

**DIVISION OF MATRIMONIAL PROPERTY:
EQUITY VERSUS EQUALITY**

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DISSERTATION DECLARATION FORM

I confirm that:

- this dissertation represents my own work;
- the contribution of any supervisors and others to the research and to the dissertation was consistent with normal supervisory practice.

Date: 18th April 2016

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ABSTRACT

This study examines the efficacy of the current matrimonial property regime. The new regime was introduced to replace the archaic colonial law imposed by our colonial masters in the form of the Married Women's Property Act 1882. Even decades after independence, we clung to the same law in matters of division of matrimonial property. What followed were varied and contradictory decisions on division of matrimonial property. There were those that opined that only financial contribution was to be considered as seen in cases such as *Njuguna v Njuguna*. Others took non-monetary contribution as adequate for a claim, as seen in *Kivuitu v Kivuitu*.

There was need for stability, which was to be provided by the 2010 Constitution, Marriage Act 2014 and Matrimonial Property Act 2013. The dissertation therefore attempts to establish whether this in fact was achieved, as we observe that Sections in the Matrimonial Property Act to a large extent take us back to the era of uncertainty that characterized the Pre-2010 Constitution period.

LIST OF ABBREVIATIONS:

MWPA- Married Women's Property Act of 1882

CEDAW- Convention on the Elimination of all forms of Discrimination Against Women

ICESCR- International Covenant on Economic, Social and Cultural Rights

FIDA- Federation of Women Lawyers

LIST OF CASES

Karanja v Karanja [1976] KLR 307

Njuguna v Njuguna [1982] LLR 823

Kivuitu v Kivuitu [1985] LLR 1411

Echaria v Echaria Civil Appeal No. 75 of 2001

Pettitt v Pettitt [1969] 2 ALL ER 385

Gissing v Gissing [1970] 2 ALL ER 780

I v I [1971] EA 278

CHAPTER ONE

BACKGROUND

Kenya, and the world in general, have but recently began transcending decades of oppression of women and the suppression of their rights.¹ Perhaps to put it more accurately, we as a country have made major strides and have come a long way, but still have much further to go to reach where we ought to be.² This state of affairs cannot be more evident than in the institution of marriage when it comes to division of matrimonial property and courts' approach to the issue.³

For the longest time, contribution to the acquisition of property was viewed through a single lens; that of monetary contribution. This can be seen in decided cases such as *Karanja v Karanja*⁴ and *Njuguna v Njuguna*.⁵ In these decisions, in the splitting of matrimonial property, the individual that provided the financial means to acquire was considered to have superior, if not absolute, rights over the property. Even the indirect contribution had to be financial. More often than not, given the structure of our society, it was women that suffered.⁶ Their non-monetary contributions, though equally important, were never taken into consideration and were looked down upon.⁷ Courts in their conservativeness felt much safer relying on existing principles of property.⁸ This dissertation is a glimpse into the manner in which ambiguous and scanty legislation in the past led to lack of uniformity in decision making and that we should learn from this rather than repeat it. Just when we thought we were heading in the right direction courtesy of the judgment in *Kivuitu v Kivuitu*⁹ in the recognition of non-monetary contribution,

¹ Truth, Justice and Reconciliation Commission Report, Volume IIC, Chapter 3, Minority Groups, Indigenous People and Gross Violations of Human Rights, (May 2013), 151.

² FIDA and International Women's Human Rights Clinic, Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, 2008, 26.

³ Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 5.

⁴ [1976] KLR 307.

⁵ [1982] LLR 823.

⁶ Obiangi Arugu L, *Social indicators and effects of marriage divorce in African societies*, The Business & Management Review, Volume 4 Number 4, March 2014, 382.

⁷ Datiles, Michelle, J., *Whose Souls Do Bear An Equal Burden of Love. Recognising the Value of the Work of the Home in Law*, Home Renaissance Foundation, Working Paper, no. 16 (2009), available at <http://www.homerenaissancefoundation.org/homeorg/pdf/Michelle%20Datiles.pdf> accessed on 8 January 2016.

⁸ Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 7.

⁹ [1985] LLR 1411.

we were thrown back into the dark ages by the findings in *Echaria v Echaria*¹⁰ where work in the home did not amount to entitlement to equal property rights.

Due to this state of affairs, the Government has taken measures by reviewing laws relating to women.¹¹ This is what informed the Matrimonial Property Act No. 49 of 2013, Marriage Act No. 4 of 2014, as well as certain provisions of the 2010 Constitution of Kenya. However, it seems the aims of the law makers to rectify the aforementioned injustice have not been met. Also, it appears the provisions have brought about confusion in matters of division of matrimonial property.

The definition of matrimonial property is provided for under the Matrimonial Property Act 2013 as including the matrimonial homes and household goods and effects in them. Also included are immovable and movable property jointly owned and acquired during the subsistence of the marriage.¹²

The Constitution goes on to set out the equality of rights of the parties to a marriage before, during and at the dissolution of the marriage.¹³

The place and importance of non-monetary contribution has also been cemented through the enactment of the new Matrimonial property Act. Sec 2 provides for contribution to include both monetary and non-monetary contributions, including domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

Section 2 of the Matrimonial Property Act and Article 45 of the Constitution were ideally meant to work hand in hand. The Constitution should put all parties on the same level. The Act should then give non-monetary contribution its due consideration and respect. This is all well and good, but does this provide an elaborate method for the actual division?

Section 7 of the Matrimonial Property Act states:

¹⁰ Civil Appeal No. 75 of 2001.

¹¹ Kameri-Mbote P and Nzomo M, The coverage of gender issues in the draft bill of the constitution of Kenya 2002: Have the hens finally come home to roost for Kenyan women?, *University of Nairobi Law Journal* 1, (2004), 3.

¹² Section 6 (1), *Matrimonial Property Act* (Act No. 49 of 2013).

¹³ Article 45 (3), *Constitution of Kenya* (2010).

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.¹⁴

This seems to imply that contribution, including that of a non-monetary nature, can indeed be quantified. Yet there is no hierarchy of contributions nor a system of quantification provided. The ambiguity of the provision has left a lot of room for interpretation, potentially based on personal bias, which could lead to the defeat of the whole purpose of the legislation in place.

