

The Need for the Statutory Introduction of the Concept of “Matrimonial Property” in Nigeria[‡]

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Abstract

This article demonstrates how the application of the ordinary rules of property law in the determination of the property rights of spouses in Nigeria has been unfair to a financially weaker spouse (usually the wife). It calls for reconsideration of the present matrimonial property rights arrangement between a husband and a wife in Nigeria. It argues in favour of the statutory introduction of the concept of “matrimonial property” in Nigeria to apply both during marriage and at divorce. To give some background, reference is made to the South African matrimonial property system of community of property and the accrual system. The article proposes that a special category of property, known as “matrimonial property” and which emphasizes the equal proprietary rights of spouses, is recognized.

Keywords

Accrual, community of property, divorce, marriage, matrimonial property, Nigeria, property rights, South Africa

INTRODUCTION

Questions regarding which principles of law are applicable in determining the property rights of spouses at divorce have been confronted by several countries at different times. In some countries, with systems that separate property completely, the property system is made more flexible by incorporating the exercise of judicial discretion to determine the property rights of spouses at divorce; however legislation in other countries prescribes fixed rules to determine the property rights of spouses during marriage and at divorce, offering little or no exercise of judicial discretion.

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Opinion is however moving towards marriage being a partnership of equals.¹ The equal partnership element of marriage recognizes the equal, but different, contributions spouses make to the success of the marriage. Spouses' contributions, either to the welfare of the family or to the acquisition of property, are not discriminated against or differentiated between on the basis of monetary contributions.² Each spouse is seen to have contributed to the financial prosperity of the marriage to the best of his or her ability.³ Recognizing the understanding that marriage regards spouses as equal partners, a number of countries have taken steps to enact laws that seek to create just and equitable legal rules to determine the proprietary rights of spouses at divorce.

In the Nigerian legal system, however, statutory provisions and judicial attitudes to the property rights of spouses at divorce have not been in tune with modern realities as seen in other countries. In respect of the property of spouses, marriage is hardly a partnership of equals. Nigerian family law creates a distinction between the financial and non-financial contributions of spouses in determining a spouse's beneficial interest in property. The law does not vest in the courts the power to redistribute property at divorce. This leads to the conclusion that property settlement provision and its application in Nigeria discriminate against the financially weaker spouse (usually the wife), as Nigerian courts apply strict property law to determine spouses' proprietary interests. In this regard, there is a need to reconsider the present matrimonial property rights arrangement between a husband and a wife in a civil marriage in Nigeria.

The concept of "matrimonial property"

The term "matrimonial property", as employed in this article, implies property (immovable or movable) acquired by either or both spouses during the subsistence of the marriage other than that acquired by gift, inheritance or bequest,⁴ except as otherwise agreed by the spouses. This includes, among other things, spouses' income, whether derived from earnings or property, and assets that are acquired by means of either spouse's income or gains. However, it excludes personal property (that is, property that is personal in nature, gifts, inheritances and bequests acquired before or during the subsistence of the marriage).

It constitutes property that is not only jointly used but also jointly owned by spouses, not necessarily as a result of the financial contributions of each of the spouses to its acquisition, but also as a result of the fact that the property was acquired in matrimony by either or both spouses and was to be used for their benefit as husband and wife. Establishing that property is "matrimonial" in

1 *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC 618 (HL), para 16.

2 *Id.*, para 146.

3 *Id.*, para 16.

4 *See id.*, para 22.

nature is not, therefore, exclusively dependent upon finding a direct financial contribution to the acquisition of the property in question. A spouse's indirect contributions, whether financial or otherwise, to the acquisition of property could possibly give rise to the construction of a beneficial interest in the property, the legal ownership of which is in the name of the other spouse.

PROPERTY RIGHTS BETWEEN SPOUSES MARRIED UNDER THE MARRIAGE ACT IN NIGERIA

In Nigeria, the courts apply ordinary rules of property law in determining any question relating to the issues of ownership of property between spouses, whether during the subsistence of the marriage or upon its breakdown.⁵ Unlike the customary law wife, who is precluded from asserting a claim to settlement or transfer of property other than her personal effects at divorce,⁶ a spouse who celebrates his or her marriage in accordance with the provisions of the Marriage Act,⁷ is entitled, by way of seeking ancillary relief in court, to a settlement of property under section 72 of the Matrimonial Causes Act (MCA).⁸ Furthermore, a spouse who seeks a definite declaration of his or her interest in any disputed property may apply to the court under section 17 of the Married Women's Property Act (MWPA)⁹ or the Married Women's Property Law of 1959 (MWPL) (as re-enacted by some of the federating states in Nigeria)¹⁰ for a declaration of an existing interest in property.

Although the position of a wife married under the Marriage Act appears to be better when compared to that of a "customary law wife" in relation to property interests at divorce, it is worthwhile noting that the ordinary rules of property law, applied by Nigerian courts, have failed to achieve justice in the property relationship between a husband and a wife. This is because the application of property law to the property relationship between spouses is based on the establishment of legal ownership.¹¹

Property rights of Nigerian spouses under the MWPA

The MWPA was enacted by the British Parliament to deal with the property rights of women married under statutory law. To a large extent, the MWPA

5 BE Umukoro "Settlement of matrimonial property upon divorce: Challenges and need for reform in Nigeria and some other Commonwealth countries in Africa" (2006) 1/1*Commercial and Property Law Journal* 116 at 117.

6 MOA Ashiru "Gender discrimination in the division of property on divorce in Nigeria" (2007) 51/2 *Journal of African Law* 316 at 320–21; OK Edu "Women and property rights under customary law" in FO Oho and OK Edu (ed) *Women, Law & Family* (2016, Art Masters) 136 at 145.

7 1914 cap M6 Laws of the Federation of Nigeria, 2004.

8 No 18 of 1970 cap M7 Laws of the Federation of Nigeria, 2004.

9 1882 (45 and 46 Vict cap 75).

