

Divorcing Marriage from Marital Assets: Why Equity and Women Fail in Property Readjustment Actions in Nigeria

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Abstract

Applicable statutes give Nigerian courts discretion to achieve fairness in marital property readjustment. Ironically, the courts' approach has often been to adjudicate on the basis of formal title, resulting in a general failure to make any readjustments. This article offers two alternative explanations for this judicial behaviour: absence of a specific statutory marriage-centred definition of matrimonial property; and the courts' failure to appreciate the implicit matrimonial property regime revealed by a perspicacious interpretation of the statutes. These factors lead the courts to exercise a title-finding jurisdiction instead of an adjustive one. This conservative approach results in the courts exercising an exclusionary prescription of property. These flaws ignore the socio-cultural underpinnings and environment of marriage that support patriarchy in Africa and generally "disable" women in relation to property rights. Sample court cases support this thesis and underscore the need for a statutory definition of matrimonial property, with marriage as its denominator.

Keywords

Marriage, assets, readjustment, women, equity, culture

INTRODUCTION

In addition to custody, maintenance payments and access rights, marital property is one of the matters over which angry divorcing spouses disagree.¹ Historically, since the passage of laws permitting women to acquire and own property, scholars have always had a keen interest in the law relating to matrimonial property or family assets, both in common and civil law countries. The law of matrimonial property has been said to be not about houses and bank accounts, but ultimately about people and their relationships.² This may be because the extent or degree of interaction between those inanimate objects and humans is determined by the relations between humans

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1 RJ Levy "Custody investigations in divorce-custody litigation" (2010) 12 *Journal of Law & Family Studies* 431 at 431.

2 KJ Gray *Reallocation of Property on Divorce* (1977, Professional Books) at 22.

themselves. As Roemer explains, the right to control, govern and exploit things entails the power to influence, govern and exploit people.³ Carruthers and Ariovich add that “owners of productive assets can prevent non-owners from using them and thereby shape non-owners’ life-chances”.⁴ Therefore, while property is important for economic performance, lack of control of it can foster wealth inequality.⁵ This is in addition to its linkage to negative development outcomes.⁶ Upon marriage, the dyadic relationship that may have existed between an unmarried person and things of value usually changes to a triadic one between the owner of property, the spouse and the property. This can lead to the controlling and exploitative behaviour identified by Roemer. During the marriage, the law largely allows the parties to manage their relationship to their property. However, it has always sought ways to strike a balance in the triadic relationship upon marital breakdown, so that wealth inequality is reduced while economic performance is enhanced between the parties. This intervention may mirror, or clash with, the socio-cultural attitudes of the citizenry to property.

In situations of marital breakdown whether or not ending in divorce, judicial decisions in Nigeria indicate that there is often much dispute regarding who should benefit from the parties’ real estate. This is because real estate, whether developed or undeveloped, is economically prized in Nigeria; it is a most important element of both group and individual ownership.⁷ This may be because, apart from being an important means of securing shelter and livelihood (primarily through farming), it has since the colonial period been central to trade and commerce as a means of securing credit.⁸

3 JE Roemer “What is exploitation?” (1989) 18 *Philosophy and Public Affairs* 90 at 90–91, cited in BG Carruthers and L Ariovich “The sociology of property rights” (2004) 30 *Annual Review of Sociology* 23 at 23. Also see JL Anderson “Comparative perspectives on property rights: The right to exclude” (2006) 56/4 *Journal of Legal Education* 539 at 541.

4 Carruthers and Ariovich, id at 23–24.

5 Id at 31.

6 G Kelkar “Gender and productive assets: Implications for women’s economic security and productivity” (2011) 46/23 *Economic and Political Weekly* 59 at 60 and 64. She explains (at 60) that “entitlement to land helps women to improve their position within the home and outside, significantly improving their consultative roles and decision-making”. The absence of such entitlement forestalls independent investment and reduces inclusion in asset-based policy, leading to a reduction in economic empowerment.

7 Fekumo opens his text with these words: “Land is the most precious commodity of the ancient Nigerian. Its value to the modern Nigerian is still very high.” See JF Fekumo *Principles of Nigerian Customary Land Law* (2002, F&F) at 1.

8 K Mann “Women, landed property, and the accumulation of wealth in early colonial Lagos” (1991) 16/4 *Signs* 682. The author shows that commercialization of, and expansion in, international trade in post-slave trade colonial Lagos resulted in a struggle between men and women over land resources both inside and outside the household. These factors underscored the shift from communal land ownership to private / individual ownership of land to secure credit for trade; the outcome was the commercialization (buying and selling) of land. Thus the views expressed by Ike as late as the 1980s that property rights to land in Nigerian agriculture are not specific, or that individualized allotments

Therefore, tussle over land is sometimes more important than tussle over the custody of the children of a marriage; a party who loses custody may be compensated with access rights. Applicable statutes in Nigeria, such as the Matrimonial Causes Act 1970 and the Married Women's Property Act 1882 (and its domesticated versions), give courts discretion to achieve fairness in marital property actions. The court is required to be equitable in benefitting all the parties involved and is bestowed with a wide discretion in doing so. The jurisdiction covers all properties of the parties, whether jointly or separately owned. While this jurisdiction of the courts is well defined, the problem that they have faced over time is how to exercise this jurisdiction. The courts' puzzling approach has generally been to exclude from their equity jurisdiction property over which formal title is shown.⁹ This results in a general failure to make any readjustments. Critics agree, and judicial decisions show, that this equity jurisdiction has generally failed in Nigeria.¹⁰ However, beyond critical views as to the cause of this problem, this article offers two alternative explanations for this judicial behaviour. First, a specific *marriage-centred* definition of matrimonial property is absent from the statutes. Alternatively, the courts fail to appreciate the implicit or functional matrimonial property regime revealed by a perspicacious interpretation of the statutes. The result is that the courts restrict their jurisdiction by focusing on finding where title lies (usually in the man) and exclude property over which title is located from their adjustive jurisdiction. This is often to the disadvantage of the woman who is usually a non-title land user. This approach ignores the socio-cultural underpinnings, orientation and environment of marriage that support patriarchy in Africa and generally disable women in relation to property rights. The ramification is that equity, the objective of the jurisdiction, fails and women are further deprived of property rights. This article suggests that there is a need for a deliberately crafted statutory definition of matrimonial property over which the court exercises jurisdiction. This could be achieved through a definition that: directly removes discretion from the court regarding the specification of property that it can readjust; recognizes and incorporates the legal, social and cultural significance of marriage as its core underpinning; is mandatory; and promotes a communal property ideal during the subsistence of the marriage. This would ensure that the courts do not use their discretion to restrict their jurisdiction.