An interpretation of Article 45 of the 2010 Constitution can be construed to call for the division of the property down the middle.¹⁵ This is what equality of parties to a marriage is taken to mean. The proponents of this view the parties in a marriage as one. Therefore, the concept of contribution is irrelevant. This is because non-monetary contributions cannot be quantified, yet are equally important. Since there is no way to quantify such contribution, a split right in the middle would make more sense to them.

Therefore, if we are using the idea of equal share, could the Act not be interpreted to go against providing each spouse with a 50/50 share? If the Constitution calls for equality, should there be any reference to distribution based on contribution? Would reference to such not imply that there is indeed a way to quantify non-monetary contributions? Also, since there is no hierarchy provided, does one type of contribution have primacy over the other? Ironically, the codification and recognition of the idea of non-monetary contribution may have done more harm than good.

This study, as much as it attempts to determine the intentions of Parliament, also tries to question whether these intentions are in line with the Constitution or the right fit for the country irrespective. It seeks to determine the proper sense of the term 'equality'. Does equality mean sameness or fairness? There is also a question as to whether the constitutional provision of Article 45 can be applied so directly to the division of property. Also, is an attempt to provide a distribution formula that gives different proportions of the matrimonial property necessarily a bad thing? There are questions of justice at play. One should get what they rightfully deserve. Failure to do so can have a very negative effect on the very pivotal institution of marriage. One

¹⁴ Section 7, *Matrimonial Property Act* (Act No. 49 of 2013).

¹⁵ National Assembly Official Report, 12th November 2013, Committee of the Whole House, 24.

such effect is that individuals could begin to enter marriages for the wrong reasons, or fail to contribute adequately to the marriage, due to the automatic entitlement to half the matrimonial property.

STATEMENT OF THE PROBLEM

The determination of division of matrimonial property based on contribution (whether monetary or non-monetary) is unfair and unconstitutional.

Statute has not given a concise answer as to the ratio to be applied in division of property upon dissolution of a marriage. This leads to a lot of ambiguity, and leaves the process open to abuse by the courts.

JUSTIFICATION OF THE STUDY

The study will help ensure that all the parties get their due, in whatever form it may be, in the division of matrimonial property. This is whether it may be through equal shares or differing ratios. Jurisprudence shows that women have historically been drawing the short straw. A clear and concise way of splitting property would ensure that Kenya is not pulled back into that dark era.

STATEMENT OF OBJECTIVES

1. To examine the adequacy of the current laws on the division of matrimonial property in Kenya.
2. To determine the proper interpretation of 'equality' in division of matrimonial property.

RESEARCH QUESTIONS

1. How exactly is matrimonial property to be divided according to the current laws? Which is the best method to do so?
2. Is there contradiction between the constitutional provision of equality of rights of spouses brought out in Article 45 (3) and the concept of classifying and distributing matrimonial property on the basis of contribution (either monetary and non-monetary) in the Matrimonial Property Act?

RESEARCH METHODOLOGY

This research will be conducted mainly by qualitative analysis which will primarily make use of secondary sources such as scholarly works, statute and case law. The Hansard report on the Matrimonial Property Bill and reports on matrimonial property shall be also be used.

LIMITATIONS

One of the main limitations is the fact that the Matrimonial Property Act is relatively new. Its commencement date was 16 January 2014, slightly over a year ago. This means that there is not much precedent that has been established to offer guidance.

CHAPTER TWO: THEORETICAL FRAMEWORK

When attempting to determine the proper meaning of Article 45 of the Constitution on equal rights, this study uses theories that shed light on the idea of equal rights in marriage. One such theory is based on one of the two types of equality brought out by Aristotle; that of numerical equality.¹⁶ If persons are identical in the relevant aspects, making them indistinguishable, then they should in turn be granted the same quantity in division.¹⁷ This will, however, not always be just. In the context of distribution of matrimonial property, the Constitution calls for equality of parties in a marriage. One should therefore be indistinguishable from the other. Using this reasoning, equal distribution would seem favourable.

This can of course be countered by his opposing view on equality, that of proportional equality.¹⁸ He calls for each to be given their due. He is of the opinion that giving equally will not always be just. If the individuals are not equal, then it also follows that their portions will also not be equal. This theory could potentially dispute a system in matrimonial property where property is divided equally without any justification.¹⁹ It raises the question of whether parties in a marriage are in fact always equal. The issue is, however, what criteria is to be used to establish the relevant factors to determine and justify different ratios of property entitlement? Also, is there and should there be a difference between monetary and non-monetary contribution? How can non-monetary contribution be quantified? These questions work on the assumption that each spouse is contributing in either one form or the other. There is the possibility that a spouse fails to do either, and are they equal in such a case?

Nigel Lowe²⁰ and Gillian Douglas²¹ elaborate on the doctrine of unity.²² They explain its biblical origins.²³ They are of the view that a husband and wife obtain one legal personality. It is a

¹⁶ Ostwald M, *Nicomachean Ethics Aristotle*, Macmillan Publishing Company, 1962, 110.

¹⁷ Ostwald, *Nicomachean Ethics Aristotle*, 110.

¹⁸ Ostwald, *Nicomachean Ethics Aristotle*, 110.

¹⁹ Ostwald, *Nicomachean Ethics Aristotle*, 110.

²⁰ Nigel Lowe holds an LL.B (Sheffield) of the Inner Temple, and is a Professor of Law at Cardiff University.

²¹ Gillian Douglas holds an LL.B (Manchester), LL.M (London), and is a Professor of law at Cardiff University.

²² Lowe N and Douglas G, *Bromley's Family law*, Oxford University Press, 2007, 107.

²³ Genesis 2:24 *For this reason a man will leave his mother and father and be united to his wife, and they will become one flesh*, New International Version.

concept where a husband and wife are viewed as a single person in the eyes of the law. It would seem that this doctrine advocates for the division of property in equal portions. If the two parties are seen as one, the acquisitions of one are those of the other. It therefore follows that in the event of divorce, each party is entitled to an equal share. The parties to a marriage are equal halves of the unified entity that is the marriage.

This legal concept has its flip side. Lowe and Douglas observe the cracks in the doctrine of unity. They see it as a way in which the wife is subordinated to the will of the husband. Geddes²⁴ and Lueck²⁵ illustrate that most developing countries have attempted to distance themselves from the doctrine of coverture (doctrine of unity),²⁶ as it is viewed as a hindrance to the exercise of women's rights and the control over the products of their labour. This push away from the doctrine attempts to recognise women as *feme sole*. This effectively makes them distinct and separate entities in terms of ownership of property, and would seem to be more inclined towards a system of separate property ownership. Therefore, in a context where non-monetary contribution is looked down upon, yet is predominantly what women bring to the family, wouldn't being looked at as distinct entity work against them?

