varying degrees, incorporates customary law into its legal system.<sup>26</sup> This type resembles Merry's "classic legal pluralism", a term she used to describe "the intersection of indigenous and European law" in a colonial context.<sup>27</sup> Weak legal pluralism is evident in post(-colonial) measures such as codification of customary law, statutory regulation of customary law, judicial interpretation of customs with alien legal standards, and even the establishment of customary law courts by the State. Since these varying measures are present in all African States, weak legal pluralism is the reality in Africa. To properly contextualise this reality within the concept of normative intersectionality, we use marriage gifts.

The division of marriage gifts after divorce in southern Nigeria demonstrates dialogue between State laws and indigenous norms, a dialogue with profound significance for legal pluralism in post-colonial societies. Using data from interviews and focus group discussions we conducted in Imo, Abia, Anambra and Enugu states between 2014 and 2016, we argue that legal pluralism in Africa is essentially imitative in nature. The data that informs this argument was elicited from 159 research participants. They include married and engaged couples, female divorcees, social welfare officials, traditional leaders, clergy, and the staff of non-governmental organisations.

Following this introduction, part 2 of the article explains the contextual background of marriage gifts. In so doing, we emphasise the communal character of the agrarian social settings in which the customary law of matrimonial property developed in Nigeria. Part 3 reveals the interplay of intersectional forces in contemporary customary marriages. These forces are notably State laws, customs, traditional institutions, and the changing nature of family property. In turn, the changing nature of property is induced by urbanisation, individualism, women's independent income, formal education, Western acculturation, and the consequential decrease in the concept of the extended family. We demonstrate the role of the Social Welfare Department in normative intersectionality. This Department, a statutory body mandated to protect the interests of women and children, straddles State laws and indigenous laws by increasingly ordering men to share matrimonial property and/or pay compensation to women. We argue that its quasi-judicial orders in respect of marriage gifts and properties bought by

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<sup>24</sup> The degree of autonomy between State law and customary law in deep legal pluralism is unclear. Generally, it seems to be when the State is not obliged to "incorporate cultural or religious forms of non-state law into state law". See Rautenbach C "Deep legal pluralism in South Africa: judicial accommodation of non-state law" (2010) 42 *Journal of Legal Pluralism and Unofficial Law* 143 at 146.

<sup>25</sup> Ocran M "The clash of legal cultures: the treatment of indigenous law in colonial and post-colonial Africa" (2006) 39 *Akron Law Review* 465 at 468.

<sup>26</sup> Woodman GR "Legal pluralism and the search for justice" (1996) 40 *Journal of African Law* 152 at 157.

<sup>27</sup> Merry (1988) at 872.

women contribute to adaptations in the customary law of matrimonial property in Nigeria. Part 4 concludes with recommendations.

## 2. CONTEXTUAL BACKGROUND OF MARRIAGE GIFTS

To understand the historical background of marriage gifts in Nigeria, one needs an appraisal of the Nigerian legal system. Like other African States, the array of rules and principles strutting as State laws in Nigeria are restatements, adaptations, and plain reproductions of European laws and principles, which were imposed by colonial administrators. Like elsewhere also, Nigeria retained the legislative and judicial structures of its colonial legal architecture after it gained political independence.<sup>28</sup> Accordingly, Nigeria's legal system is a mix of largely oral customary laws, religious (mainly Islamic) laws, and statutory laws (State laws).<sup>29</sup> Although people are free to opt for customary law in personal issues such as marriage and inheritance, the restrictive regulations of State laws and the oral nature of many customs make legal pluralism difficult.<sup>30</sup> This difficulty is not helped by lacunas in the legislative framework. Indeed, there is no statutory regulation of customary law marriages, no direct recognition of customary law marriages in mainstream marriage laws, and no express subjection of customary law to the Bill of Rights.