Before suggesting a text for the recommended definition, this article sets out the import of the statutory provisions and attempts a contextual and purposive interpretation that reveals that the jurisdiction encompasses all marital

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are absent or that land markets are non-existent, cannot be supported. See DN Ike "The system of land rights in Nigerian agriculture" (1984) 43/4 *The American Journal of Economics and Sociology* 469.

9 See below under the section "The approach of the courts".

10 See below, *id* and under the section "Marriage and property acquisition in Nigeria".

property (acquired during marriage or acquiring that status by virtue of marriage) that can be the subject of the court's jurisdiction. Thereafter, it examines the approach of the Nigerian courts through a sample of judicial decisions. While some scholars subject these decisions to strictures on other related grounds, this article shows that it is actually the absence of a marriage-centred definition of matrimonial assets that lies beneath the general failure of this equity jurisdiction, as observed in the cases and identified by scholars.

THE STATUTORY AMBIT OF THE EQUITY JURISDICTION

In divorce situations, section 72(1) of the Matrimonial Causes Act 1970¹¹ (MCA) applies. It provides:

- (1) The court may ... 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* ...
- (2) The court may ... make such order ... 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."¹²

In non-divorce situations, the determination of property rights for married persons can come under section 17 of the Married Women's Property Act 1882.¹³ The key elements of this provision are that:

"in any question between husband and wife as to title to or possession of property either party ... may apply to a judge ... and the judge ... may make such order with respect to the property in dispute ... as he thinks fit ... or may

11 Cap M7 Laws of the Federation of Nigeria 2011.

12 Emphasis added. It may be noted that proceedings for settlement orders are a form of matrimonial cause under the MCA. However, they cannot be brought independently as they must relate to a concurrent, pending or completed main matrimonial cause such as the dissolution or nullity of marriage: *id*, sec 114. Furthermore, orders for the settlement of property are not an alternative to lump sum payments, as has been suggested by Adesanya and supported by Ashiru. See MOA Ashiru "Gender discrimination in the division of property on divorce in Nigeria" (2007) 51/2 *Journal of African Law* 316 at 319, citing SA Adesanya *Law of Matrimonial Causes* (1973, Ibadan University Press) at 228. Lump sum payments relate to maintenance awards (financial provisions) and are separately provided for under secs 70 and 73 of the MCA. The corollary is that a party may ask for both reliefs in the same petition.

13 The Married Women's Property Act 1882 is a statute of general application that applies directly in states of the federation that have local versions of the act. The important provisions are essentially the same in all states.

direct ... any inquiry touching on the matters in question to be made in such manner as he shall think fit”.

It is observable that, in relation to property, the MCA provisions cover property both jointly and separately owned by the parties. Again, properties covered by both pre-nuptial and post-nuptial settlements are included, as the court should have the power to evaluate the arrangement and order a resettlement of already settled property. It appears that the “settlement” includes arrangements effected by third parties on the parties to the marriage, as well as those by one party on the other. Thus the sub-section is principally intended to bring all properties to which the parties may be entitled, either jointly or separately, within the court’s equity jurisdiction. The tenor of the section indicates that even properties covered by a prenuptial agreement can be called into the court’s jurisdiction.¹⁴ It is significant that the court’s discretion and equity (fairness) jurisdiction under the statutes is wide. In *Acquah v Acquah*¹⁵ it was held that the court can exercise the powers under section 72 on its own motion. In *Kafi v Kafi*¹⁶ it was held that “the main limitation in making [a section 72] order must be ‘as the court considers just and equitable’”.¹⁷ As to the scope, intention or objective of section 72, Nwogugu, citing *Cartwright v Cartwright*,¹⁸ explains that an order under the section will relate to the whole or part of the property involved and that the court is empowered to enable it to make proper provisions for the spouses and their children.¹⁹ Thus, the court’s order in *Kafi* in favour of the wife was “for her benefit and that of her children”.²⁰ In other words, the result of any exercise should be benefit-oriented. The corollary is that it should be needs-based, as in cases of maintenance. All said, the court’s powers under section 72 cannot be limited, save as provided under the section itself.

Given this, the ambit of the court’s discretion is absolute and the range of the parties’ properties over which the court can exercise its jurisdiction seems unlimited. The consequence should be that the jurisdiction should focus on the readjustment of proprietary interests and nothing else. Therefore, between the parties alone, there is no basis for the court to adjudicate over titular rights, unless such an exercise is necessary to ascertain or determine the extent of, or title quality, of the parties’ assets. Title

14 M Attah “Prenuptial agreements as enforceable contracts in Nigeria: How far-reaching is *Oghoyone?*” (2013) 1/1 *ABSU Property and Comparative Law Journal* 147 at 159.

15 [1985] HC/NLR 35 at 40 per Adeyemi J. In *Oghoyone v Oghoyone* [2010] 3 NWLR (pt 1182) 564, the Court of Appeal held that sec 72 could apply in a situation where the marriage is void. This accords with sec 69 of the MCA, which expressly provides that a void marriage can ignite the court’s equity jurisdiction.

16 [1987] 3 NWLR (pt 27) 175.

17 *Id* at 185–86, per Uche-Omo JCA.

18 [1982] 12 *Family Law* 252.

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

20 *Above* at note 16 at 185–86.

determination in general court business is necessary when litigants dispute the ownership of property. This is not the case under section 72. Indeed, the section applies regardless of where title lies. The important element is that the property does not belong to a third party. Thus, the court's obligation should be limited to readjustment unless there is no basis for doing so (such as where the court concludes that the distribution of interests or concessions made by the parties is already equitable). The implication of this position is that all property belonging to the parties is to be regarded as marital, a result that the court may then choose to readjust.²¹ As noted above, the purpose of the readjustment is to be fair to all parties in the family. As noted above, where the court estimates that the demarcation or distribution of interests is fair, there will be no basis for it to exercise any discretion to readjust further.