Another important theory would be the labour theory of property whose main proponent was John Locke.²⁷ He was of the view that every individual owned themselves. In extension, they owned the work of their hands (i.e. their labour). He therefore opined that when one works, their labour enters into the object upon which they have exerted effort. It then follows that the object then becomes one's property. It can, therefore, be inferred that one is entitled to the benefits of what they work for. If one put no input into the object, they should not be entitled to any rights over it. With regard to matrimonial property, this theory could be taken to imply that only the individuals that have put substantial effort and work into its acquisition are entitled to the property. However, this would seem to justify the traditional view that it is the individual that has provided the financial means to acquire the property through salaried employment who is entitled to property rights. This is not necessarily the case. There is an argument for the fact that

²⁴ Geddes R is an Associate Professor and Director of the Cornell Program in Infrastructure Policy.

²⁵ Lueck D is a Professor of Economics (by courtesy), Professor of Law (by courtesy), and Co-Director, Program on Economics, Law, and the Environment; Ph.D., University of Washington, 1987.

²⁶ Geddes R and Lueck D, 'The gains from self-ownership and the expansion women's rights', *The American Economic Review*, Vol. 92, No. 4 (Sep., 2002), 1079.

²⁷ John Locke, 'Second treatise of government', (1690), Chapter IV, paragraph 27.

by the 'labour' of the housewife, the husband is then able to put their mind to work since those tasks and minor financial obligations have been taken care of.²⁸ Therefore, though indirectly, the housewife plays as pivotal a role in the acquisition of the property as their husband.

Another major theme would have to be justice. In the view of John Rawls, the primary subject of justice is the basic structure of society, or more precisely, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation, with one of these major social institutions being the family.²⁹ Wayne A. R. Leys gives some insight on the idea of justice as well.³⁰ He puts forward the analogy of a police man rebuking a jaywalker. If he finds out that the individual is blind, he will stop traffic and help him across the road. He is of the view that the question of justice is one that should be looked at taking into consideration the specific set of factors in a given situation. This is despite, *prima facie*, the situation looking as if to fit only a specific rule.³¹ To apply it in the context of division of matrimonial property, division should take into consideration all relevant factors that may lead a court to conclude that one party is deserving of a lower or higher portion of the matrimonial property. Division across the middle may not always be the most just outcome if the factors seem to call for some variation.

Another theory is the social contract. But not at its basic level. It should be looked at, in the words of Rawls, when carried to a higher level of abstraction.³² This requires us to apply it more generally, and not only as the original contract to enter a particular society or to set up a particular form of government.³³ A preferred angle would be the idea of principles of justice; that free rational persons agree to initially as setting the fundamental terms of their association, thus providing the means to regulate all other agreements.³⁴ The same can therefore be applied to the institution of marriage. Are there not principles that are implied not only explicitly by spouses, but purely on the basis of the marriage itself? Marriages were traditionally never entered into in the contemplation of future discord, and therefore it was unlikely that the spouses had actually

²⁸ Lord Hodson in *Pettitt v Pettitt*, Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 19.

²⁹ Rawls J, '*A theory of justice*', Harvard University Press, 1971, 6.

³⁰ Leys W, '*Justice and Equality*', *Ethics*, Vol. 67, No. 1 (Oct., 1956), 20.

³¹ Leys W, '*Justice and Equality*', 20.

³² Rawls, '*A theory of justice*', 10.

³³ Rawls, '*A theory of justice*', 10.

³⁴ Rawls, '*A theory of justice*', 10.

wrapped their heads around what would happen in the event they did split up.³⁵ This has of course changed moderately due to the legal innovation of prenuptial agreements. But such are largely for the wealthy who have vast assets to protect. Irrespective of this, there are surely certain unspoken obligations and expectations that are created at the point of marriage. This provides a basis for those that argue for a split down the middle of property. They are of the view that any discussion on contribution, whether it incorporates non-monetary ones or not, will lead to discord. A preferred approach for them would be disregard for contribution and instead a recognition of the sacrosanct commitments associated with the institution of marriage.

Given the structure of families generally, it is women that suffer in the context of division of matrimonial property. For this reason, gender will of course be a predominant theme in the discussion. It follows that another lens to view division of matrimonial property will be that of the feminist. The terms feminist and feminism come with them a lot of baggage. They are generally seen as extremist, and not so much a push for equality of the sexes but more so as a fight against men.³⁶ For these reasons, they are received with much scepticism and even disdain. Admittedly, there are various classifications of feminism, some of which are quite radical and hostile. However, what unites them is greater than what divides them, and there are on the same page in the more substantial areas of the feminist debate.³⁷ Rosalind Delmar opines that a feminist, at the very least, is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain neglected and unsatisfied, and the satisfaction of these needs requires a radical change in the social, economic and political order.³⁸

Another theory that is used is that of Marxism. Marxism is traditionally isolated as an economic model.³⁹ Irrespective of the economic dimensions encountered in a family context, it is still primarily a social institution. One of the largest problems with the institution of marriage is perhaps the fact that it has been turned into an economic institution of sorts.⁴⁰ Of particular interest is Marxist criticisms of capitalism. For that reason, capitalism shall also be scrutinised.

³⁵ Lord Morris of Borth-Y-Guest in *Pettitt v Pettitt*, Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 15.

³⁶ Watkins G, *Feminism is for Everybody: Passionate Politics*, South End Press, 2000, 2.

³⁷ Delmar R, What is Feminism?, 9, available at <http://www.sfu.ca/~decaste/OISE/page2/files/DelmarFeminism.pdf> accessed on 8 January 2016.

³⁸ Delmar R, What is Feminism?, 8, available at <http://www.sfu.ca/~decaste/OISE/page2/files/DelmarFeminism.pdf> accessed on 8 January 2016.

³⁹ Comparing Economic Systems, available at <http://www.ushistory.org/gov/13b.asp> accessed on 8 January 2016.

⁴⁰ A. Zeizer V, *The Purchase of Intimacy*, Princeton University Press, 2009, 288.