10 These states include Edo, Lagos, Ogun, Ondo, Osun and Oyo.

11 Umukoro "Settlement of matrimonial property", above at note 5 at 118.

altered the property rights of married women and improved their status under English law.¹² The MWPA formed part of the Received English Law¹³ in Nigeria by virtue of British colonialism.¹⁴ It applied to the federating states of Nigeria as a “statute of general application”¹⁵ until the former Western Region of Nigeria enacted the MWPL,¹⁶ which applied to the Western and Mid-Western States in Nigeria.¹⁷

The MWPA established the doctrine of separate property¹⁸ between spouses. It vested married women with separate ownership rights to property¹⁹ as if they were *feme sole* [unmarried or a single woman].²⁰ Section 1(1) of the MWPA recognizes the rights of women married under the Marriage Act to acquire, hold, alienate and dispose of property by will without interference from their husbands or any trustee. This makes it possible for married women to establish claims for ownership whenever there is a dispute concerning property. With the operation of the MWPA, any personal (movable) or real (immovable) property acquired by a woman before or after her marriage is treated as her separate property.²¹ Married women’s contractual rights in respect of their separate property are recognized and they bear all entitlements and liabilities arising from it.²²

Section 17 of the MWPA is instructive to this discussion. This section grants the High Court the power to determine the ownership of property between spouses. The relevant part of section 17 provides: “[i]n any question between husband and wife as to the title to or possession of property, either party ... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice ... and the judge ... may make such order with respect to the property in dispute ... as he thinks fit.”

12 MC Onokah *Family Law* (2003, Spectrum Books Limited) at 269.

13 Received English Law is one of the sources of Nigerian law. It comprises English common law principles, the doctrine of equity and the statutes of general application that were enacted in England and were in force before 1 January 1900. See AO Sanni *Introduction to Nigerian Legal Method* (1999, Kuntel Publishing House) at 126.

14 *Ibid.*

15 A Park *The Sources of Nigerian Law* (1963, African Universities Press) at 24–36.

16 EI Nwogugu *Family Law in Nigeria* (rev 2nd ed, 1990, HEBN Publishers) at 85 states that this law re-enacted part of the provisions of the MWPA and the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 and 26 Geo 5 cap 30).

17 Onokah *Family Law*, above at note 12 at 273.

18 The doctrine of separate property recognizes the separate rights of spouses to acquire and deal with property during the subsistence of their marriage as if they were not married. Ownership of property is in most cases ascertained by virtue of the strict principles of the law of property, except where a spouse can produce evidence to show some financial contribution to the other spouse’s property that could entitle her to some proprietary interest. See JG Miller *Family Property and Financial Provision* (2nd ed, 1983, Sweet & Maxwell) at 3.

19 Umukoro “Settlement of matrimonial property”, above at note 5 at 118.

20 See MWPA, sec 1(1).

21 See *id* secs 2 and 5.

22 See *id*, sec 1(3)–(5).

It is germane to emphasize that section 17 of the MWPA does not regulate the redistribution or readjustment of property between spouses on the dissolution of a civil marriage.²³ The primary aim of section 17 in respect of disputed property between spouses is for the court to determine questions regarding the ownership of property between spouses as it thinks fit.²⁴ The striking phrase from section 17 of the MWPA is “as he thinks fit”. The opinion has been expressed that this phrase does not give the court the unfettered discretion to redistribute property in accordance with what it deemed just.²⁵

At divorce in Nigeria, it is common for spouses to rely on the provisions of the MWPA to establish the ownership of property, as was done in *Aderounmu v Aderounmu*.²⁶ Whenever there is a property related dispute between spouses, therefore, Nigerian courts interpret the provisions of the MWPA strictly to determine the extent of a spouse’s interest in the property of the other spouse.²⁷ For a spouse to succeed, he or she must prove a direct financial contribution to the purchase or development of the disputed property based on ordinary rules of property law.²⁸

The courts have held that, where a spouse makes a claim for an interest in property, he or she must provide cogent evidence of a financial contribution to that property.²⁹ For a spouse to succeed, he or she must prove, on the balance of probability, that he or she is a joint owner of the property in question or that his or her financial contribution was substantial with regard to the purchase or development of the property about which there is a disputed interest. Financial contribution to property is, thus, the only basis for the establishment of an interest in property at divorce.³⁰ According to the Supreme Court in *Amadi v Nwosu*,³¹ a claimant needs to explain not only the quantity and quality of his or her contributions to the disputed property, but also give details and particulars of the contributions that would enable the court to decide in the claimant’s favour.³²

This leads to the conclusion that, in Nigeria, property rights between married spouses are completely separate. It is argued that the complete separation of property system, which requires a spouse to present “evidence of direct financial contribution to the acquisition or development of the property or

23 See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393, per Lord Morris.

24 Ibid.

25 Id at 395 and 398. See also SM Cretney and JM Mason *Principles of Family Law* (5th ed, 1990, Sweet & Maxwell) at 234; and F Emiri and AO Giwa *Equity and Trusts in Nigeria* (2012, Malthouse Press) at 424–25.

26 [2003] 2 NWLR (pt 803) 1 at 19.

27 C Arinze-Umobi “Discrimination / inequitable distribution of matrimonial property upon divorce: Critique of section 72 MCA” (2004) 4/1 *Unizik Law Journal* 188 at 197.

28 See *Egunjobi v Egunjobi* [1976] 2 FNLR 78.

29 *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Essien v Essien* [2009] 9 NWLR (pt 1146) 306 at 331–32.

30 See *Egunjobi*, above at note 28.

31 Above at note 29 at 4.

32 See also *Oghoyone v Oghoyone* [2010] 3 NWLR (pt 1182) 564.

an agreement to that effect”³³ in order to substantiate his or her interest in the property, runs contrary to the partnership element of marriage and places the less buoyant spouse (most often the woman) in a disadvantaged position at divorce. A law, fashioned in this light, regards spouses simply as commercial partners, with an obligation to give detailed accounts and keep close records of their transactions with each other.³⁴

The sole limitation that a spouse encounters by bringing his or her application under the MWPA is that the court is precluded under the act from varying the property rights of spouses in disputed property.³⁵ A right to property is determined solely on the basis of recognized property law principles.³⁶ What the court does is to apply the law and exercise its discretion as it thinks fit while determining the extent of the established interests of the parties in the property in dispute.³⁷

Settlement of property under the Matrimonial Causes Act

Section 72 of the MCA empowers the High Court to make an order for the settlement of property in proceedings for matrimonial causes where a principal relief has been sought³⁸ and granted.³⁹ Section 72(1) provides: “[t]he 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 a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.”⁴⁰

33 Umukoro “Settlement of matrimonial property”, above at note 5 at 118–19.

34 Ibid.

35 See *Cobb v Cobb* [1955] 2 All ER 696 (CA) at 700, where it was held that the court’s only duty under sec 17 of the MWPA is to determine ownership of property and not to vary vested titles to property. See also *Gissing v Gissing* [1971] AC 886 (HL) at 904, where it was held that parties’ existing property rights cannot be varied once they have been established under sec 17 of the MWPA.