Conversely, where the court's exercise of this jurisdiction focuses on making a finding as to who, between the parties, has title to a particular property so as to declare exclusive ownership on that party, the court's discretion will be fettered. Such an exercise would also run counter to the welfare (benefit) principle that supports the jurisdiction. First, that property would be excluded from the court's adjustive jurisdiction, thereby reducing the range of property that the court can readjust. This would be against the express provisions of the section. Secondly, the exercise may prevent the benefit that the other party, as well as the children of the marriage, should procure from a proper exercise of an adjustive jurisdiction. It is interesting that the court's jurisdiction can be exercised in favour of children of the marriage, both below and above the age of 21.²² In the latter case, the court exercises its jurisdiction where it agrees that there are "special circumstances" justifying or warranting it. In Nigeria such special circumstances abound, including special-care children (health-challenged, physically and intellectually disabled) as well as dependent children in tertiary schools who are above the age of 21. This may be because there is no social welfare code in any part of the country for these categories. Indeed, many normal children are not functionally emancipated from parental support until after this age. Furthermore, the usual expectation of family members is that, in family relations, property obtained by any member of the family during a marriage is neither separately nor even jointly owned (in the legal sense). It is generally regarded as "communal" and all should benefit from it.²³ Therefore, any other exercise of jurisdiction under the

21 There is no provision excluding any type or category of property from the court's jurisdiction.

22 MCA, sec 72(3). It is interesting that the powers can be exercised in favour of children over 21.

23 This attitude may be dictated by customary law property institutions that are founded on such "communal" principles. Of importance is the institution of "family property". With this, even though certain decision-making powers are granted to the head of family, the descendants of a property owner upon whom a property devolves are seen as being in a relationship akin to a tenancy in common. As such, the descendants do

section that fails to focus on readjustment will be against the clear provisions of the section and may truncate the basic premises of marital and family relations in Nigeria.

In non-divorce situations, disputes as to title can only arise regarding property acquired during the currency of a marriage. Properties acquired before marriage cannot be the subject of rancour because title is clearly defined.²⁴ This will particularly be the case where the properties have been kept separate and not mixed with those acquired during the marriage. The provisions impliedly recognize that marital relations could distort the demarcation of proprietary interests in assets acquired during the marriage. This reality should impose a matrimonial property regime on the parties, leaving the court with only an adjustive jurisdiction upon marital breakdown or divorce.

The arrangement under the statutes should provide an institutional refuge for either spouse of a broken-down marriage as well as the children of the marriage. Unfortunately, the court generally conducts a title determining exercise to the disadvantage of the woman, who may already be tied down by African cultural precepts of marital relations and the acquisition of interests in property.

THE APPROACH OF THE COURTS: A MARRIAGE-DEFEATIST DEFINITION

Nigerian courts have generally failed to appreciate the extent of the statutory discretion accorded to them. Instead of an adjustive jurisdiction, the court usually proceeds to locate title using evidence-based tools, principally legal or formal title, but also the adversarial technicalities of pleadings and proof. With regard to title, whoever has legal title for which there is documentary evidence retains separate ownership. The courts treat property over which there is formal title as if it were excluded from the court's adjustive jurisdiction, even in divorce situations. Often, the parties may have acquired just one piece of vacant land or land with a building that may have served as the matrimonial home. For the woman generally, such title location is a

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not have separate interests, even over portions allotted to them for their use, unless and until the arrangement is extinguished by, for example, partition. No descendant can oust others and none can dispose of any portion without consultation with all the others. See the observations of Uwaifo JCA in *Onyido v Ajemba* [1991] 4 NWLR (pt 184) 203 at 215 and Lewis JSC in *Olanguno v Ogunsanya* [1970] ANLR 227 to this effect. Also see generally: E Chianu *Law of Sale of Land* (2009, LawLords) at 257–61; Fekumo *Principles of Nigerian Customary Land Law*, above at note 7 at 183–94; and WE Offei *Family Law in Ghana* (2014, Offei) at 244. Added to this are strong notions of the “unity of spouses” dictated by socio-cultural and religious values. As noted in the section below on “Marriage and property acquisition in Nigeria”, this is a factor that strengthens patriarchy and female deference because it projects the man as the decision maker in the family.

24 *National Provincial Bank v Hasting Car Mart* (1965) 3 WLR 1.

socio-cultural and legal quagmire, as the exercise is carried out without considering the cultural principles underpinning marital relations in Nigeria. This approach is qualified where there is documentary evidence that the parties pooled resources to acquire the land or erect the house. Again the same factors generally make proving this a herculean task for the woman. At the very least, this is a defeatist definition in terms of the cultural forces underpinning marriage, and defeatist of the equity objective of the jurisdiction.

In the decisions below there was a total failure of equity, as the properties involved were excluded from readjustment since, in accordance with the court's definition, they were separately owned.

In *Nwanya v Nwanya*²⁵ the respondent wife claimed that she had contributed ₦6,000 to the building of a house that was in her husband's name. Her claim was dismissed as she was unable to substantiate it. On the vital issue of evidence, Olatawura JCA said, "[i]f ... the respondent has given a lump sum of ₦6,000 or any sum to her husband, she should have led evidence in support. If she bought building materials and gave them to her husband, she was duty bound to lead evidence in support. If her monetary contribution was by way of cheque, evidence ought to have been led also".²⁶

In *Amadi v Nwosu*²⁷ the appellant's husband sold his house that served as the matrimonial home and moved to another part of the city. The appellant refused to vacate possession and the respondent purchaser sued her for declaration of title, damages for trespass and an injunction. The appellant could not provide evidence to support her contention that she had an interest in the house. She merely said that she paid for labour and sand and made no effort to substantiate her testimony; under cross-examination she testified that she did not know when the house was built. Her husband testified that she was not earning money when he built the house and his testimony that he built the house without any contribution from his wife was not challenged in cross-examination. The Supreme Court dismissed the appellant's claim. Kutigi JSC stated:

"The appellant [argued] that she contributed to the building of the house. If it were so, then certainly when she came to testify in court she ought to have explained the quality and quantity of her contribution. She also ought to have given details and particulars of the contributions which would have enabled the court to decide whether or not she owned the property with [her husband]. She did not. In addition the appellant called no witnesses to prove that she contributed either labour or sand to the building."²⁸

25 [1987] 3 NWLR (pt 62) 697.

26 Id at 704. See also *Onwuchekwa v Onwuchekwa* [1995] 5 NWLR (pt 194) 739, in which the same evidential requirement defeated the wife's case. See generally Chianu *Law of Sale of Land*, above at note 23 at 314–15.