Karl Max's view of society in a capitalist state was that of a class system. Society was divided between the oppressed and oppressors. There were a handful of individuals that controlled the factors of production, and those that provided labour for them were neglected through low wages and poor working conditions.⁴¹ From this view it is evident that his sentiments are as much applicable in a state as they are in the family unit. Traditionally, in most marriages, family assets are held in the name of the husband. The wife, though assisting in the acquisition of the aforementioned assets, is given no rights. This is its own form of 'class struggle and oppression', where there is a divide between the man and wife. The man benefits from the wife's work in the home in the acquisition of property, yet she is not adequately compensated for this through acquisition of property rights. This division of classes had only one foreseeable end in Max's view; revolution by the lower class. And in many ways, there has been a revolution. Perhaps not a revolution in the manner Karl Max had envisioned, but there has definitely been major progress achieved by the feminist movement.

A very important legal concept as well would be the distinction between community of property and separate property regimes.⁴² Community of property is a creature of civil law. It is the organization and realization of property rights as the automatic consequence of a certain relationship, being marriage in this case. Spouses own all property acquired during the subsistence of the marriage equally regardless of contribution in acquisition. Separate property regime on the other hand is not about the sharing of title but in whose name the title is. Therefore the only time there is sharing is when both names are found on the title.⁴³

⁴¹ Marx K, Engel F, '*The Communist Manifesto*', Oxford University Press, 1992.

⁴² Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 1.

⁴³ 'Separate and Community Property During Marriage: Who Owns What?' available at <http://www.nolo.com/legal-encyclopedia/separate-community-property-during-marriage-29921.html> accessed on 8 January 2016.

CHAPTER THREE: A GLANCE AT THE HISTORY AND ANALYSIS OF BOTH CONSTITUTIONAL AND STATUTORY PROVISIONS PRE-2010 CONSTITUTION

INTRODUCTION

This section provides an analysis of the decided cases that have influenced the distribution of matrimonial property over the years up to the present day. It is sad to observe that in many aspects, the more things have changed, the more they have remained the same. The problems that characterised this period seem to still be present.

TRADITIONAL AFRICAN CULTURE

This study will begin with brief glance at the Kenyan cultural context, prior to colonization. Custom has a very important role to play in the social, economic and political structure of a society. Therefore, it is vital for any government to take such into consideration in both policy and legislation. The importance of custom is made clear in our current Constitution, with the place of customary law cemented and the place of culture also acknowledged.⁴⁴ The same can also be observed in our marriage laws, with the recognition of polygamous marriages.⁴⁵

Our African culture is rich and vibrant and has been a source of pride and admiration across the globe.⁴⁶ This is plain to see in the success and economic strength of our tourism industry.⁴⁷ The institution of marriage specifically has a lot of significance culturally.⁴⁸ It provides enrichment of the community through child birth. There was always the potential for a mother to give birth to a powerful child. Through this function, they were viewed as the link between the unborn and the ancestors. For these reasons, women had a high status in society and were treated with respect.⁴⁹

⁴⁴ Article 11, *Constitution of Kenya* (2010).

⁴⁵ Section 3 (1), *Marriage Act* (Act No. 4 of 2014).

⁴⁶ African Cultural Center, available at http://www.africanculturalcenter.org/5_4culture.html accessed on 8 January 2016.

⁴⁷ Tourism; From the Report: Kenya 2016, available at <http://www.oxfordbusinessgroup.com/kenya-2016/tourism> accessed on 8 January 2016.

⁴⁸ 'African Marriage: The most important ceremony in African culture' available at http://www.africanholocaust.net/news_ah/africanmarriageritual.html accessed on 4 December 2015.

⁴⁹ 'African Marriage: The most important ceremony in African culture' available at http://www.africanholocaust.net/news_ah/africanmarriageritual.html accessed on 4 December 2015.

Yet, despite our reverence for it, it is equally important to concede that there are numerous practices in our culture that we must set aside. It is safe to generally state that most Kenyan tribes are largely patriarchal.⁵⁰ We piece together our lineage through our fathers. There was an obvious bias towards men. My use of tense should in no way imply that such is a thing completely of the past. Times have changed, and laws have since then been passed to curb such discrimination, but there are still many forms of discrimination that survive today. Prior to colonization, such practices were done widely and openly with a false sense of necessity and misplaced pride. Some of these practises include female genital mutilation and the marriage of minors. In many African cultures, the wife was viewed as a chattel; an extension of a man's property, as seen through practices like wife inheritance.⁵¹ Given this, it was considered absurd, an oxymoron even, for a woman to own property. In the event of disagreement, most of the time all the woman was allowed to leave with were the clothes on her back and a few personal items.⁵²

ENGLISH JURISPRUDENCE AND THE MARRIED WOMEN'S PROPERTY ACT

The establishment of the British colony introduced formal laws. This was brought about mainly by the arrogant belief in the superiority of their own legal framework coupled with their disgust at what they believed to be a barbaric and backward set of norms that we called our customs.⁵³ Both notions, to a large extent, were mistaken. Many laws did not appreciate or recognize our culture, and were in many aspects in direct conflict. It must however be admitted that some of these conflicts were rightfully determined in favour of the laws of our former colonial masters.⁵⁴

With regard to matrimonial property specifically, the Married Women's Property Act of 1882 (MWPA) came into force. The primary goal of this legislation was to strengthen the rights of women, by recognizing women in marriage as *feme sole*, and thus capable of owning property

⁵⁰ 'Gender-Based Violence and its Patriarchal Roots: Case in Kenya' available at <http://ampglobalyouth.org/students/gender-based-violence-and-its-patriarchal-roots-case-in-kenya/> accessed on 8 January 2016.

⁵¹ Wife Inheritance Spurs AIDS Rise in Kenya by Stephen Buckley, available at http://www.washingtonpost.com/wp-srv/inatl/longterm/africanlives/kenya/kenya_aids.htm accessed on 8 January 2016.

⁵² Masime JA in *Kivuitu v Kivuitu*, Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 52.

⁵³ Ndulo M, African Customary Law, Customs and Women's Rights, *Cornell Law Faculty Publications, Paper 18*, 2011, 91.