The 1999 Constitution of the Federal Republic of Nigeria (Constitution), which shares law making powers between the federal and 36 state governments, omits their legislative power over customary law. Ordinarily, this silence ought to indicate the existence of deep legal pluralism. However, it does not, since the Constitution establishes customary courts, outlines their position in the hierarchy of courts, and stipulates the qualifications of their judges.<sup>31</sup> Significantly, these judges interpret customary law with a colonial legal standard, which enjoys statutory protection in the Evidence Act and court laws. A typical example of this standard, widely known as the repugnancy clause, states that "where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience".<sup>32</sup> So, from the outset, the recognition of customary law in Nigeria is subjected to stringent and alien judicial standards. Regrettably, these standards often ignore the social contexts of customary law, thereby creating dissonance between

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<sup>28</sup> Part one titled "Foundations of the Government" in Awa EO *Federal government in Nigeria* California: University of Chicago Press (1964).

<sup>29</sup> Section 45(1) of the Interpretation Act, Cap 89, Laws of Nigeria and Lagos 1958.

<sup>30</sup> Nwauche ES "The constitutional challenge of the integration and interaction of customary and the received English common law in Nigeria and Ghana" (2010) 25 *Tulane European & Civil Law Forum* 37 at 40-47; Obilade AO "The relevance of customary law to modern Nigerian society" in Osinbajo & Kalu (eds) *Towards a restatement of Nigerian customary laws* Lagos: Federal Ministry of Justice (1991).

<sup>31</sup> In descending order, the federal courts are the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, customary courts of appeal, and the Sharia Court of Appeal of the Federal Capital Territory. State courts are high courts, State Sharia courts of appeal, State customary courts of appeal, magistrate courts, customary courts, and area courts. See ss 237-288 of the Constitution.

<sup>32</sup> Section 18(3) of the Evidence Act of 2011.

customary law and its foundational values. A good example of this dissonance is a curious statute known as the Dowry Law.<sup>33</sup>

The Dowry Law claims to regulate the quantum of bride wealth in south-east Nigeria. However, it is so widely ignored that it might as well not exist.<sup>34</sup> Its failure may be attributed to two primary reasons. The first and most obvious reason relates to the full-belly thesis – in that the socio-economic needs of people trump their obligation to comply with the State’s pathetic attempt to regulate an intimate aspect of their cultural lives. The second and less obvious reason is the radical changes in the agrarian social settings in which the practice of bride wealth payment emerged. Prior to the acceleration of socio-economic changes by colonial rule, customary laws operated in communal social settings in which families lived in close-knit units.<sup>35</sup> In these settings, bride wealth served a symbolic role as the legitimating mark of a customary law marriage. Accordingly, it was provided in the form of livestock and food items.<sup>36</sup> Sometimes, it was offered in the form of service by the groom to the bride’s father. Following the advent of commercialisation, migrant labour, and the Western acculturation that was embedded in formal education, its symbolism receded.

Today, people perceive bride wealth as an avenue to escape from poverty, or an opportunity to acquire wealth.<sup>37</sup> Thus, while bride wealth continues to symbolise a valid customary law marriage, the ideas and practices surrounding its quantum have adapted to the socio-economic changes brought by the colonial experience. Unfortunately, the Dowry Law adopted a top-down or rule-minded approach to these adaptations, thereby exacerbating the dissonance between foundational values and actual practice of cultural norms. We will show in part 3 how Nigerian judges follow a similar rule-minded approach to issues of marriage gifts. But what are marriage gifts?

## 2.1 Marriage gifts in Igboland

The Igbo are one of the three major ethnic groups in Nigeria. Previously, they used to be confined to the geo-political area referred to as South-East Nigeria. Currently, they have a significant population in the south and north of Nigeria (Lagos and Abuja), and are in good numbers in other parts of the country. Like the Jews, they take their customs wherever they go, and marriage is the most prominent of these customs. Marriage gifts are known in Igbo parlance as “*ihe eji edu nwanyi ulo*” (things used to accompany a woman home).<sup>38</sup> As the name implies, they are items given to the bride by her family

<sup>33</sup> Limitation of Dowry Law, Eastern Region Law No 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963.

<sup>34</sup> Diala (2018) at 33.

<sup>35</sup> The reasons for such social settings range from agriculture to defence from wild animals and marauders.

<sup>36</sup> Agbasiere JT *Women in Igbo life and thought* New York: Routledge (2000) at 109-110.

<sup>37</sup> Izunwa MO “A critique of certain aspects of the grounds, procedure and reliefs attaching to customary divorce law in Southern Nigeria” (2015) 7 (5) *Journal of Law and Conflict Resolution* 31 at 35.