36 This requires proof of a legal title to property, for example by way of a deed, or proof of a beneficial title by the existence of a trust. In *Pettitt*, above at note 23 at 393, per Lord Morris of Borth-Y-Gest, it was held that the question before the court under sec 17 of the MWPA was to determine which of the spouses owned the property and not to decide to whom the property should be given based on the court’s discretion.

37 Cretney and Mason *Principles of Family Law*, above at note 25. See also Emiri and Giwa *Equity and Trusts in Nigeria*, above at note 25.

38 Onokah *Family Law*, above at note 12 at 267.

39 See MCA, sec 75(1) and (2)(b)(i) and (ii). With particular reference to maintenance or custodial orders, however, the court may proceed to make such orders after dismissing a petition for a principal relief that was heard on the merits, if “(i) the court is satisfied that the proceedings for the principal relief were instituted in good faith to obtain that relief; and (ii) there is no reasonable likelihood of the parties becoming reconciled”: *id*, sec 75(2)(b).

40 See sec 24(1)(b) of the English Matrimonial Causes Act cap 18 of 1973 for a similar provision on the settlement of property and the power of the English courts in that regard.

Although the MCA does not define the term “settlement of property”, the word “settlement” implies “an act of bestowing or giving possession under legal sanction”.⁴¹ “Settlement” can also imply the disposition of property or the act of granting it.⁴² The term “disposition” means the “transfer or relinquishment to the care or possession of another”.⁴³

The view has been expressed that “settlement of property” as employed by section 72(1) of the MCA implies simply the relinquishment of property by a spouse to the care or possession of the other spouse as part of providing maintenance for the spouse.⁴⁴ In this sense, the court often makes a property settlement order on a spouse to hold property either as a life interest, as a trustee or subject to the occurrence of one or more events.⁴⁵ The court’s power to discharge a settlement of property order made pursuant to section 72 of the MCA⁴⁶ raises the question of whether the court can make a settlement of property order in the nature of an absolute transfer of property, that is a transfer of ownership from one spouse to the other. This issue is addressed later in this article.

Section 72(1) of the MCA enables a spouse who has contracted a civil marriage to apply for the settlement of property upon him or herself upon the dissolution of marriage.⁴⁷ The court is empowered to make an order settling the property of one or both spouses on either of the spouses or for the benefit of any child of the marriage.⁴⁸ It is not necessary that the property to be settled must be property that was acquired after the celebration of the civil marriage between the spouses.⁴⁹ Even premarital property acquired by either or both spouses is also subject to a property settlement order under section 72(1).⁵⁰ The overriding consideration that directs the exercise of the court’s jurisdiction is the term “just and equitable”.⁵¹ A property settlement order made

41 See “Settlement” in FC Mish *Merriam-Webster’s Collegiate Dictionary* (10th ed, 2000, Merriam-Webster).

42 See “Settlement” in *The English Dictionary*, available at: <<https://en.wiktionary.org/wiki/settlement>> (last accessed 19 March 2019).

43 See “Disposition” in *The English Dictionary*, available at: <<https://en.wiktionary.org/wiki/disposition>> (last accessed 19 March 2019).

44 See *Kafi v Kafi* [1986] 3 NWLR (pt 27) 175 at 186–87.

45 *Id* at 187. See also *Akinboni v Akinboni* [2002] 5 NWLR (pt 761) 564. This view can be contrasted with the recommendation of the English Law Commission on statutory co-ownership. See PM Bromley *Bromley’s Family Law* (6th ed, 1981, Butterworths) at 420–21, where the author argued that the disposition of such property “would have to be a beneficial and absolute interest in possession and not ... a life interest or one held by one of the spouses as a trustee”.

46 MCA, sec 73(1)(j).

47 Onokah *Family Law*, above at note 12 at 267.

48 *Ibid*.

49 Ashiru “Gender discrimination”, above at note 6 at 318.

50 *Ibid*.

51 See MCA, sec 72(1).

pursuant to section 72(1) must satisfy the “just and equitable” requirement in the circumstance of each case.⁵²

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

The law provides for antenuptial and postnuptial settlements of property on intended spouses and spouses respectively. Such settlements can be made by either or both of the spouses or by a third party in favour of either or both of the spouses.⁵³ An antenuptial settlement has been defined as a settlement made on intended spouses “in contemplation of a particular marriage”.⁵⁴ A postnuptial settlement, on the other hand, is a settlement made on already married spouses.⁵⁵ A postnuptial settlement makes provision for financial benefits for either or both of the spouses as spouses (husband and wife) in their married state.⁵⁶ The term “settlement” under section 72(2) of the MCA⁵⁷ means a disposition (transfer) made by a third party who makes a future or continuing provision for either or both spouses or for their children.⁵⁸ The provision is resorted to in cases where a spouse alleges that dealings with a property, which is in the name of either or both spouses, were in the nature of making continuing provision for the future needs of either or both spouses in their capacity as husband and wife.⁵⁹

A spouse is entitled to seek relief for a property settlement order under section 72(2) in proceedings for the dissolution of their marriage on the basis that the need for the continuing provision of the future needs of a spouse or both spouses, upon which the settlement was originally made, will be (or has been) extinguished by virtue of an order for the dissolution of the marriage.⁶⁰

Upon the application of a spouse, the court is empowered to make an order that it thinks just and equitable in respect of an antenuptial or postnuptial settlement.⁶¹ In making the order, the court may well consider whether the property in question can serve as part of maintenance provisions to a spouse

52 Onokah *Family Law*, above at note 12 at 267.

53 EI Nwogugu *Family Law in Nigeria* (3rd ed, 2014, HEBN Publishers) at 272.

54 Ibid. Antenuptial settlement is a disposition of property made before marriage.

55 Ibid. Postnuptial settlement is a disposition of property made after marriage.

56 Id at 232, citing the English case of *Prinsep v Prinsep* [1929] P225 (Fam) on the definition of postnuptial settlement.