⁵⁴ Ndulo M, African Customary Law, Customs and Women's Rights, *Cornell Law Faculty Publications, Paper 18*, 2011, 91.

separately before and after marriage.⁵⁵ Though there was nothing directly guiding on the manner property was to be divided on divorce, there was much speculation and varied views on the interpretation of Section 17. The said Section 17 provided this:

*In 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.*⁵⁶

The wording of this section, many interpreted, gave the judges discretion as to the manner in which they could allocate property rights.⁵⁷ In the context of division of matrimonial property upon divorce, many brought claims on the hope that the courts could alter existing property rights for equitable distribution of matrimonial property.

The landmark case on the interpretation of Section 17 is the *Pettitt case*. The judgement was quite conservative. Lord Reid attempted to construe the intention of parliament when passing the legislation. He observed that at the time of its passing, certainty and security of rights of property were of utmost importance. It therefore seemed absurd that Parliament could possibly have intended that the Judiciary be provided with such power over the property of an individual, with no one to check it. Another point he noted was the fact that this power was only available to them in summary proceedings. It was therefore even more preposterous to imagine that if indeed they were intended to wield such power, that they should only do so in summary proceedings but not in those of an ordinary nature.

It was therefore the conclusion of the court that the section was provided as a means for speedily settling disputes by deciding where the title rightfully lay, rather than a means of giving some title that previously did not exist.

The courts were unwilling to view matrimonial property as a special kind of property with special rules applying to it, going as far as saying that the term ‘family assets’ had no legal meaning or significance. They were after all in a jurisdiction that recognized the separate

⁵⁵ Section 2, *Married Women's Property Act* (1882).

⁵⁶ [1969] 2 ALL ER 385.

⁵⁷ Lord Morris of Borth-Y-Guest in *Pettitt v Pettitt*, Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 14.

property regime. They could not be faulted. The enactment of the MWPA as well was a clear step to distance women from the doctrine of coverture.⁵⁸ Women wanted their own identity, and the ability to hold property on their own. However, this emancipation came at a price. This price was not borne by the women in salaried employment possessing the means to acquire property in their own names. The true victims of this freedom were the women that stayed at home as housewives contributing to the acquisition of matrimonial property through their toil in the households. They were completely forgotten. The little hope that Section 17 provided for them was swiftly crushed by the courts. This is a clear example of legislation that was not particularly sensitive to the realities of property ownership in most Kenyan households.

It therefore followed that courts attempted to determine the beneficial interests of each parties through existing principles of law. The judges in the *Pettitt* case acknowledged the difficulty in establishing such rights since at the time of marriage or of purchasing they did not put their minds to determining where they lay. This is because they did not, at that point of marital bliss make such arrangements, in contemplation of future discord. For this reason, the court was obliged to examine the evidence and establish where interest lay. It is at this point that we see the disregard for non-monetary contribution. The upholding of security of title was key.

The court therefore, had to infer intention of the parties through their actions. The inferences were however made from a financial viewpoint. Lord Morris of Borth-Y-Gest only looked at the issue from the angles of where either both have contributed to the purchase of the house or where improvements have been made to the house by one. When Lord Reid assessed the contribution of the claiming spouse, he considered his improvements as nearly all being of an ephemeral nature. He found that the spouse should not be entitled to a share simply for doing that which a husband often does. These can be seen as direct attacks on non-monetary contributions. They are by their very nature recurring. The wife, as is the case in many homes, will be expected to cook every day, more than once as a matter of fact. The same goes for cleaning, among other household chores. It was evident that existing principles were not adequate to cover any form of contribution other than that of a financial nature.

⁵⁸ Geddes R and Lueck D, 'The gains from self-ownership and the expansion women's rights', 1079.

The decision in *Gissing v Gissing*⁵⁹ moved us closer to the promised land, yet still had its pitfalls. It was beneficial to the extent of its recognition of indirect contribution. One did not need to make direct contribution to the purchase price. Substantial contribution to household expenses which enabled the other spouse to make payments for the house was recognised. However, the downside was that the said indirect contributions were still expected to be of a financial nature.

Also important to be noted from both cases was the idea of ratio. In both cases, the maxim 'equality is equity' was found to be inadequate. Since the determination of rights was to be based on evidence, specifically those of a financial nature, it therefore followed that the determination of rights would vary from case to case. There would be instances where the rights would be found to lie in totality on one party. There would be some instances where both had an interest but in varying proportions. There would also be instances where the contribution of both spouses are so substantial that it would be impossible to fairly estimate portions. In such instances, it would only be but fair for both to acquire an equal share of the property. The idea of varied rights was plausible when dealing purely with financial contribution because evidence was attainable. However, the issue would get much more complicated with the introduction of non-monetary contributions.

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These two cases are adequate in providing a general feel of the initial direction that Kenya took with regard to the division of matrimonial property upon divorce. It is important to note that the judgements were quite conservative. They were unwilling to encroach unto the law making function of parliament. The findings of these judges were not based on any personal bias against women, as they conceded that there was indeed an imbalance that needed to be remedied by the law.⁶⁰ Ironically, the decision in *Pettitt v Pettitt* was against a husband attempting to acquire interest in his wife's property. They made the decisions they made purely on the belief that their hands were tied but while still acknowledging that there was indeed a problem that needed to be addressed. Lord Hodson quotes the President of the Probate, Divorce and Admiralty Division who eloquently stated that *'The cock can feather the nest because he does not have to spend most*

⁵⁹ [1970] 2 ALL ER 780.

⁶⁰ Lord Hodson in *Pettitt v Pettitt*, Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 19.

of his time sitting on it.⁶¹ This is an acknowledgment of the importance of non-monetary contribution, yet to accept such a concept was considered to be the introduction of entirely new concepts into the law, and not the development of existing principles. The idea of matrimonial property, by then referred to as joint family property, was found to have no legal meaning. Community ownership in the Common law system was yet to be realised. All in all, the only solution to all this was viewed to be the enactment of relevant legislation by parliament.

It is important to note that women were already at a disadvantage as their rights were being impeded even by the highest law of the land, the Constitution. The independence Constitution allowed for discrimination in personal matter, of which divorce is included.⁶² This effectively justified use of traditional concepts in arriving at decisions, which were more often than not detrimental to the woman.

The Kenyan cases that followed up until the enactment of Matrimonial property laws give a very clear picture as to the dangers of vague laws that are open to divergent interpretation. *I v I*⁶³ was the first reported decision that confirmed the applicability of the MWPA in Kenya as a statute of general application. What followed were numerous contrasting decisions, showing a lack of uniformity of thought in the matrimonial property regime.