27 [1992] 5 NWLR (pt 241) 273.

28 Id at 280.

In *Akinboni v Akinboni*²⁹ the document of title to the matrimonial home was in the name of the petitioner husband. The respondent alleged in her cross-petition, upon which she gave evidence, that both parties owned the property jointly. She stated that she allowed the petitioner to obtain the title deed in his sole name to enable him to obtain a housing loan from his employers, who would not accept jointly owned property. There was no specific or express prayer that the building be partitioned or sold and the proceeds shared. Despite this, the High Court ordered the partition of the property. The Court of Appeal indicated that it was willing to treat matrimonial causes liberally, but allowed the technical rules to prevail in this case. It reasoned that,

“... although matrimonial cause cases are treated as different from ordinary civil cases and matters and with liberal approach to the technical rules of pleadings, ... the assertion of the respondent on joint ownership of the family property has not ... been proved as required by law. It was a situation where the respondent adduced oral evidence to vary or contradict what was commonly accepted by the parties and admitted that the deeds or documents of title for the said property was [sic] in the name of the appellant. ... It is trite that oral or extrinsic evidence is not admissible to contradict or vary a written document or agreement except in fraud cases.”³⁰

Applying section 132 of the Evidence Act³¹ and without even alluding to section 72 of the MCA, it held that the trial court was in error when it accepted the respondent’s oral testimony, which operated to vary what the court and the parties had accepted to be the contents of documents of title to the matrimonial home. Denying the respondent any proprietary interest in the property, the court gave her and the four children of the marriage (whose custody was given to the respondent) only a right to reside on the property during their good behaviour and restrained the appellant from selling or disposing of the property during such residence.

The property in dispute in *Essien v Essien*³² was in the sole name of the respondent husband. The appellant wife’s petition for dissolution ran concurrently with his suit. The divorce petition was concluded earlier than the husband’s suit and declared that the parties were joint owners of the disputed property. The wife sought to introduce that judgment in her husband’s suit as estoppel regarding the issue of ownership of the disputed property. She argued that her husband collected her salary as part of her contribution to the building and that her father provided lodging for the parties whenever they were in town where the building was situated. The trial court discounted the divorce judgment and held that the respondent was the sole owner of the

29 [2002] 5 NWLR (pt 761) 564.

30 *Id* at 579–80.

31 Now, Evidence Act 2011, sec 128.

32 [2009] 9 NWLR (pt 1146) 306.

property. The Court of Appeal held that the issue of estoppel could not arise since it had not been specifically pleaded. It further held that the trial court was right not to have inferred joint ownership of the property in issue in favour of the plaintiff / appellant, since the requirement that a direct financial contribution to the purchase price of the matrimonial home or to the repayment of the mortgage instalments in respect of it was necessary before a joint interest could be inferred.³³

The formalistic attitude in these cases was to the disadvantage of the woman, who is often the party that applies to the court for readjustment.³⁴ This is a reality generally faced by African women due to cultural forces, a reality that the courts obviously ignore.

MARRIAGE AND PROPERTY ACQUISITION IN NIGERIA: WHAT THE JUDGMENTS IGNORE

These judgments ignore the reality that the matrix of cultural marital norms and values foster a strong female deference to men. That, in addition to a patriarchal system of property ownership and succession in Nigeria,³⁵ as in many parts of Africa, means that most lands will invariably be acquired in the man's name as the legal title holder or inherited through the man. Actual or symbolic virilocal or patrilocal marriage patterns mean that a woman does not generally receive land from her natal family. This is despite the separate property model facilitated by statutes and functionally practised by some localities, including the Binis in mid-western Nigeria. The cultural principle is that her proprietary interests and welfare will be catered for through her husband and among his people. As Manji points out, a natal family grant will raise the prospect of interference in family land by a different family.³⁶ Even where a woman receives some grant from her natal family,

33 Id at 330.

34 Also see: *Gaji v Paye* [2003] 8 NWLR (pt 823) 583; *Idrisu v Obafemi* [2004] 11 NWLR (pt 884) 396; *Okere v Akaluka* (2014) LPELR 24287; *Olabiwonmu v Olabiwonmu* (2014) LPELR 24065; *Imariagbe v Omo-Imariagbe* (2012) judgment of the High Court of Edo State, suit no B/423D/2008; and *Uzokwe v Uzokwe* (2010) judgment of the High Court of Ebonyi State, suit no HAB/3D/2005. In all these cases, the courts adopted the title-finding approach.

35 NO Odiaka "The concept of gender justice and women's rights in Nigeria: Addressing the missing link" (2013) 2/1 *Afe Babalola University Journal of Sustainable Development Law and Policy* 190 at 200–04. Using judicial decisions, Odiaka demonstrates the judicial attitude to discriminatory customary practices in some succession regimes that are patriarchal, a phenomenon that is deeply rooted in some customs. She opines (at 203) that such customs do not have "an objective perception of the worth of the female personality as regards devolution of properties". This however is a sweeping statement. She fails to distinguish between the actual customary laws pronounced upon in the judgments and abuses of the customs that brought the parties to court. In reality, these customary laws allow women (widows) a possessory right in the family estate for life: *Aneke v Nweke* [2014] 9 NWLR (pt 1412) 393.

36 A Manji "Her name is Kamundage": Rethinking women and property among the Haya of Tanzania" (2000) 70/3 *Africa: Journal of the International African Institute* 482 at 483–84.

her right is usually a usufruct.³⁷ Where it is titular, “distance usually prevents her from claiming it or from exercising control over it as her responsibilities to her husband’s land” (and family) prevail.³⁸ This is true even if the marriage is indeed neolocal, as is common due to urban migration. One thesis offered by Mukund is that women’s property rights are “determined primarily by values and norms which are socially acceptable, as well as the mechanisms of intra-household decision making and distribution”.³⁹ She is of the view that economic theory cannot explain these forces and dynamics. It can be said that this view is also very important when the dynamics are cultural.

Women in Nigeria have always been economically active.⁴⁰ Their work and dexterity provide income and food for the family. Today more and more women are educated⁴¹ and many are in waged employment.⁴² Added to this are those in governance and decision-making positions.⁴³ Many others

37 L Bennet “Women, law and property in the developing world: An overview” (1981) 3/ 2 *Human Rights Quarterly* 88 at 89.