57 This is similar to sec 86(2) of the repealed Australian Matrimonial Causes Act No 104 of 1959 (Cth).

58 *Dewar v Dewar* (1960) 106 CLR 170; *Australian Family Law Guide* (2nd ed, 1999, CCH Australia) at 207.

59 See *Dewar*, id at 173.

60 This was the position of the Australian court in *Dewar*, id, which considered sec 86(2) of the Australian Matrimonial Causes Act.

61 MCA, sec 72(2).

and the children in his or her custody.⁶² The court's power to make a property settlement order upon the dissolution of a marriage in relation to either an antenuptial or postnuptial settlement must be founded on the consideration of what is "just and equitable".⁶³ Where the court exercises its discretion, its order could relate to the whole or a part of a property dealt with under an antenuptial settlement.⁶⁴ The property settlement provision of section 72 of the MCA concludes with subsection (3), which has the effect that the power of a court to make a property settlement order can be exercised only in relation to the children of the marriage for the benefit of any child of the marriage who is less than 21 years of age. The court is, however, enjoined to exercise its discretion where special circumstances exist to justify the exercise of such powers.⁶⁵

It is notable that, while section 72 specifically provides for the court's powers to make a property settlement order, section 73 outlines the court's general powers in relation to issues of maintenance, custody and the settlement of property proceedings. It is necessary to consider some of the provisions of section 73(1) of the MCA, not only on the basis that they make direct reference to the provision for a property settlement order under section 72 but also on the basis that they have been used by the court as alternatives to a property settlement order.⁶⁶ Of particular importance is the provision of section 73(1)(j) of the MCA that empowers the court to discharge, modify or vary a maintenance, custody or property order made under part IV of the act. With particular reference to section 73(1)(j)(i) of the MCA, the court can discharge a property settlement order where the spouse in whose favour it was made remarries or where there exists a just cause for doing so. Strictly on the basis of this provision, it is arguable that the kind of settlement of property provided for by the MCA does not imply a total transfer of the legal and beneficial interest in property (ie total ownership) from one spouse to another upon the breakdown of marriage. If it does, then a spouse's remarriage will have no effect on a property settlement order that had earlier been made, except in cases of fraud, duress, suppression of evidence, lack of material disclosure or the existence of other exceptional circumstances.

A careful perusal of some of the provisions of section 73 of the MCA reveals, however, that, but for the provision of section 73(1)(j), Nigerian courts could interpret section 72 (settlement of property) as being capable of transferring ownership. For instance, in making a property settlement order under section 72, the court is empowered to order the execution of any necessary deed or instrument of title or the production of a document of title, among other things, in order to carry out a property settlement order effectively.⁶⁷ Where

62 See *Dewar*, above at note 58 at 173.

63 MCA, sec 72(2). See also, *Nwogugu Family Law in Nigeria*, above at note 53.

64 MCA, *ibid*.

65 *Id*, sec 72(3).

66 *Onokah Family Law*, above at note 12 at 267.

67 MCA, sec 73(1)(d).

a person who is mandated by the court to execute such a deed or an instrument of title in favour of a spouse fails or neglects to do so, an officer of the court may be appointed to do the same.⁶⁸ It is noted that the court is also empowered to make a permanent order in respect of section 72 of the MCA.⁶⁹ The author is of the view that reference to section 72 in section 73(1)(j) is an anomaly, to the extent that it does not relate specifically to the cessation and modification of spousal maintenance orders.

Property settlement order as a maintenance order

Section 70 of the MCA empowers the court to make maintenance orders. In maintenance proceedings, the court is enjoined to make a just order by considering “the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances”.⁷⁰ The court can also make an interim maintenance order, pending the disposal of proceedings for maintenance.⁷¹ Similar considerations guide the court in making an interim maintenance order.⁷²

It is notable that, under the court’s general powers (as stated in section 73 of the MCA), the court is empowered to make a maintenance order by ordering a spouse to make a lump sum or periodic sum payment, which may or may not be secured.⁷³ The court may also order a spouse to execute a deed or instrument or produce a document of title for the purpose of carrying out a maintenance order effectively.⁷⁴

It is pertinent at this point to emphasize that there is a difference between a maintenance order and a property settlement order.⁷⁵ The rationale behind this difference lies in the effect of the orders. Once made, a property order is not contingent or reversible upon the occurrence of certain event(s) like remarriage or a change in circumstances; however, a maintenance order can be varied, discharged or set-aside by the court upon the occurrence of any event(s) that has been stipulated by statute.

It should, however, be borne in mind that a maintenance order can also be made by way of ordering a spouse to settle specific property⁷⁶ on the other spouse.⁷⁷ It is in this sense that Adesanya⁷⁸ and Tijani⁷⁹ have argued that

68 Id, sec 74.

69 Id, sec 73(1)(h).

70 Id, sec 70(1).

71 Id, sec 70(2).

72 Ibid.

73 Id, sec 73(1)(a)–(c).

74 See id, sec 73(1)(d).

75 See *Kafi*, above at note 44.

76 This means that the court’s order is directed at particular property of a spouse to be used by the other spouse, for example as a home for herself and the children of the marriage.

77 MCA, sec 73(1)(d).

78 SA Adesanya *Laws of Matrimonial Causes* (1973, Ibadan University Press) at 228.

79 N Tijani *Matrimonial Causes in Nigeria: Law and Practice* (2007, Renaissance Law Publishers) at 180.

the property settlement provision under section 72 of the MCA can “serve as an alternative to an order for lump sum payment where” the court thinks it is proper to order a spouse to settle a specific property or investment on the other spouse.

There are other instances where the court could possibly make a maintenance order by way of settling a specific property on a spouse. First, for example, where both spouses are joint owners of the matrimonial home, the court could order a spouse to settle the matrimonial home on the custodial spouse in order to provide a home for the spouse and the children of the marriage.⁸⁰ In this sense, the settlement of the matrimonial home on the custodial spouse does not extinguish the title of the non-custodial spouse, unless the court states in its order that it does.⁸¹ Secondly, where the financial resources or earnings of a spouse are not adequate to provide periodical payments, the court can, by way of supplementing such payment, order a property settlement in order to provide a home for a spouse and the children of the marriage.⁸² Thirdly, where the court thinks it could be impracticable, in view of the circumstances of the case, to make an order for a lump sum payment, it could make a property settlement order to prevent future financial uncertainties.⁸³ These examples give further credence to the assertion that property orders are in most cases made by the court in order to provide maintenance for a spouse.⁸⁴ Where that is what the court intends, it should be stated specifically that the order being made is a maintenance order.