<sup>38</sup> “*The eji edu nwanyi ulo*” reflects the Owerri dialect. It is expressed slightly differently in other parts of Igboland.

and friends during or shortly after marriage to make her marriage experience comfortable. In southern Nigeria, marriage gifts differ from the gifts brought by a groom as part of the requirements of bride wealth.<sup>39</sup> This differentiation is necessary, as some African communities conflate marriage gifts with bride wealth.<sup>40</sup> For example, writing about Malawi, Mwambene described marriage gifts (Chikole) as “a gift from a boy to a girl in form of clothing, household effects or money given at a time of proposing marriage. The gift may be returnable upon termination of betrothal. However, it is not essential for the validity of a marriage”.<sup>41</sup> Similarly, Nsereko confusingly used “marriage gifts” to refer to bride wealth in his quest to disown the notion that customary marriage is “woman purchase”.<sup>42</sup> Among the Igbos of Nigeria, the key distinction between bride wealth and *ihe eji edu nwanyi ulo* is source and function. Whereas bride wealth and its associated gifts emanate from the groom and are legal obligations for the validity of a customary marriage, marriage gifts come primarily from the bride’s family and are not requirements for a valid marriage. Two main reasons are responsible for this distinction.

First, marriage gifts are post-factum, since they are only given to a bride after the conclusion of the marriage. Also, unlike the customarily stipulated or even regimented gifts that form part of bride wealth, marriage gifts are discretionary in form and substance. So, while a groom may not opt out of the gifts that form part of bride wealth, no such obligation exists for *ihe eji edu nwanyi ulo*. Secondly, the range and quantum of marriage gifts are dependent on the financial ability of the bride’s family, their relationship with their daughter, and the degree to which they love or accept their son-in-law. Thus, it is not out of place for a wealthy father-in-law to buy a house for his daughter, secure a job for his son-in-law, furnish the couple’s house, or buy a vehicle for their use. All these discretionary actions are modern expressions of marriage gifts. Conversely, a groom may be compelled to delay marriage rites until he acquires the financial means to comply with bride wealth requirements.<sup>43</sup>

There are two general categories of marriage gifts, categories that reflect continuities and discontinuities in marriage relations in southern Nigeria. The first category is gifts received by a bride from her parents and extended family. In the past,

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<sup>39</sup> Osom J *Moral implication of high bride-price in Nigeria: Annang case survey* (unpublished PhD thesis, Rome: Academia Alfonsiana, 1989) at 34.

<sup>40</sup> For example, in a bid to disown the notion that customary marriage is not a “woman purchase”, Nsereko used the phrase “marriage gifts” to refer to bride wealth. See Nsereko D “The nature and function of marriage gifts in a customary African marriage” (1975) 23(4) *American Journal of Comparative Law* 682 at 682.

<sup>41</sup> Mwambene L *Divorce in matrilineal customary law marriage in Malawi: a comparative analysis with the patrilineal customary law marriage in South Africa* (unpublished LLM thesis, University of the Western Cape, 2005) at 14 fn 40.

<sup>42</sup> Nsereko (1975) at 683.

<sup>43</sup> Ntoimo LFC & Isiugo-Abanihe UC “Determinants of singlehood: a retrospective account by older single women in Lagos, Nigeria” (2014) 27 *African Population Studies* 386 at 388 & 390; Odimegwu C, Pallikadavath S & Adedini S “The cost of being a man: social and health consequences of Igbo masculinity” (2013) 15 (2) *Culture, Health and Sexuality* 219 at 226.

this category consisted exclusively of cooking utensils and items of adornment such as jewellery, clothes and sandals. Presently, they include modern gadgets such as houses, cars, refrigerators, television sets, dishwashers and household furniture. In fact, rarely does a bride depart for her husband's house without receiving some household furniture, no matter how small the quantity is. The second category of *ihe eji edu nwanyi ulo* is gifts given to the couple by their friends. Here, the gifts may be given in the matrimonial name of the couple, usually when received from their mutual friends, or in their individual names when received from a friend of either party. This category also includes gifts given to the bride ostensibly for her own benefit. As we explain in part 3, this category often presents problems during marriage dissolution, given the difficulty of determining whether household furniture is intended for the bride's use. Just like the first category, the forms of gifts in this category have changed.