38 Manji “Her name is Kamundage”, above at note 36 at 484.

39 K Mukund “Women’s property rights in south India: A review” (1999) 34/22 *Economic and Political Weekly* 1352 at 1352.

40 Mann “Women, landed property”, above at note 8.

41 Available statistics show that the rate of female enrolment in secondary schools increased from 45.3% in 2010 to 47.3% in 2013. The success rate for girls in the Senior School Certificate examinations was nearly at a par with that of the boys. In 2013, 49% of the candidates with five credits (including in English language and mathematics) were girls. The number of women enrolled in tertiary institutions increased from 44.9% (2010) to 46.2% (2013), although the completion rate dropped slightly from 45.9% (2010) to 45.5% (2013). Interestingly, by 2013, 48.3% of teachers in primary schools were women, with 47.7% in secondary schools and 25.5% in tertiary institutions. See National Bureau of Statistics 2013 *Statistical Report on Women and Men in Nigeria* (December 2014) at 11–17.

42 Id at 18–22 shows that, by 2013, women’s participation in the labour force was 64.5%. In about 15 states including the Federal Capital Territory, women were more dominant in the labour force. These figures have been judged to be low; see SJ de Silva “The work of women in Nigeria” (15 March 2016) *AfricaCan End Poverty*, available at: <<http://blogs.worldbank.org/africacan/the-work-of-women-in-nigeria>> (last accessed 13 July 2018) and N Onyejeli “Nigeria: Country workforce profile”, available at: <https://www.bc.edu/research/agingandwork/archive_pubs/CP22.html> (last accessed 3 July 2018). Nevertheless, they almost fulfil predictions made earlier regarding the women’s labour force movement; see AO Akinsanya “Empowerment of women in wage employment in Nigeria: The relevance of workers education” (2011) 27/1 *Journal of Social Sciences* 59. The author considers them progressive in a traditionally male-dominated economy.

43 National Bureau of Statistics, id at 104–10. The tables show that, in 2007, there were nine female senators (out of 109) and 26 female representatives in the National Assembly (out of 360). In 2011, the figures reduced to eight and 22 respectively. In the 36 State Houses of Assembly, there were 57 female members (out of 990) in 2007 and 54 (out of 986) in 2011. There were 56 female local government chairpersons (out of 556, although some states did not supply information to the National Bureau of Statistics) in 2007 and 30 (out of 768) by 2011. Female counsellors totalled 665 (out of 6,493 council seats) in 2007 and 738 in 2011. By 2013 there were 210 female judges or kadis (judges whose decisions are based on Islamic religious law) out of 799 judicial positions in the country.

exercise independent entrepreneurial prowess to the economic benefit of their male-folk and children.⁴⁴ Yet, in Nigeria it is normal for a woman to have little control over the income she generates. The patriarchal cultural psyche influences her attitude to money and property.⁴⁵ Generally, the husband controls the distribution and expenditure of family income. It is socio-culturally awkward for a married woman to acquire separate landed property (such as by purchase in the open market). This is not because she is not free to do so.⁴⁶ Indeed, Okeke indicates that, in the pre-colonial period, Nigerian

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- 44 E Gayawan and SB Adebayo “Spatial analysis of women [sic] employment status in Nigeria” (2015) 6/2 *CBN Journal of Applied Statistics* 1 at 12. Using data from the 2008 Nigeria Demographic and Health Survey, the authors showed that there is a north-south divide in women’s engagement in year-round employment compared with those not working and an east-west divide for seasonal / occasional employment. They note that the causal factor of this pattern is the marked concentration of industries in the southern part of the country and Kano at the northern fringe. This, in addition to women’s level of education, marital status, place of residence, gender of household head, wealth index and religion, are strong determinants of women’s participation in the Nigerian labour force. The important point in their study is that women are willing to take on both year-round employment and seasonal / occasional employment, such as farming.
- 45 This is historically correct. Using colonial Lagos as a study, Mann documents and shows that, even though women have always enjoyed the freedom to acquire private rights to land and courts were willing to protect such rights, customary land practices, which favour patriarchy and survived crown grants to individuals, numbed women’s sensitivity to private ownership. Most crown grants were to men; women lacked information about the importance of private ownership and acquisition due to the unofficial behaviour of colonial officials; even women with management rights over family lands as family heads preferred to delegate such functions to male agents and kin; few women had access to capital to spend on land acquisition; moreover, “marriage was ideally virilocal”. See Mann “Women, landed property”, above at note 8 at 691–96 and 699.
- 46 The Constitution of the Federal Republic of Nigeria 1999, sec 43; Married Women’s Property Act 1882, sec 1; and Married Women’s Property Law 1959, sec 1 (applicable in states created out of the former Western and Mid-Western Region of Nigeria, namely Delta, Edo, Ekiti, Ogun, Ondo, Osun and Oyo) guarantee this freedom. Exercising this right is a separate issue. The formal existence of rights (in this case, the right to acquire and own immovable property) and the “lived realities of most women for whom rights are far from having acquired much substantive meaning in their lives” has been identified as one of the strategic dilemmas faced by feminists in the politics of rights discourse: A Cornwall and M Molyneux “The politics of rights – dilemmas for the feminist praxis: An introduction” (2006) 27/7 *Third World Quarterly* 1175 at 1180. Land reform that should benefit women has been slow and largely unsuccessful. The Presidential Technical Committee on Land Reform set up on 2 April 2009 under President Obasanjo to “determine individuals’ possessory rights” does not seem to have made much progress. See AL Mabogunje “New land reform in Nigeria” (editorial) (2009) 325/5942 *Science* 793. Be that as it may, women in many parts of Nigeria have always had freedom of access to both direct and derivative sources of land rights, even in parts of the country where primogeniture is strong; see SNC Obi “Women’s property and succession thereto in modern Ibo law (eastern Nigeria)” (1962) 6/1 *Journal of African Law* 6.