The author argues that the court can properly discharge, modify or suspend a maintenance order containing an order for property settlement, upon the application of an “affected spouse”. The same argument cannot, however, be sustained in respect of a property order (strictly speaking, one that is not made by way of maintenance). It is reasoned that an “independent order” for a property settlement should be a final order that extinguishes all the rights of the transferor spouse.

A careful perusal of the facts of *Kafi v Kafi*⁸⁵ and the evidence on record reveals that the order made by the trial court was a maintenance order that incorporated a property settlement order (as maintenance for the wife and children).⁸⁶ The husband’s argument on appeal, that the trial court should

80 Ibid.

81 In *Akinboni v Akinboni* [2002] 5 NWLR (pt 761) 564, although the wife failed to establish joint ownership in the disputed property that was used as the matrimonial home of the spouses and their children, the court restrained the husband from disposing of the property. It granted occupation rights in one of the flats to the wife and children, subject to their good behaviour.

82 Tijani *Matrimonial Causes in Nigeria*, above at note 79 at 181.

83 Ibid.

84 The court makes these orders in the exercise of its general powers under the MCA, sec 73.

85 Above at note 44.

86 Id at 185–87. See also I Sagay *Nigerian Family Law Principles, Cases, Statutes & Commentaries* (1999, Malthouse Press) at 462.

not have made a property settlement order in favour of the wife and the children of the marriage, having already made a maintenance order of ₦360 per month for the wife, was not sustained at the Court of Appeal.⁸⁷

It was the judgment of the Court of Appeal that, in making a property settlement order as a maintenance order, the court does not require evidence of joint acquisition or the development of the property in question.⁸⁸ It held that the sole restriction on the exercise of the court's discretion is whether the order is "just and equitable" in the circumstances.⁸⁹ The condition imposed by the court that the settled property must not be sold during the wife's lifetime in order for it to remain a home for the wife and the children further buttressed the nature of the court's order.⁹⁰ Relying on the authority of *Kafi*, nothing precludes the court from making both orders where justice demands it.

Judicial application of section 72 of the MCA

It is noteworthy that the MCA does not contain any statutory guidelines for the exercise of the court's discretion under section 72, nor does it outline any considerations or criteria that Nigerian courts must follow in making appropriate orders under section 72. The courts are not enjoined by statute when making a property settlement order to take into consideration a spouse's indirect financial or non-financial contributions to the acquisition of the property. For instance, a spouse cannot rely on his or her domestic contribution to the family, without any further direct financial contribution to the acquisition of property, for a beneficial interest in that property.⁹¹

A contribution is said to be direct when a spouse makes a direct payment towards the acquisition, mortgage or lease of the property in dispute.⁹² An indirect contribution will include a spouse's contribution to the improvement or development of the property in dispute.⁹³ A spouse's contribution will also be indirect in cases where the spouse undertakes to bear household expenses in order to enable the other spouse to acquire a specific property. In his dissenting judgement in *Egunjobi v Egunjobi*, Fakoyode JA expressed his opinion as follows: "[i]t seems to me that if a wife foregoes house-keeping allowances from her husband and runs the house at her own expense for a substantial period of time in order to enable her husband save money to buy or acquire some specific property eg land, house or car, she should be entitled to some beneficial interest in the property even though her contributions to the property are indirect".⁹⁴

87 *Kafi*, id at 186.

88 Id at 185.

89 Id at 186.

90 Id at 187.

91 See *Dairo v Dairo* suit no ID/90HD/86 of 15 July 1988 (unreported) Lagos High Court.

92 *Egunjobi*, above at note 28 at 85.

93 Ibid.

94 Ibid.

In *Dairo v Dairo*,⁹⁵ the Lagos High Court rejected the ancillary relief sought by the wife in proceedings for the dissolution of her marriage. In that case, the wife's uncontroverted evidence at trial was that both she and her husband had reached an agreement where she spent her income on the maintenance and welfare of the family while the husband spent his on building the matrimonial house. In the absence of proof of a direct financial contribution to the house, the court ignored the wife's claim for a share in the house.

In *Okere v Akaluka*, the Court of Appeal's judgment, holding that the plaintiff (the wife) was entitled to 50 per cent of the proceeds from the sale of the house in dispute, was hinged on the fact that the wife had made substantial contributions to the acquisition of the disputed property.⁹⁶ As it currently stands in Nigeria, there is no authority to the effect that a spouse's indirect contributions or a wife's domestic contributions to the family's welfare will alone give rise to a claim for a beneficial interest in property acquired in the sole name of the other spouse.

The author argues that the exercise of the court's discretion in relation to the settlement of property has been limited and, to a great extent, has failed to echo the unheard voices of Nigerian women in respect of the financial tragedies that they encounter during marriage and at divorce. A brief consideration of the South African matrimonial property system, particularly as it relates to the community of property system and the accrual system, will help make a case for the statutory introduction of the concept of "matrimonial property" in Nigeria.

THE SOUTH AFRICAN MATRIMONIAL PROPERTY SYSTEM

South African law presents a structured matrimonial property arrangement that allows intending spouses the opportunity to indicate their preference for a particular matrimonial property regime⁹⁷ to regulate their property relationship while their marriage subsists and upon its breakdown either by divorce or death. This article now offers a succinct examination of the current matrimonial property systems in South Africa as they relate to civil marriage.

Before the enactment of the Matrimonial Property Act (MPA),⁹⁸ there were two major types of matrimonial property system in South Africa.⁹⁹ These were marriage in universal community of property with the husband's marital power¹⁰⁰ and marriage out of community of property (that is complete

95 Above at note 91.

96 (2014) LPELR-24287 (CA) at 61.

97 E Bonthuys "The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: An argument for change" (2014) 131 *South African Law Journal* 439.