In *Karanja v Karanja*,⁶⁴ though the property was held in the name of the husband, the direct and indirect financial contribution of the wife were considered. As discussed earlier, the categorization of contribution as only direct or indirect financial contribution eliminates entitlement of spouses that are perhaps unable to do either, yet still play a significant role in the family through non-monetary contributions. This unfortunate state of affairs was solidified by the manner in which Simpson J dealt with the issue of whether the imputation of trust could be rejected due to customary law. In answering this question, the court did indeed find that written law trumped customary law. It did however apply the rule specifically in the context of a marriage where the wife is also in salaried employment. This begs the question, why the distinction? The only plausible reason for this would be the fact that it could be reasonably

⁶¹ Lord Hodson in *Pettitt v Pettitt*, Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 19.

⁶² Section 82 (4) (b), *Constitution of the Republic Of Kenya*, 1963 (as Amended to 2008) (Repealed)

⁶³ [1971] EA 278.

⁶⁴ [1976] KLR 307.

concluded that only a salaried woman would have the financial ability to contribute towards the household either directly or indirectly. This shows that even the Kenyan courts were not sensitive to the actual state of affairs in the country, and were very quick to carry on the law in a manner largely in disharmony with the Kenyan context.

The case also concurs with the conclusions reached in both the *Pettitt* and *Gissing* case with regard to ratios. Their finding also disregarded the maxim ‘equality is equity’, finding instead that despite the wife’s contribution, she was not entitled to half but one-third.

Similarly, *Njuguna v Njuguna*⁶⁵ also only looked at direct and indirect financial contributions. On the evidence, Sachdeva J found that the wife had made very substantial contributions to the acquisition of the property. The conclusion was that she was entitled to a 50% share.

Arguably, the biggest step prior to the introduction of the Matrimonial Property Act 2013 was the decision in *Kivuitu v Kivuitu*.⁶⁶ Though the property was purchased primarily on the income of the husband, the judges took into consideration the wife’s indirect contributions through her non-monetary contributions as a wife and financially through her businesses. This landmark case had the potential to provide a significant shift towards a regime of recognition of both monetary and non-monetary contributions. However, even as late as the time of the hearing of the case in 1991, we were still relying on the MWPA for guidance. With no legislation to reinforce the position, we were still making massive strides backward even as late as 2007 in the case of *Echaria v Echaria*.⁶⁷ In the case the wife was denied equal property rights despite her work in the home.

It was evident that there was little that would change until the enactment of legislation that provided women with concrete and stable rights, whether their contribution was monetary in nature or not.

⁶⁵ [1982] LLR 823 (HCK).

⁶⁶ [1985] LLR 1411 (CAK).

⁶⁷ Civil Appeal No. 75 of 2001.

CHAPTER FOUR: POST- 2010 CONSTITUTION AND MATRIMONIAL PROPERTY ACT ERA

INTRODUCTION

Given the reality of a matrimonial property law regime flooded with conflicting authorities, and reliance on archaic legislation (the MWPA), there was outcry for reform in Kenya.⁶⁸ This stemmed from the expectation of the law to fulfil one of its most basic functions; to ensure stability. Stability could be achieved in two varying ways. There were those that argued that the *Kivuitu*⁶⁹ decision, which was the first to recognize non-monetary contribution, would lead to the *de facto* application of community of property system,⁷⁰ which prior to the 2010 Constitution was a foreign legal concept in Kenya.

However, there was a much larger portion of the public that was calling for the recognition of non-monetary contribution, and more generally for a fairer property regime for women.

INTERNATIONAL INSTRUMENTS ADDRESSING MATRIMONIAL PROPERTY ISSUES

Law makers were also under pressure to fulfil their international obligations. Kenya has ratified both the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICESCR provides that:

*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.*⁷¹

Federation of Women Lawyers (FIDA) tabled a report finding that the state of the laws prior to the new Constitution and marital laws were in turn violating women's enjoyment of the right to housing provided for under the ICESCR.⁷²

⁶⁸FIDA and International Women's Human Rights Clinic, Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, 2008, 2.

⁶⁹ [1985] LLR 141.

⁷⁰ Juma K and Kanjama C(ed), *Family law digest: Matrimonial property*, Law Africa Publishing Kenya Ltd., 2009, 44.

⁷¹ Article 3, ICESCR.

The lack of rights over land left them at the mercy of men that held absolute property rights. This of course greatly jeopardized their access and security over the use of land. This is despite the fact that they provide majority of agricultural labour.⁷³ It is the perfect analogy of capitalist criticisms put forward by communist theorists. It also depicts of the manner in which those that actually do provide labour are themselves denied the enjoyment of benefits, with maximum benefits going instead to the one that owns the factors of production.⁷⁴ It is important to note that matrimonial property encompasses a wider array of property,⁷⁵ and is not only limited to land and things attached to it. There is however an obvious bias to focus more on it. Given its value, it is more often than not the key matter of contention in the legal process. Most other items are not considered worth the legal costs.

CEDAW is much more specific in protecting women rights. It provides that:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

⁷² Article 11.1, *ICESCR*.

⁷³ FIDA and International Women's Human Rights Clinic, *Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights*, 2008, 12.

⁷⁴ Comparing Economic Systems, available at <http://www.ushistory.org/gov/13b.asp> accessed on 8 January 2016.

⁷⁵ Section 6(1), *Matrimonial Property Act* (Act No. 49 of 2013).

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.⁷⁶

It was obvious to many that the state of the laws as they stood were discriminatory in nature. It may of course be argued that they were neutral and thus were not targeting women. However, sex-neutral or symmetrical laws can themselves be discriminatory in nature.⁷⁷ Discrimination also comes in indirect forms. This is because sex-neutral laws do not cater for the gender differences that are intrinsic to the social structure of a given society.⁷⁸ Therefore, laws such as the Registered Land Act (repealed) that conferred absolute ownership on the individual who had registered it,⁷⁹ may at face value seem to cater to both sexes evenly. Practically speaking however, and considering the structuring of majority of Kenyan households, it is the man who registered as owner. This effectively locked women out of ownership of property.

Of particular importance to the ongoing discussion is Article 17 of CEDAW, which states as follows:

States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all

⁷⁶ Article 2, CEDAW, General Assembly Resolution 34/180 of 18 December 1979.