women seem to have enjoyed some social autonomy in the form of control in both domestic and public domains.⁴⁷ Therefore, coverture was never an absolute rule.⁴⁸ Robertson, however, notes that women's "relationship with men appears to have largely mediated their social status as a collective".⁴⁹ This tie and its ramifications seem not to have changed much; "social boundaries and expectations women must adhere to" significantly mediate such freedom.⁵⁰ Thus, as in some parts of India, even if the woman is the formal legal owner, the tendency is for the management of land to be taken over by, or handed to, the man.⁵¹ Even where she provides the entire income, with few exceptions she is content to have land (including cars and other costly household items) purchased by the husband in his name. She is proud to project her husband as a capable breadwinner and as one who achieves, even when she supports those achievements financially. Some exceptions, also dictated by cultural norms, that she purchases in her own name include items of clothing and jewellery. This attitude is general, unaffected by educational or other social status, and is seen in both rural and urban zones of the country. A woman who behaves otherwise may be inviting reprisals from her kinship and she cherishes the approval of kinsmen and women. Ironically, wives in elitist families (such as titled families) are worse-hit as they must provide a "good" example for other women. This pattern intersects with and is supported by a sometimes distorted perception of religious tenets that ordinarily encourage wifely relative subjection to the man; and religious fervour is strong. For the same cultural reasons, the wife will not usually have the panoply of documentary evidence to show the internal family arrangements and negotiations regarding how property was purchased or income

47 PE Okeke "Reconfiguring tradition: Women's rights and social status in contemporary Nigeria" (2000) 47/1 *Africa Today* 49 at 51. However, she notes (citing C Robertson "Developing economic awareness: Changing perspectives in studies in African women" (1976-86) 13/1 *Feminist Studies* 97) that her place in society was influenced by factors such as age, status in the natal family, royal ancestry and religious affiliations, factors that assigned women to different ranks.

48 Coverture is the legal doctrine whereby, upon marriage, a woman's legal rights and obligations were subsumed by those of her husband. Exceptions have been identified in which women acquired rights under coverture. These included the cases of widows, abandoned wives, women of royalty, and contracts involving *feme sole* traders and marriage settlements. See R Geddes and D Lueck "The gains from self-ownership and the expansion of women's rights" (2002) 92/4 *The American Economic Review* 1079 at 1082-84.

49 Robertson "Developing economic awareness", above at note 47, cited in Okeke "Reconfiguring tradition", above at note 47 at 51.

50 Id at 52. In some parts of Africa, such as Uganda, women's autonomy and control over land gravitated from the house-property complex through the principle of land gifting (because they had to provide food) and became severely restricted under the current system of patriarchy, which has become entrenched in legal jurisprudence. See L Khadiagala "Negotiating law and custom: Judicial doctrine and women's property rights in Uganda" (2002) 46/1 *Journal of African Law* 1.

51 Mukund "Women's property rights", above at note 39 at 1352.

was generated or spent. Consequently, her use of land is generally non-titular, informal and secondary as a *feme covert* [married woman].⁵²

Arinze-Umobi criticises the courts' approach of importing common law principles of property law into matrimonial relationships, on the basis of section 72 of the MCA.⁵³ She regards as absurd, negative, discriminatory and anti-matrimonial⁵⁴ the rule that participation in the acquisition of matrimonial property has become "the only platform and qualification for distribution of marital property upon divorce".⁵⁵ She argues that fairness requires that "invisible and indirect" factors must be considered alongside the parties' living standards before the marriage breakdown, the parties' age and market potential, and any physical or mental disability of either of the parties.⁵⁶ In questioning the fairness of the courts' decisions, Emeke shares the same views regarding invisible contributions.⁵⁷ Furthermore, she recognizes the significance of marriage as a special type of partnership based on equality of the parties, not a business or commercial enterprise where financial contributions would form the basis of sharing at the dissolution of the marital partnership.⁵⁸ While these interpretations and suggestions are important, they focus on enlarging and liberalizing the meaning of "contribution" in the acquisition of property. They hinge on factors to be considered in the actual exercise of discretion, rather than the characterization of matrimonial

52 E Henrysson and SF Joireman "On the edge of the law: Women's property rights and dispute resolution in Kissi, Kenya" (2009) 43/1 *Law & Society Review* 39 at 43, arguing that women have weak property rights overall in sub-Saharan Africa; out of all the participants in 16 focus groups, only one woman had the title deeds for her land. Using the Kissi region as an example, the authors show that women also have limited access to formal and informal dispute resolution systems because of the costs involved. C Cheka "How law and custom serve to disempower women in Cameroon" (1996) 4/8 *Reproductive Health Matters* 41 at 42.

53 C Arinze-Umobi "Discriminatory / inequitable distribution of marital property upon divorce: A critique" (2004) 4/1 *Unizik Law Journal* 188. The author reviews three decisions of the courts in this area: *Nwanya v Nwanya* [1987] 1 NWLR 699; *Sodipe v Sodipe* (1990) 5 WRN 98; and *Egunjobi v Egunjobi* (1976) 2 FNLR 78. For a discussion of the common law heritage that fostered the "title" regime, see AA Tait "Divorce equality" (2015) 90 *Washington Law Review* 1245.

54 That is, it negates the peculiar nature of marriage and its interwoven duties between spouses.

55 Quoting Lord Morris of Borth-y-Gest in *Pettitt v Pettitt* (1969) 2 All ER 385 at 396, where he stated that couples do not make their arrangements in the contemplation of future discord or separation, nor, when acquiring a house, do they contemplate that a time might come when decisions would be made as to who owned what.

56 Arinze-Umobi "Discriminatory / inequitable distribution", above at note 53 at 189. By "invisible and indirect" she means non-financial contributions made towards the acquisition and improvement of family assets. A concrete example is a case where a woman manages the "internal affairs" of the home while releasing the man for gainful employment.

57 EA Emeke "Women's rights and the gender question: Appraisal of the journey so far in the light of CEDAW and the WCW Beijing Platform for Action" (2001) 3/1 *Nigerian Education Law Journal* 72.

58 *Id* at 76.

property. As some other decisions show,⁵⁹ the true rule is that “invisible and indirect contributions” are sometimes considered, as much as direct and financial ones, but only as factors in quantifying contributions. In such cases, where the court considers the contribution (whether financial or otherwise) as insignificant, baseless or unproved, it will not regard it as a contribution and will not infer joint property.