98 Act No 88 of 1984.

99 J Heaton and H Kruger *South African Family Law* (4th ed, 2015, Lexis Nexis) at 61.

100 *Ibid.* Marital power under common law enables the husband to exercise his power over his wife's property by virtue of marriage. Under this doctrine, the wife lacks the capacity to contract or litigate.

separation of property).¹⁰¹ With the commencement of the MPA, section 11(1) of which abolished the husband's marital power¹⁰² and which introduced the accrual system¹⁰³ as a soothing modification to the out of community of property system, however, there are now three major matrimonial property systems from which intending spouses must choose, according to their particular circumstances. They are: the universal community of property; complete separation of property; and the accrual system.¹⁰⁴ This article discusses the universal community of property system and the accrual system.

Universal community of property system

This is the default matrimonial property system in South Africa and is applicable to all civil marriages in which the intending spouses did not conclude an antenuptial contract.¹⁰⁵ The universal community of property, which can also be referred to "as a universal economic partnership of the spouses",¹⁰⁶ comes into existence by operation of law upon the conclusion of a marriage.¹⁰⁷ This is a general rule¹⁰⁸ that can only be deviated from when parties to a civil marriage conclude a marriage contract out of community of property, which must be registered to be enforceable against third parties.¹⁰⁹ Where spouses intend a different matrimonial property system to govern their property rights, they must therefore do so by concluding an antenuptial contract.¹¹⁰

In the universal community of property system, spouses are regarded as "co-owners in undivided and indivisible half-shares of all the assets and liabilities they have at the time of their marriage as well as the assets and liabilities they acquire during the marriage".¹¹¹ Upon the dissolution of the marriage, spouses have the right to an equal division of the balance of the joint estate

101 Ibid.

102 Pursuant to sec 12 of the MPA, a wife has the capacity to contract and litigate over her property.

103 See *id.*, secs 2–10.

104 Heaton and Kruger *South African Family Law*, above at note 98 at 102; M de Jong "The need for new legislation and / or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" (2012) 23/2 *Stellenbosch Law Review* 225 at 227–40.

105 See KN Monareng *A Simple Guide to South African Family Law* (2008, Siber Ink CC) at 13; LN van Schalkwyk *General Principles of the Family Law* (5th ed, 2014, Printburo) at 241.

106 JA Robinson "Matrimonial property regimes and damages: The far reaches of the South African Constitution" (2007) 3/1 *Potchefstroom Electronic Law Journal* 1 at 3.

107 See *Brummund v Brummund's Estate* 1993 (2) SA 494 (Nm) at 498.

108 There is, however, "a rebuttable presumption that all marriages are concluded in community of property": *Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (A) at 10; A Skelton and M Carnelley (eds) *Family Law in South Africa* (2010, Oxford University Press) at 80; JA Robinson, S Human, BS Smith and M Carnelley *Introduction to South African Family Law* (5th ed, 2012, Printing Things) at 166.

109 See *Ex parte Spinazze and Another NNO* 1985 (3) SA 650 (A) at 658.

110 Heaton and Kruger *South African Family Law*, above at note 98 at 83.

111 See *Ex parte Menzies et Uxor* 1993 3 SA 799 (C) at 811; *Gugu and Another v Zongwana and Others* [2014] 1 All SA 203 (ECM) at 210.

after all their liabilities from it have been settled.¹¹² It is noted that the spouses' joint estate remains undivided and indivisible during the subsistence of the marriage, except where a court orders that the joint estate be divided under section 20 of the MPA.¹¹³

Both spouses in the universal community of property system exercise equal powers in respect of the management and disposal of assets that comprise the joint estate.¹¹⁴ The joint estate may exclude certain assets, such as gifts or a bequest with an exclusion clause and non-patrimonial damages.¹¹⁵ Assets that are excluded from the spouses' joint estate make up their separate estate(s).¹¹⁶ It is thus possible for spouses married in community of property to own separate property.¹¹⁷ Separate property is the property of either spouse that is not included in the joint estate.¹¹⁸

Damages (except damages pertaining to patrimonial loss) recovered by a spouse for any delict committed against him or her constitute the separate property of that spouse. They do not fall into the joint estate.¹¹⁹ Where a spouse has incurred liability for any delict committed by him or her, inclusive of damages for non-patrimonial loss, the damages awarded in respect of that act are recoverable from the spouse's separate property.¹²⁰ Should the spouse have no separate property, the damages will be recoverable from the joint estate¹²¹ and any loss suffered by the other spouse in this regard will be taken into consideration in the distribution of their property interests upon the division of the joint estate.¹²²

Although an order for the division of the joint estate will be made by the court in divorce proceedings, a spouse married in community of property may, under the provisions of section 20 of the MPA, apply to the court for an order to divide the joint estate during the subsistence of the marriage.¹²³ Section 20(1) provides: "[a] court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just".¹²⁴

112 See *Leeb and Another v Leeb and Another* [1999] 2 All SA 588 (N) at 597.

113 See *ibid.*

114 See MPA, sec 14.

115 In respect of non-patrimonial damages, see *id.*, sec 18(a).

116 See Heaton and Kruger, *South African Family Law*, above at note 98 at 64–67 for a list of assets that can be regarded as the separate property of the spouses in a community of property system.

117 *Id.* at 64.

118 See MPA, sec 1.

119 See *id.*, sec 18(a).

120 See *id.*, sec 19.

121 See *ibid.*

122 See *ibid.*

123 *Leeb*, above at note 112 at 597.

124 See MPA, sec 8(1) for a similar court power in respect of the accrual system.

In this instance, the court is vested with the judicial discretion to deal with the spouses' joint estate as it deems just and equitable. In furtherance of the court's power under section 20(1), it may make an order to the effect that the community of property system be replaced by a different matrimonial property system as it deems just.¹²⁵ This change in the spouses' property system is a court-ordered change. It is different from the change contemplated by section 21 of the MPA, which is made upon application by both spouses.