## 2.2 Marriage gifts then and now

In the pre-colonial past, *ihe eji edu nwanyi ulo* reflected the state of Igbo society. This society was essentially agrarian, collective, and close-knit. Families worked together to produce wealth consisting basically of farm produce and livestock.<sup>44</sup> In this communal social setting, marriage was primarily a union between families, rather than the union between two individuals it has largely become.<sup>45</sup> For example, the selection of marriage partners, arrangements for marriage ceremonies, and payment of bride wealth, were generally organised by the couple's parents and extended families. Importantly, investigations were (and still are) conducted by the couple's families to determine their suitability for marriage. Unsurprisingly, a bride was accepted as an integral part of her husband's family, with the same property status as her husband's siblings. She engaged in craftwork, cultivated land and reared livestock, just as a member of the family. While this communal context of marriage was reflected in the meaning and forms of bride wealth, it greatly influenced the celebration of marriage and the types of marriage gifts given to a bride by her family.<sup>46</sup> Being very invested in the success of the marriage, the extended family reflected their trust in the groom's family's ability to care for their daughter through *ihe eji edu nwanyi ulo*. Thus, marriage gifts consisted only of kitchen utensils, clothes, and jewellery, since the basic household furniture needed by the bride for a comfortable marriage experience was available in her new home.

The social setting described above contributed to the evolution of the customary law of matrimonial property. This law restricts divorcing women's property rights to their "wearing apparels, beddings, and cooking utensils".<sup>47</sup> Faced with this restriction,

<sup>44</sup> Mere AA "Contemporary changes in Igbo family system" (1976) 6 *International Journal of Sociology of the Family* 155 at 156.

<sup>45</sup> Isiugo-Abanihe UC "Consequences of bridewealth changes on nuptiality patterns among the Ibo of Nigeria" in Bledsoe C & Gilles P (eds) *Nuptiality in sub-Saharan Africa: contemporary anthropological and demographic perspectives* Oxford: Clarendon Press (1994) 74.

<sup>46</sup> Isiugo-Abanihe (1994) 74.

<sup>47</sup> *Duruaku v Duruaku & another* (unreported) Suit No CC/EZ/IK/2D/2004 Judgment of 26 March 2009 at 2; *Lancaster Ubani v Beatrice Ubani* (unreported) Suit No CC/EZ/39/2000 Judgement of 29 April 2004. See also Obi SNC (assisted by Anyaegbunam CDC et al) *The customary law manual: a manual of*

divorcing women have little recourse to the courts, given the lack of constitutional regulation of customary law and its barely defined interaction with State laws in Nigeria.

As a core component of matrimonial property, marriage gifts in pre-colonial times stand in stark contrast to their contemporary forms. In the past, these gifts were unsophisticated, given from group generated wealth, and surrounded by communal rights and obligations. Today, however, the situation has changed drastically. First, the extended family or kinship group is disappearing, along with its strong role in marriages. Secondly, women increasingly acquire properties alongside their husbands through independent income and sophisticated marriage gifts from friends and families. Thirdly, the nature of matrimonial property has assumed modern forms that are unanticipated by the customary law of (matrimonial) property.<sup>48</sup> Given the lacuna in Nigeria's legislative framework, these changes place marriage gifts at the centre of an uncertain legal situation during divorce. We now turn to how people are navigating the division of marriage gifts during divorce and the socio-legal forces that drive their attitude.

### 3. NORMATIVE INTERSECTIONALITY IN MARITAL PROPERTY DIVISION

As seen in part 2, the extended family played a very strong role in marriage. Arguably, this role contributed to the rarity of divorce, since the family was the first port of call for resolving matrimonial disputes.<sup>49</sup> Indeed, a wife's family had special motivation for resolving marital problems between their daughter and her husband, since they could be compelled to repay bride wealth in the event of divorce. On the rare occasions where their interventions failed, a divorced woman was entitled to return to her parent's house with all her marriage gifts, given that they consisted of only kitchen utensils and items of adornment. Her ability to exit marriage with these properties was aided by the fact that the couple, generally, followed the due process of divorce, which usually involved the family members of both parties.<sup>50</sup> This divorce process was elaborate, often involved the return of the bride wealth, and sometimes included some sort of ritual ceremony or the carrying of certain types and quantities of palm wine.<sup>51</sup>

Today, many men do not follow the due process of divorce, while some do not participate in, nor consent to the decisions of family mediation. In any event, attitudes to matrimonial property division are increasingly coming under the strong influence of

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*customary laws obtaining in the Anambra and Imo states of Nigeria* Enugu: Ministry of Justice Anambra (1977).