Uzodike recognizes the failure of equity under section 72, a provision that should guard against financial uncertainty and secure a permanent home for any children of a marriage, but hinges the failure on the inability of Nigerian family law to develop a distinct concept of marital property.⁶⁰ Even though this goes to characterization, a “distinct concept” thrives on the assumption that property remains the same in value at all times: once matrimonial property, always matrimonial property. Such a system would require an objective list of what is to be regarded as matrimonial property or an objective basis for determining whether, by its nature and characteristics, a particular item should be regarded as “property” and not necessarily as “matrimonial property”. This was the problem that faced state legislators in the United States of America. With the divorce revolution of the 1970s and 80s, states adopted equal distribution statutes that recognized the theory of marriage as an “economic partnership” and promoted the “community property ideal”. Yet these failed to “alleviate economic inequality between spouses post-divorce”.⁶¹ A major factor in this failure was the assumption by the court of the need to circumscribe and demarcate “property”. The courts distinguished between marital property on the one hand and non-liquid assets (such as professional degrees) and “career assets”⁶² on the other. These last two were not regarded as marital property and the statutes became desultory. The recognition of these items as “property” in more recent times has been gradual and piecemeal.⁶³ In addition, the question of the characterization of individual items is fluid. What is regarded as viable property today may not continue to be in the future. Promising farmland may become worthless to the parties as matrimonial property if it is eroded by floods and becomes a gully, as happens in some parts of the country. A building in a choice area may reduce

59 See *Mueller v Mueller* [2006] 6 NWLR (pt 977) 627, *Egunjobi v Egunjobi* [1976] 2 FNLR 78 and *Kafi v Kafi*, above at note 16.

60 ENU Uzodike “Settlement and division of property on divorce” in JA Omotola (ed) *Essays on Nigerian Law* (1989, Faculty of Law, University of Lagos) 105 at 111.

61 Tait “Divorce equality” above at note 53 at 1260. See also DL Rhode and M Minow “Reforming the questions, questioning the reforms: Feminist perspectives on divorce law” in SD Sugarman and HH Kay (eds) *Divorce Reform at The Crossroads* (1990, Yale University Press) 191 at 197.

62 “[A] large array of specific assets such as pension and retirement benefits, a license to practice a profession or trade, medical and hospital insurance, the goodwill of a business, and entitlements to company goods and services”: LJ Weitzman *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985, Free Press), quoted in Tait “Divorce equality”, id at 1260–61.

63 Tait “Divorce equality”, id at 1274.

drastically in value if a noisy factory or poultry farm is sited close to it. A beautiful car may turn out to have little value at the time of marital breakdown if its spare parts can no longer be found in the market. Therefore, the author takes the view that the question of identifying what qualifies as property should be left to the internal determination of the parties. Even though Nweze has endeavoured to defend some of these decisions, particularly *Onwuchekwa* and *Amadi v Nwosu*, as being correct, this has only been done along the lines of legal technicalities of the adversarial system. According to him, they accord with strict fidelity to binding authorities, the discharge of the burden of proof and rules of pleading.⁶⁴

CURING THE DEFECT: EMPHASIZING THE NEED FOR A MANDATORY MARRIAGE-CENTRED DEFINITION

In the author's opinion, the statutes are problematic because they do not expressly and specifically define and emphasise "matrimonial" property as such. Furthermore, the courts generally fail to recognize the implicit matrimonial property undertones of the provisions, not the fact that they favour men.⁶⁵ These flaws have created an intermediate definitional jurisdiction in favour of the courts. Three lessons can be drawn from the cases. First, where there is a document of title in favour of one party to the marriage, that property is excluded from being matrimonial property. Secondly, where a party insists that the property is jointly owned, that party is responsible for producing evidence that both parties contributed adequately to its acquisition, whether financially or otherwise. Thirdly, oral evidence, even about the parties' private arrangements, cannot be allowed to contradict the contents of documents of title. As the cases show, these complications have blurred the perceived ideal of matrimonial property. Following the path taken by the courts, the parties seem to be focused on showing the existence of *joint* ownership instead of *matrimonial* property. The solutions proffered by scholars to this conundrum include: recognition of the special relationship that marriage engenders with the implication that "intangible or invisible contributions" should be recognized;⁶⁶ consideration of the parties' living standards, age

64 CC Nweze "Reflections on selected judicial decisions relating to women's rights in Nigeria" (2004) 4/1 *Unizik Law Journal* 1.

65 This is one of Ashiru's contentions. However, he also cites "strong cultures which are negative towards women": MOA Ashiru "Gender discrimination in the division of property on divorce in Nigeria" (2007) 51/2 *Journal of African Law* 316 at 328. The second explanation is more cogent. The MCA's provisions on property readjustment are gender neutral (as is most of the rest of the act) and they have no discriminatory elements. This however is not to say that the "economic injustice, biological deprivation and social marginalization" suffered by even an unmarried woman are not real: S Khandekar "Women's right to property" (1995) 30/24 *Economic and Political Weekly* 1402. By "biological deprivation", she means parental preference of the male child as the one who should inherit as against the female.

66 In some jurisdictions, invisible and intangible contributions made by, for example, a

and market (remarriage) potential in making readjustment orders; and the development of a distinct concept of matrimonial property. These suggestions are germane, but they do not get to the root of the problem. A mandatory marriage-based definition of matrimonial property will subsume them.

When a party is endeavouring to show joint ownership, it is simply asking that property be shared using a formula. A core objective of that *sharing* jurisdiction is to benefit parties and their children. In Nigeria this is the socio-cultural expectation of family members. Nigerians do not generally think in terms of separate or joint ownership in marriage. They see properties acquired during marriage from a communal perspective. This was recognized more than four decades ago in *Egunjobi v Egunjobi*.⁶⁷ In this case, the husband acquired a parcel of land and bought some building materials before he married his wife. The wife's proved contribution was the supervision of the building and ₦1,170 in cash. There was no evidence of what the building cost. The majority of the Western State Court of Appeal held that the wife was entitled to one-third of the building. Of note, Akinkugbe JCA who read the majority judgment said: "there is no doubt that when the respondent was making her contributions to the building of the property *it was never in contemplation of either side that one day they would have to fight out their respective rights in law courts*. There is no doubt that the appellant and respondent *believed that each of them had beneficial interest in the house*".⁶⁸

This policy of benefitting and making financial and other welfare provisions for at least the immediate family members is evident in the similar jurisdiction of testate and intestate succession under the general law. It is exemplified not only in the standardized sharing formula of an intestate's estate, but particularly in the remedial scheme under succession laws of various states, where insufficient provision has been made for a "dependent" survivor of a testate or intestate individual.⁶⁹ One rationale that should make the policy behind that type of remedial dispensation a general legal property readjustment policy is the well-founded belief that the value of properties owned by married couples (even if acquired before marriage) is usually affected by the interplay of the forces of matrimony. The important point was admitted in

contd

wife, may actually be "paid for" as part of an exercise of the right to divorce. See for example the wife's position in revocable divorce situations (divorce at the request of husband) under Iranian Islamic law in AR Bariklou "The wife's right of divorce on the basis of the delegation condition under Islamic and Iranian law" (2011) 25/2 *International Journal of Law Policy and the Family* 184 at 186.