One of the advantages of the community of property system is the incorporation of the partnership element of marriage. This system is aimed at attaining equality between spouses in a monogamous (civil) marriage. Marriage is seen as an equal partnership, which gives equal weight to both the financial and non-financial contributions of spouses to the joint estate. Marriage in community of property also serves as a protective measure to a financially weaker spouse who is entitled to share in the other spouse's financial prosperity upon divorce.¹²⁶

The administration of the joint estate can, however, be onerous, and the capacity of a spouse to act in some situations is limited by the statutory requirement of consent by the other spouse.¹²⁷ It is, however, the author's opinion that the universal community of property system will not be feasible in a country like Nigeria, with an entirely different legal culture and social orientation. Besides the fact that it is completely alien to Nigeria, a system that places legal restrictions on spouses' capacity to perform certain legal acts only when the required consent has been obtained,¹²⁸ will hamper commercial transactions and impede the ease of doing business in Nigeria.

Accrual system

It is noted that the complete separation of property system, which is one of the matrimonial property systems in South Africa, prevents spouses from sharing assets acquired by their joint efforts during the subsistence of their marriage.¹²⁹ Consequently, in order to mitigate the hardship,¹³⁰ among other reasons, in 1982 the South African Law Commission advocated the introduction of the accrual system.¹³¹ Hence, the MPA brought the accrual system into operation.¹³²

125 See *id.*, sec 20(2).

126 Robinson et al *Introduction to South African Family Law*, above at note 108 at 157.

127 See MPA, sec 15.

128 See *ibid.*

129 See AH van Wyk "Matrimonial property systems in comparative perspective" (1983) *Acta Juridica* 53 at 62; F du Toit "South Africa: Trusts and the patrimonial consequences of divorce: Recent developments in Africa" (2015) 8/2 *Journal of Civil Law Studies* 655 at 660.

130 JD Sinclair "Marriage: Is it still a commitment for life entailing a lifelong duty of support?" (1983) *Acta Juridica* 75 at 78.

131 Heaton and Kruger *South African Family Law*, above at note 98 at 91.

132 See MPA, chap 1.

The accrual system applies to marriages in the out of community of property system with an antenuptial contract, where the contract does not expressly exclude its application.¹³³ By this system, upon “the dissolution of a marriage ... the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse ... acquires a claim against the other spouse ... for an amount equal to half of the difference between the accrual of the respective estates of the spouses”.¹³⁴ It is, however, interesting to note that this right “is a patrimonial benefit which may on divorce be declared forfeit, either wholly or in part”.¹³⁵

Under section 4(1)(a) of the MPA, “[t]he accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage”.¹³⁶ In the computation of the accrual of a spouse’s estate, unless the spouses’ antenuptial contract indicates to the contrary or a testator or donor stipulates otherwise, inheritances, legacies or donations that a spouse received while he or she was still married, together with any assets acquired by him or her as a result of his or her possession or former possession of the property, are excluded.¹³⁷ In addition, a donation from one spouse to the other, except a donation *mortis causa*, is not considered to be part of the property of either spouse in the computation of the accrual of their respective estates.¹³⁸

It is essential that the net commencement value of the spouses’ estates be declared in the antenuptial contract at the commencement of the marriage. This is to ensure certainty in ascertaining the accrual of the spouses’ estates.¹³⁹ Where a spouse fails to make a declaration in his or her antenuptial contract, he or she is required to declare the net value of his or her estate before his or her marriage or within six months after the celebration of the marriage in a statement that is required to be signed by the other spouse and attested to by a notary.¹⁴⁰ The antenuptial contract or a certified copy of the signed statement constitutes *prima facie* proof of the net value of the spouses’ estates.¹⁴¹

Section 6(4) of the MPA states that, where a spouse’s liabilities exceed his or her assets at the commencement of the marriage or in a case where a spouse fails to declare the value of his or her estate as required by section 6(1) of the MPA and the contrary is not proved, the net value of the spouse’s estate will be deemed to be nil at the commencement of his or her marriage.¹⁴²

133 In such cases, the accrual system applies automatically by default. See *id.*, sec 2. See also Robinson et al *Introduction to South African Family Law*, above at note 108 at 157.

134 See MPA, sec 3(1); du Toit “South Africa: Trusts”, above at note 129 at 661.

135 See *id.*, sec 9.

136 See *id.*, sec 4(1)(b) on how the accrual of the spouse’s estate is determined.

137 See *id.*, sec 5(1).

138 See *id.*, sec 5(2).

139 Skelton and Carnelley (eds) *Family Law in South Africa*, above at note 108 at 111.

140 See MPA, sec 6(1).

141 See *id.*, sec 6(3).

142 See *Olivier v Olivier* 1998 (1) SA 550 (D) at 554 and 555.

In *Olivier v Olivier*, where the parties had declared the net values of their assets to be nil in their antenuptial contract, the defendant's (husband's) argument to adduce evidence under section 6(3) of the MPA was rejected on the grounds that section 6(3) of the act on which he sought to rely was not applicable because it referred only to cases where the parties had failed to declare the net values of their estates.¹⁴³ Where the parties had expressly declared the net values of their estates to be nil in their antenuptial contract, it would not be acceptable for a party to adduce evidence contrary to the express content of the document.¹⁴⁴ In the absence of a claim for rectification, the declaration in the antenuptial contract will be upheld.¹⁴⁵

In *Thomas v Thomas*, however, the court took a contrary position. It was of the view that the declaration in an antenuptial contract or statement of the net values of the spouses' estates is not clear proof but only serves as prima facie proof, as stated in section 6(3) of the MPA.¹⁴⁶ Parties are not precluded from proving the actual net values of their estates at the time of the marriage, where the declared net values do not represent their true values.¹⁴⁷

Furthermore, a spouse is legally obliged to provide full disclosure of the particulars of the values of his or her estate within a reasonable time when required by the other spouse, in order to determine the accrual of their respective estates.¹⁴⁸

It is pertinent to note that the legal right to participate in the division of the accrual of a spouse's estate can only arise at the dissolution of the marriage,¹⁴⁹ except in cases where a spouse has made a successful application to the court on the basis that his or her "right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being prejudiced or will probably be seriously prejudiced by the conduct of the other spouse".¹⁵⁰ Where the court is satisfied that it is in the interests of justice to allow the application while the marriage is in force, and that it will not prejudice other persons, it will order an immediate division of the accrual of the estate of the spouses in accordance with the provisions of chapter I of the MPA or on such other basis as it deems just.¹⁵¹ Should the court exercise its powers under

143 *Id* at 554.

144 *Id* at 555–56.

145 *Ibid*.