<sup>48</sup> See Diala AC "The shadow of legal pluralism in matrimonial property division outside the courts in southern Nigeria" (2018) 18 *African Human Rights Law Journal* 706 at 710, 719 & 728.

<sup>49</sup> Ekpe CP "Social welfare and family support: the Nigerian experience" (2014) 10 *Journal of Sociology & Social Welfare* 484 at 487.

<sup>50</sup> See generally, Kuye PO "Rights of women under customary law" in Osinbajo Y & Kalu A (eds) *Towards a restatement of Nigerian customary laws* Lagos: Federal Ministry of Justice (1991) 385.

<sup>51</sup> Olishah SO *The Ibo native law and custom* Onitsha: New Era Press (1963) at 19.

State law values,<sup>52</sup> the doctrinal demands of Christianity, and the acculturation influences of liberal Western philosophies. In this context of interconnected influences, the changing forms of marriage gifts and marital disputes reveal normative intersectionality in the division of matrimonial property during the dissolution of a customary law marriage. To contextualise the operation of this intersectionality, we first explain the philosophy of marriage gifts division.

### 3.1 Philosophy of marriage gifts division

The traditional Igbo customary law of matrimonial property regards a wife as part of her husband's property. This philosophy, which made sense in the communal, agrarian settings described in part 2, resembles 'feme covert,' a legal doctrine that thrived in medieval Europe.<sup>53</sup> Under feme covert, a married woman's legal rights and liabilities were subsumed under her husband's rights in a manner that rendered her legally invisible. Diala illustrates the Igbo customary law of matrimonial property with the ancient story of a chief who bequeathed all but one portion of his estate to his chief slave.<sup>54</sup> Faced with the option of choosing only one portion, the chief's only son regained all his father's estate by declaring: "Since you [chief slave] are part of my father's property, I choose you." Accordingly, the following discussion of marriage gifts division during divorce constitutes, in many ways, changes in this traditional philosophy. We argue that these changes reflect normative intersectionality.

There is fair agreement among the majority of our research participants that a divorcing woman is entitled to exit her marriage with whatever her family gave her as marriage gifts. These gifts would usually include items of adornment and household furniture. The rationale is that every gift identifiable as emanating from the woman's family belongs to her. This rationale is especially reinforced if the divorce is initiated by the man. A social welfare official in the focus group summarised it as follows: "If her husband drives her away, he is obliged to return all that her relatives gave her as marriage gifts. But if she decided to leave on her own, those things will remain in her husband's house because he performed traditional rites over her."<sup>55</sup>

Significantly, fault, as a key element in the division of matrimonial property under customary law, is more pronounced today than it was in the past. Indeed, fault previously played a trivial role, which arose mainly from the fact that men were free to marry more than one wife.<sup>56</sup> Men's polygamous ability gave them certain latitude in

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<sup>52</sup> Such as, the best interest of the child principle in children's laws, a principle that is fiercely protected by State welfare officials.

<sup>53</sup> Blackstone W *Commentaries on the laws of England vol 1* William Carey Jones (ed) (1976) at 443-445.

<sup>54</sup> Diala AC "A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria's southern states" (2018) 18 *African Human Rights Law Journal* 100 at 103-104.

<sup>55</sup> This position was unanimously approved by the ten other social welfare officials in the group discussion on 14 January 2015, and by traditional leaders in a separate discussion on 15 January 2015.