67 Above at note 59.

68 Id at 84 (emphasis added).

69 For example, under sec 127 of the Administration and Succession (Estate of Deceased Persons) Law of Anambra State. Similar provisions are found in the Wills Law 1990 cap W2 Laws of Lagos State 2003, sec 2; and Wills Law 1990 (Oyo), sec 4. See (23 August 1990) 15/36 *Oyo State of Nigeria Gazette*, Supplement, part A. See Attah "Prenuptial agreements" above at note 14 at 160–61.

*Kafi v Kafi*⁷⁰ that the development (and increase of value) of properties and the business successes of parties to a marriage would usually be achieved by their *joint efforts*, which may not necessarily be quantifiable in monetary terms. The respondent / cross petitioner in this case prayed for settlement of a choice property on her, and financial support for herself and the children of the marriage whose custody she also requested on the basis of her contributions towards the properties. She claimed to have managed part of the family business while the petitioner was establishing another branch in Lagos, performed her domestic duties as a wife, caring for and feeding all the company's customers who came from within and without Nigeria, purchasing building materials, supervising workmen on site, especially when the petitioner was away on business, preparing food for workers and fetching water for them. The Court of Appeal upheld the trial courts' order settling the property on her on the basis that the only limitation to making such an order under section 72 of the MCA would be the statutory discretion under the act.⁷¹

On this basis, a true prescription of matrimonial property can only be made by reference to marriage. The theoretical foundation of such a definition can only be the legal, social and cultural significance of marriage in the African context. The result will be that all property acquired by the parties or any of them during the subsistence of the marriage should be regarded as matrimonial property. The Court of Appeal has hinted at the possibility of such a definition. In *Mueller v Mueller*⁷² there were three houses and one undeveloped plot on the parties' land. The trial court awarded two of the houses as well as the undeveloped plot to the respondent. It also ordered a partition of the matrimonial home as jointly owned property. The appellant maintained that the property in dispute, which was purchased in her name, was her personal property that she had acquired during the marriage. Her evidence was the purchase receipts and title documents that were in her name. The respondent claimed the property was a joint family property for which he provided most of the finance while the appellant supervised the construction jobs, and he sought an equal partition of the property. The respondent's evidence included a statement of the vendor of the property that he dealt with the appellant who paid the purchase price as a married woman. He also relied on some receipts and letters in which the appellant acknowledged the receipts of sums from the

70 Above at note 16.

71 Id at 185–86. More than half a century ago, the English Court of Appeal approved that line of reasoning in *Fribance v Fribance* [1957] 1 All ER 357. In that case, while the husband's earnings were largely saved, the wife's earnings were used to meet household expenses. When they purchased the freehold of the house in which they had been living, the wife contributed GBP 20, with the bulk of the purchase money sourced from the husband's savings. The Court of Appeal upheld the County Court's decision that the house belonged to them in equal shares even though the house was in the husband's name. *Fribance* was cited with approval in *Akinbuwa v Akinbuwa* [1998] 7 NWLR (pt 559) 661.

72 Above at note 59, a rare decision where a man asked for joint ownership. This was probably because he was not Nigerian.

respondent. The Court of Appeal commendably reasoned that, because the property was acquired during the marriage, it was matrimonial property:

“The respondent admitted the property was purchased in the appellant’s name and that she supervised construction works thereon. It must be noted that the properties were acquired in [sic] appellant’s marriage name. Such was not out of [sic] ordinary, as earlier on, the rented apartment of the couple was also in the name of the appellant. ... As husband and wife there is nothing wrong in buying property in the name of one of the parties. Such still remains matrimonial property which belongs to the parties jointly.”⁷³

It would have been helpful if the judgment had come from the Supreme Court as, being later in time, it would have overridden earlier judgments to the contrary. It is a positive indicator that in Nigeria the socio-cultural expectation is that marriage and marital assets are never divorced. Such an approach is also found in the Rules on Divorce Law under the Swiss Civil Code for the regime of pensions. According to Schwenger:

“The central principle is laid down in art 122(1) of the [Civil Code] according to which all pension claims acquired during the marriage must be shared equally. There is no hardship or escape clause; thus it does not matter whether one of the spouses suffered any marriage related detriments in relation to his or her pension claims. Freedom of contract is not acknowledged in this field.”⁷⁴

CONCLUSION

Given the challenge posed by the inapt provisions of existing statutes and the general failure of the courts to insist on a definitive marriage-centred view of properties acquired during marriage, it is important that the statutes be amended. This article has argued that any other approach will run counter to ingrained socio-cultural norms and values regarding marital relations, which support the ideal that marriage and assets acquired during its currency should not be viewed separately. The law must support this dispensation if it is to be a living law. The author therefore recommends that the elements of discretion and equity should be limited to redistribution. Therefore, the sections should be repealed and the following new section inserted in the MCA:

- “1. Where the parties to marriage or any of them desire that property be shared or property rights readjusted, the court shall do so according to what it considers just and equitable. In exercising its sharing or adjustive

⁷³ Id at 642.

⁷⁴ I Schwenger “Ten years divorce reform in Switzerland” (2011) *The International Survey of Family Law* 397 at 401.

powers, the court shall bear in mind the needs of the parties and the needs and rights of children of the marriage.

2. All such property to be shared shall be called matrimonial property.
3. Matrimonial property means (excluding the rights and interests of third parties and other encumbrances)⁷⁵ all items of property including real property and personal goods that the parties or any of them acquire or become entitled to during the subsistence of the marriage or that the parties or any of them acquired or became entitled to prior to the marriage but brought into the marriage for the benefit of the members of the family, including the party acquiring the property and any children of the marriage.”

75 These may include community debts and separate debts that may be met from the marital property or from the debt-incurring spouse's separate assets. For a comprehensive discussion, see JR Ratner “Creditor and debtor windfalls from divorce” (2011) 3 *Estate Planning and Community Property Law Journal* 211.