⁷⁷ Rikki Holtmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom', *Women's human rights: CEDAW in international, regional and national law*, Cambridge University Press (2013), 100.

⁷⁸ Rikki Holtmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom', *Women's human rights: CEDAW in international, regional and national law*, Cambridge University Press (2013), 111.

⁷⁹ Section 27 (a), *Registered Land Act* (Chapter 300) (Repealed).

*appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.*⁸⁰

This provision does not cater for the fact that even within urban areas, there are many households that are characterised by the lady contributing mostly, if not completely through non-monetary means. It is, however, an acknowledgement of the economic significance of such contribution.

These factors eventually led to the Marriage Act, Matrimonial Property Act and several key provisions of the 2010 Constitution.

INTENTION OF PARLIAMENT WITH REGARD TO SECTION 7 OF THE MATRIMONIAL PROPERTY ACT

The Matrimonial Property Act came with it the recognition of non-monetary contributions.⁸¹ Also quite significant was the introduction of the idea of matrimonial property itself.⁸² The introduction of a system of joint ownership based on assets acquired during the subsistence of a marriage was itself a major win. It also ushered in the era of community of ownership; an idea previously foreign to Kenyan jurisprudence.

These in themselves do not provide an answer on the manner in which Parliament intended the matrimonial property to be split. There is the possibility of inferring an intention for a split down the middle based on the Marriage Act, which states that:

*Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.*⁸³

There are those that feel that the idea of equal rights at the dissolution of marriage would seem to extend to property rights.⁸⁴ Equal rights would therefore be taken to entitle each party to an equal share of the matrimonial property.

⁸⁰ Article 17, CEDAW.

⁸¹ Section 2, *Matrimonial Property Act* (Act No. 49 of 2013).

⁸² Section 6, *Matrimonial Property Act* (Act No. 49 of 2013).

⁸³ Section 3 (2), *Marriage Act* (No. 4 of 2014).

⁸⁴ National Assembly Official Report, 12th November 2013, Committee of the Whole House, 24.

But perhaps there is more to be discovered when determining the intentions of Parliament, not in the provisions in the Act, but those left out in the bill.

Clause 7 of the Matrimonial Property Bill when brought to Parliament initially read as follows:

*Subject to section 6(3), ownership of matrimonial property vests in the spouses in **equal shares irrespective of the contribution** of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved.*⁸⁵

This was amended and subsequently passed into law as:

*Subject to section 6(3), ownership of matrimonial property vests in the spouses **according to the contribution** of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.*⁸⁶

From this, there seems to be an obvious conclusion. If parliament had indeed intended for equal shares on divorce, the initial version of Section 7 would have prevailed. The current Section 7 when read with Section 2 on the definition of contribution seems to point towards an attempt to quantify such. Yet such a task is complicated ten-fold by the fact that non-monetary contributions are now recognized. How are such to be quantified? It therefore logically follows that the Judiciary has been provided with great discretion; the very same discretion that led to the numerous and blatantly contradictory decisions in the pre-2010 Constitution period. The laws that were intended to provide stability have therefore failed to achieve their intended purpose.

Displeasure with the amendments was observed during the vote, an unfortunate show of the tyranny of numbers. Whereas there was overwhelming support from the male camp who form the majority, 28 out of the 34 women members were opposed to the bill in its new form.⁸⁷ From this we see the Man of law⁸⁸ at work, a concept that holds that the law is designed to cater for the needs and whims of the man of law. The Man of law is described as the white educated affluent male. Of course in the Kenyan context, being predominantly black in population, the aspect of

⁸⁵ Clause 7, *Matrimonial Property Bill*, 2007.

⁸⁶ Section 7, *Matrimonial Property Act* (Act No. 49 of 2013).

⁸⁷ National Assembly Official Report, 12th November 2013, Committee of the Whole House, 23.

⁸⁸ Naffine N, *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen and Unwin (1990), 100.

colour is less relevant. It is therefore the educated successful middle class man alone that has a say in the political sphere, and he is taken to do so on behalf of the household.⁸⁹ He does so, however, keeping his self-interest at the forefront.

The section itself seems to be contradictory to the purpose of the statute. The introduction of the idea of matrimonial property was a shift towards the introduction of the concept of community of ownership in marriage. The Matrimonial Property Act provides for matrimonial property to include any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. Yet Section 7, by requiring one to obtain rights dependant on their contribution is an aspect of the opposing concept of separate property.

CONSTITUTIONALITY OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT
With the separation of powers, the legislative arm of government has indeed been provided with the law making process as falling under its ambit. But statute is just but one of the sources of law. And whereas there has been much debate as to the hierarchy of laws, that which sits at the top is not contentious. The Constitution is the *grundnorm* and all laws passed by parliament must be in line with its provisions.⁹⁰

The question then becomes whether Section 7 of the Matrimonial Property Act is inconsistent with Article 45 of the Constitution.

Article 45 states that:

Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage⁹¹

It can be argued that the nexus established between equal rights and equal shares is a stretch, to say the least. Equal rights can be taken simply to mean equal treatment before the law.⁹² If it is to provide any guidance on distribution, such would definitely not be direct. But what would this equal treatment entail? Using Aristotle's two notions of equality, equality can either be numerical or proportional in the context of distribution. Numerical equality stems from the idea

⁸⁹ Naffine N, *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen and Unwin (1990), 100.

⁹⁰ Article 2, *Constitution of Kenya* (2010).

⁹¹ Article 45, *Constitution of Kenya* (2010).

⁹² Kameri-Mbote, P., 'Fallacies of Equality and Inequality; Multiple Exclusions in Law and Legal Discourses', Inaugural Lecture delivered on 24 January 2013 at the University of Nairobi, 7.

that each is given their due, their due being an equal share, given the fact that they are identical and indistinguishable in all relevant aspects.⁹³ Section 2 of the Matrimonial Property Act recognizes both monetary and non-monetary contribution. It does not, however, provide any form of hierarchy. Also, it is impossible to quantify non-monetary contribution. It therefore follows that there is no measure that can be used to distinguish one form of contribution from another in terms of value. To make such an attempt would be to leave determination of entitlement to the personal bias of each judge. From this, it can be seen that treating both parties equally before the law would seem to best be achieved through the equal division of property. This has not been achieved by Section 7.