146 [1999] 3 All SA 192 (NC) at 200–01.

147 *Ibid*.

148 See MPA, sec 7.

149 See *id*, sec 3(2). See also *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W) at 849; *MB v NB* 2010 (3) SA 220 at 232; M de Jong "The cut-off date for determining accrual claims: A cruel decision and a better decision" (2011) 74 *Journal of Contemporary Roman-Dutch Law* 472 at 474.

150 MPA, sec 8(1). See also *Reeder v Softline*, *ibid*.

151 See MPA, *ibid*.

section 8(1) of the MPA, it may make an order for the accrual system to be replaced with a complete separation of property system.¹⁵²

The accrual system provides an avenue for the financial independence of spouses during the subsistence of their marriage but, at dissolution, entitles them to half a share in the accrual of their respective estates.¹⁵³ By this system, marriage is regarded as a kind of joint venture or partnership that recognizes the existence of joint interests in the accrual of the spouses' estates upon the dissolution of their marriage.¹⁵⁴ The notion of "equality" between spouses is advanced through the instrumentality of the accrual system.¹⁵⁵ It ensures the equitable distribution of assets between spouses.¹⁵⁶ In the author's opinion, a financially weaker spouse is better off because he or she, without a forfeiture order, has a half share in the accrual produced by the marriage.¹⁵⁷ The accrual system would constitute a feasible avenue for reform in Nigeria. However, a modified version of this system is proposed in terms of a statutory introduction of the concept of "matrimonial property".

RECOMMENDATIONS

There is a need to introduce the concept of "matrimonial property" in Nigeria. There should be a definite property right in relation to "matrimonial property" as defined above. There is, thus, either a need for a new law in this regard or an amendment of the MCA, being the existing law on matrimonial causes.

The concept of "matrimonial property" advanced in this article would share similarities with the accrual system in South Africa discussed above. In this property system, spouses' property remains separate during marriage, as marriage will not have an impact on or alter the ownership of property. Upon divorce, however, both spouses will be entitled to share in the financial benefits generated by their marriage (that is, the matrimonial property).

As in South Africa, where spouses are by statute entitled to an equal division of the accrual (except in cases of a forfeiture order¹⁵⁸ or an order for the immediate division of the accrual pursuant to section 8(1) of the MPA, where the court could opt to make an order based on what it deems just rather than on equal basis), the law in Nigeria should specifically provide for spouses to have equal rights in the net value of the "matrimonial property".

In exceptional cases, the court could exercise its discretion in the interests of justice in such a manner as to deprive a spouse from benefitting unfairly from

152 See id, sec 8(2).

153 du Toit "South Africa: Trusts", above at note 129 at 661.

154 JD Sinclair "The financial consequences of divorce in South Africa: Judicial determination or private ordering" (1983) 32/4 *International and Comparative Law Quarterly* 785 at 797-98; de Jong "The cut-off date", above at note 149.

155 du Toit "South Africa: Trusts", above at note 129 at 660.

156 Id at 662.

157 PJ Visser and JM Potgieler *Introduction to Family Law* (2nd ed, 1998, Juta & Co) at 88.

158 See MPA, sec 9.

an equal division formula. Should the court decide to exercise its discretion, it should proceed on the presumption of “fair sharing”, by regarding the spouses as having contributed to the marriage to the best of their abilities.

The law should prescribe guidelines for the court to exercise its discretion. The non-financial contributions of a spouse, in terms of his or her role as a homemaker and caregiver, must not be presumed to be less than the monetary contributions of the other spouse.¹⁵⁹ Both contributions must be treated as having equal economic value.¹⁶⁰ The court should consider the length of the marriage, the spouses’ ages at the time of divorce, the spouses’ present and future financial positions and obligations, and any “serious financial misconduct during the subsistence of the marriage, such as dissipation of assets”,¹⁶¹ among other factors.

A defined matrimonial property system of equal division would have various benefits. For example, it would: preserve the independence and equality of the spouses during the marriage; recognize the partnership element in marriage and do away with the untold hardship that a complete separation of property system metes on a financially disadvantaged spouse at divorce; and give a financially weaker spouse some measure of certainty that he or she will be beneficially entitled to a share in the matrimonial property should the marriage break down. Furthermore, the concept of “matrimonial property” would give rise to the equal rights of spouses in such property and recognize the court’s discretion (exercisable in accordance with prescribed statutory guidelines), in rare cases, to depart from “equal division” to “equitable distribution” when that would aid the cause of justice.

CONCLUSION

In Nigeria, there is a complete absence of the concept of matrimonial property.¹⁶² There is no category of property known as “matrimonial property”. The property rights of spouses are determined in precisely the same way as those of strangers and are formulated strictly.¹⁶³ Nigerian law does not permit the courts to redistribute the property of spouses at divorce. Nigerian courts interpret and apply the provisions of section 17 of the MWPA to determine ownership and not to vary vested titles to property.¹⁶⁴ This emphasizes the assertion that the property rights of spouses in Nigeria are completely separate

159 J Heaton “Striving for substantive gender equality in family law: Selected issues” (2005) 21 *South African Journal on Human Rights* 547 at 564.

160 *Id* at 574.

161 *Id* at 563.

162 See OM Adekile “Property rights of women in Nigeria as impediments to full realization of economic and social rights” (26 May 2010) SSRN 1 at 13–14, available at: <<http://ssrn.com/abstract=1616270>> (last accessed 26 November 2018).

163 See *Amadi v Nwosu*, above at note 29 at 4; *Aderounmu*, above at note 26; and *Essien*, above at note 29 at 331–32. See also Ashiru “Gender discrimination”, above at note 6 at 322.

164 See *Cobb*, above at note 35 at 700.

during the subsistence of the marriage and upon its dissolution. In this regard, a spouse, at divorce, is unable to lay claims to a beneficial entitlement to property where he or she is unable to prove a direct financial contribution to the acquisition of the property.

The property settlement provision under section 72 of the MCA is applied primarily by the courts to provide maintenance for a spouse. The law tilts more to the maintenance of a spouse at divorce rather than readjusting the property interests of spouses.

With particular reference to the South African matrimonial property system of the universal community of property and the accrual system, this article calls for the statutory introduction in Nigeria of the concept of “matrimonial property”, both within marriage and upon its breakdown.