<sup>56</sup> Nwogugu EI *Family law in Nigeria* 3 ed Ibadan: Heinemann Publishers (2014) at 233; Obi SN *Modern family law* (London: Sweet & Maxwell (1966) at 364 & 366-367; Achike O "Problems of creation and

respect of the traditional elements of marital wrongdoing such as adultery and cruelty. Today, men's polygamous freedom is decreasing, judging from the monogamous views of marriage expressed by many informants. This decrease is accompanied by weightier reliance on wrongdoing as a mitigating or aggravating factor in property division. The influence of fault is so significant that women who abandon their marriage or initiate their divorce are deemed to forfeit their marriage gifts because of real or presumed disinterest in matrimonial property. Conversely, women whose husbands initiate divorce for flimsy reasons are deemed to have strong entitlements to marriage gifts and other matrimonial property. Alongside monogamy and the fault principle, equitable notions of property division are products of normative intersectionality, of which State laws, Christian doctrines, Western education, and acculturation are prominent stimuli. We shall use the roles of traditional leaders, clergy, and the Social Welfare Department in the division of marriage gifts to illustrate this intersectionality.

### 3.2 Division of marriage gifts

Nigerians are yet to embrace the idea of prenuptial agreements, for much the same reason that they dislike the adoption of wills.<sup>57</sup> Since marriage gifts are increasingly given to the couple by their friends, recovery or division of these gifts during divorce is complicated. This complication arises from changes in the nature of the beneficiary of marriage gifts. Unlike in the pre-colonial era, these gifts are no longer given to the bride for her exclusive use.<sup>58</sup> Where marriage gifts are received from friends of the couple, two broad courses are commonly followed.

When the gifts are given in the name of the couple, which is usually the family name of the husband, he generally takes them, unless he is at fault for the divorce. This situation reflects the unequal gender relations of married couples under customary law. Apart from women's restricted property rights, there are several manifestations of these unequal relations. The most notable are the bride's relocation to her husband's home, change of name to her husband's family name, and patrilineal lineage for the children of the marriage.<sup>59</sup>

As explained above, the traditional view of matrimonial property subsumes a married woman's property rights under her husband's rights. However, this view is not cast in stone. Where the woman is relatively blameless in the marital dispute leading to the divorce, change agents such as social welfare officials and non-profit organisations could award her marriage gifts given in the couple's name. Where the woman has children, her chances of winning marriage gifts increase dramatically.<sup>60</sup> The motivations for these awards vary. Although natural justice features in the division of marriage gifts,

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dissolution of customary marriages in Nigeria" in Roberts S (ed) *Law and the family in Africa* The Hague: Mouton (1977) at 151.

<sup>57</sup> Prenuptial agreements and wills are shunned for fear of jinxing one's life or relationship.

<sup>58</sup> The authors attended numerous weddings where marriage gifts from friends outnumbered and out-valued those given by the bride's family.

<sup>59</sup> Ejidike OM "Human rights in the cultural traditions and social practice of the Igbo of south-eastern Nigeria" (1999) 43 *Journal of African Law* 71 at 86-96.

<sup>60</sup> Diala "The shadow" (2018) at 718.

the key motivations appear to lie in two categories of State laws, which require explanation to drive home the operation of normative intersectionality.

The first category of State laws may be described as institutional, that is, decisions emanating from bodies established by statute to perform judicial and quasi-judicial functions. For example, the State Welfare Department, which mediates in and adjudicates over matrimonial disputes, is a statutory body with the primary mandate of promoting the best interests of women and children. The second category may be described as substantive. Here, the Constitution, children's rights laws, and international human rights instruments feature prominently. Thus, social welfare officials and non-profit organisations engaged in the resolution of matrimonial property disputes sometimes cite these laws as justification for awarding marriage gifts to women. The rationale is that the award affirms women's dignity and assists them to care for their children.<sup>61</sup>

However, traditional arbitration is not as generous as social welfare officials and non-profits are in awarding women marriage gifts given in the name of the couple. As a traditional leader vehemently declared during a focus group discussion: "This statement that a woman goes with property is not our custom! It is discretionary! ... Regardless of fault – ie, whether the man drives her away or she goes on her own – a woman [exits marriage] with nothing."

Recovery of non-monetary property given to the bride is difficult where the couple had made joint use of them. While some key informants asserted that property given by friends should be shared equitably between the couple when the marriage ends, the majority believed that the circumstances of the divorce, especially fault, should determine the mode of sharing. Understandably, divorcees believe that marriage gifts from friends should be shared equitably, even though many of them made no notable effort to claim them.

Interestingly, the ownership of gifts given to the bride by her family does not escape controversy during marriage dissolution. Long ago, when bride wealth used to have a purely symbolic meaning, the livestock, yams, and other food items that constituted bride wealth were provided by the groom's extended family. This communal contribution to bride wealth has largely disappeared, as the groom and/or his parents provide it with their independent income. Similarly, the items that constitute bride wealth are increasingly monetised. Sometimes, the bride's family uses part of the monetised bride wealth to buy marriage gifts for the bride. Accordingly, where the groom contributed to the purchase of marriage gifts given to the bride by her relatives, it could result in her loss of these gifts upon dissolution of the marriage. Given the unequal gender relations in south-east Nigeria, her husband could refuse to allow her to exit the marriage with the gifts, or insist, in an arbitral hearing, on retaining them. A traditional leader explained the complicated rationale for husbands' interests in marriage gifts given by the bride's family:

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<sup>61</sup> Diala "The shadow" (2018) at 718.

“[After divorce], the woman has right to take whatever she got from her family as marriage gifts. This is because those gifts were bought for her or in her name or in her family’s name. But what I am showing here is this: you see, this was usually in the past. Today’s people are cunning. In the past, when marrying, there were requirements that the groom’s family must satisfy – things they must bring to contribute to the items that will be bought as marriage gifts for the bride. If you are not careful or attentive, you will not really understand what is involved. For example, you may be told to bring five pounds to help us contribute – even if it is twenty pounds – to help us purchase the items to send forth our daughter into marriage. When you bring that five pounds, they may only add three pounds to it and buy kitchen utensils such as pounder, pots, and other things of that era used to send forth a woman. ... If she eventually has problem with her husband, she will want to take all those things as her marriage gifts, whereas the man contributed about 70 percent of the money with which they were bought. This is why the custom in these parts has changed. These days, people are no longer willing for their in-laws to send forth their bride. They prefer to buy whatever their bride will need. This means that ... whatever he buys belongs to him. But when the marriage collapses, his authority over the things he bought does not extend to the woman’s wearing apparels and adornments. He cannot stop her from taking those things even if she has no child. “

As the quoted informant hinted, a husband’s right to marriage gifts does not extend to his wife’s clothes and items of adornment. Similarly, it does not extend to marriage gifts and property purchased in his wife’s maiden name. This last category often involves purchase receipts, which are regarded as an important proof of ownership in judicial and quasi-judicial matrimonial proceedings.

### **3.3 The role of purchase receipts**

Normative intersectionality is evident in many court laws, which prohibit parties from relying on customs where the issue in dispute is unknown to customary law. For example, section 26 of the High Court Law of Lagos states:

“No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or questions may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.”

Ordinarily, the use of purchase receipts is unknown to indigenous law and ought to fall under legislation such as section 26. However, where receipts are objected to during disputes as being un contemplated by indigenous law, judges routinely disagree, thereby encouraging the recognition of documentary evidence under customary law. Indeed, as far back as 1944, Waddington J noted the encroachment of this type of evidence into

arbitral proceedings.<sup>62</sup> He held that customary law still applies “where the document [in issue] amounts to no more than the kind of ‘paper’ which most natives nowadays like to have as evidence of a money transaction, and which at this day, is, I suppose, quite a familiar object in most native courts, and frequently bearing an impressive array of stamps.”<sup>63</sup>

In the foregoing sense, the property which married women buy in their maiden names reveals the significant influence of socio-economic forces on the customary law of matrimonial property division. The general opinion of research participants is that women may recover property bought with their independent income if the purchase receipts are issued in their own names rather than in their married names. Suppose a woman named Miss Joy Okonkwo marries a man named Mr Johnson Amadi. If, thereafter, she bought a car and obtained a receipt issued in the name of Joy Okonkwo, her maiden name, the car is deemed to belong to her in the event of divorce. This view is supported by the judicial approach to matrimonial property, which recognises that women may claim matrimonial property with the aid of documentary evidence.<sup>64</sup> Although judges are willing to uphold women’s claims of property using receipts, they are yet to recognise women’s beneficial interest in matrimonial property.<sup>65</sup> Thus, women who contributed to the acquisition of matrimonial property by making undocumented contributions from their independent income and/or through their emotional support of their husbands, could nevertheless leave a marriage empty-handed. In this sense, purchase receipts demonstrate the intersectional influence of socio-economic changes in matrimonial proceedings and how this influence could encourage changes in customary law behaviour.

#### 4. CONCLUSION

The traditional Igbo customary law of matrimonial property regards married women’s property rights as subsumed under those of their husbands. This custom arose in agrarian social settings, in which wealth was produced jointly, property was basic, and the extended family was so invested in marriages that divorce rarely occurred. Moreover, divorced women were easily reintegrated into their families. However, the social settings of this custom have changed. The extended family is disappearing, household properties have become sophisticated, and women now contribute to matrimonial property through their independent income and receipt of marriage gifts. Regrettably, these changes receive little encouragement from Nigeria’s legislative framework, which neither regulates customary law marriages (and their proprietary consequences) nor subjects customary law’s recognition to the Bill of Rights.

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<sup>62</sup> *Rotibi v Savage* (1944) 17 Nigerian Law Reports 17.

<sup>63</sup> *Rotibi v Savage* (1944) 17 Nigerian Law Reports 17 at 82.

<sup>64</sup> For instance, the Court of Appeal ruled in *Onwuchekwa v Onwuchekwa* (1991) 5 NWLR (Pt 194) 739 that a wife must provide “sufficient proof”, such as “receipts”, to show her contribution to matrimonial property. See also *Amadi v Nwosu* (1992) NWLR (Pt 241) 273; (1992) LPELR 442 (SC).

<sup>65</sup> Diala “A critique” (2018) at 118.

Faced with an indifferent legislative framework, judges have three broad options, all of which are significant for legal pluralism. First, they could apply the customary law of matrimonial property using the rule minded philosophy of legal certainty. This philosophy thrives on judicial precedents, textbooks and oral history. Secondly, they could declare this ancient custom repugnant to natural justice, equity and good conscience, claiming that it is unfair to women for failing to recognise their beneficial interest in matrimonial property. Thirdly, they could invalidate this custom for its incompatibility with the social settings in which it emerged. For this, they could rely on the adaptability of customs to socio-economic conditions. As of now, judges have yet to choose the second and third options. This is the legal context in which we used the concept of normative intersectionality to analyse the division of marriage gifts during a customary law divorce.

Inspired by Crenshaw's notion of intersectionality, a critical race and gender theory, we offered normative intersectionality as an analytical framework for uncovering the interplay of laws and socio-economic forces in legal pluralistic settings. We argued that normative intersectionality highlights the adaptive character of customary law, a character that is suppressed by entrenched systems of social inequality, which are often concealed under the banner of tradition or established usage. Normative intersectionality abounds in customary law divorce, during which women lay claim to marriage gifts received from their families, as well as properties they bought in their maiden names.

On the one hand, women find it difficult to recover marital property or to benefit from its division when such property is in the marital name of the couple. This difficulty is due to the traditional philosophy of matrimonial property, which regards wives as part of their husbands' possessions. On the other hand, women may recover matrimonial property with the aid of purchase receipts, which were unknown to customary law. They may also win property through change agents such as the Social Welfare Department and non-profit organisations, which promote the best interests of women and children in the shadow of State law. In all these, the division of matrimonial property during divorce under customary law involves interconnected socio-economic influences that give married women novel platforms for making property claims they would otherwise not be entitled to. Their ability to recover marriage gifts and claim matrimonial property with purchase receipts is thus an adaptation of customs to socio-economic changes, which is highlighted by the concept of normative intersectionality.

Normative intersectionality offers policy makers a nuanced view of legal pluralism, one which privileges the dialogue between indigenous laws and State laws in fluid social fields. In the context of marriage gifts, policy perceptions of women's matrimonial property rights in Nigeria must take cognisance of dissonance in the communal settings of pre-colonial society and the individualistic settings of contemporary society. Above all, policy makers must factor in how people's normative struggles with this dissonance gives legal pluralism an adaptive tone in post-colonial societies.

**Individual contributions:**

The lead author wrote the theoretical framework, the introduction and the conclusion of the article.

The co-author conducted the fieldwork with the lead author, analysed the data and wrote part 2 of the article.

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