It can be argued however that proportional equality may be preferable in certain scenarios. It is against the idea that equal shares should be provided without justification, recognizing that it would not always be a just result.⁹⁴ Surely there are instances in a marital union where one party is grossly undeserving of a share of the matrimonial property, much less so of a half of it all. An allusion to this would be the fact that Kenya is a fault-based divorce system.⁹⁵ Let us look, for example, at the grounds for dissolution of a Christian marriage.

A party to a marriage celebrated under Part III may petition the court for a decree for the dissolution of the marriage on the ground of—

(a) one or more acts of adultery committed by the other party;

(b) cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or

(c) desertion by either party for at least three years immediately preceding the date of presentation of the petition;

(d) exceptional depravity by either party;

(e) the irretrievable breakdown of the marriage⁹⁶

⁹³ Ostwald M, *Nicomachean Ethics Aristotle*, 110.

⁹⁴ Ostwald M, *Nicomachean Ethics Aristotle*, 110.

⁹⁵ Section 65, *Marriage Act* (Act No. 4 of 2014).

⁹⁶ Section 65, *Marriage Act* (Act No. 4 of 2014).

Indeed, provisions such as that for irretrievable breakdown of the marriage have to a large degree watered down the extent to which Kenya is a fault-based jurisdiction. Nonetheless, we are in essence a fault-based system. If we were to take (c) for instance, it provides as a ground for divorce the desertion by either party of the marriage at least three years prior to the petition. This of course implies that there is the possibility of desertion for a greater amount of time. Therefore, in the event that the deserted spouse in the absence of the other is able to toil and acquire for themselves property, is it in any way just for the other to expect a 50% cut of the matrimonial property? In the absence of the discretion that Section 7 would seem to provide to the courts for a variation in rights, the answer would be yes. Community ownership would entitle an undeserving spouse of a half share irrespective of contribution. Such a black and white approach would not cater for individuals that are quite evidently guilty of failing to pull their weight in the marriage.

The argument above does have some merit. However, it should be noted that it only caters for very exceptional worst case scenarios. It is highly unlikely to find a party to a marriage that has failed to contribute in any way to the marriage. The law must not be based on the exceptions, but on the general rule. This is not to say that the exceptions should be cast aside. Therefore a compromise would be to provide for equal shares as the general rule, and to provide discretion only in the most exceptional of cases. The argument also works on a very dangerous assumption, the idea of a vast estate. The idea of a variation in the distribution of matrimonial property is much more attractive when used in an argument dealing with a huge estate. For one, there is plenty to go around, so even a lower percentage than 50 would still be impressive. Also, since it is the rich that make the law (Man of law), they do so to serve their own interests.⁹⁷ The amendment to Clause 7 of the Bill is a blatant example of such. The harsh reality is however that majority of the population is not in the upper middle class and above.⁹⁸ Their matrimonial property is therefore quite minuscule in comparison. Therefore even a best case scenario of 50% for both is not much. It is also a fact that women are significantly worse off upon divorce.⁹⁹ Even worse still are those in polygamous marriages, which are now legal. A split down the middle would therefore be more appropriate as the rule.

⁹⁷ Naffine N, *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen and Unwin (1990), 100.

⁹⁸ World Bank data on Kenya, available at <http://data.worldbank.org/country/kenya> accessed on 8 January 2016.

⁹⁹ Obiangi Arugu L, *Social indicators and effects of marriage divorce in African societies*, The Business & Management Review, Volume 4 Number 4, March 2014, 383.

Along the same vein, we must remember that despite our focus on the financial and legal aspects of a marriage, it is of utmost importance that we do not forget that marriage is in essence social centred.¹⁰⁰ Subjecting the social contract theory to a higher level of abstraction, it is reasonable to believe that the parties to a marriage as free rational persons agree to a set of principles initially as setting the fundamental terms of their association.¹⁰¹ Marriage, at least in its proper sense, is intended to be a life-long commitment. And in the absence of any contrary agreement, it is assumed that the parties intended to share their lives together as partners and equals. Termination of the marriage does not affect these initial principles and expectations.

Similarly, if we consider equal rights as equal treatment before the law, Section 7 of the Matrimonial Property Act as it stands would be discriminatory against women. It is another example of what would seem to be gender neutral legislation. On face value, they seem to target no one and cater for everyone. Indeed, the recognition of non-monetary contribution in itself is a great triumph for women. However, the idea that distribution shall be based on contribution places women at a disadvantage. Rikki Holtmaat in her analysis of CEDAW focuses specifically on its aim to modify gender based stereotypes by enhancing social and cultural change tackled primarily through Article 5.¹⁰² It states that:

*States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*¹⁰³

The provision for non-monetary contribution is in essence a summary of the stereotypical roles that have been attributed to women. The fact of the matter is that majority of women in households do largely contribute in ways other than financially. And yet another reality is that in most societies, such tasks are not viewed in the same light as those of a financial nature. They are looked down upon and considered to be significantly inferior. This is to a large extent the reason

¹⁰⁰ Shakargy S, *Marriage by the State or Married to the State? On Choice of Law in Marriage and Divorce*, *Journal of Private International Law*, 9:3, 2013, 527.

¹⁰¹ Rawls, *A theory of justice*, 10.

¹⁰² Rikki Holtmaat, *The CEDAW: A Holistic Approach to Women's Equality and Freedom*, *Women's human rights: CEDAW in international, regional and national law*, Cambridge University Press (2013), 100.

¹⁰³ Article 5, *CEDAW*.

behind radical feminism, which is in essence a push for women to be treated exactly the same as men.¹⁰⁴ Such sentiments do not accommodate the inherent differences of the sexes. It instead is polluted by the misleading notion that relates man to power and woman to weakness. Such notions jeopardize the right of women to be treated respectfully as equal and dignified humans.

Given this state of affairs, it would be to the detriment of women for them to be expected to compete fairly when coming forth with ‘inferior’ non-monetary contributions when compared with monetary contributions of men. Section 7 does not adequately cater for the realities of society. And whereas it may be argued that formal equality has been achieved, it is lacking in substantive equality, rendering it discriminatory in nature.¹⁰⁵ If, therefore, it limits the enjoyment of the equal rights guaranteed to both parties to the marriage at dissolution by Article 45, then Section 7 is in effect unconstitutional.

¹⁰⁴ Watkins G, *Feminism is for Everybody: Passionate Politics*, South End Press, 2000, 2.

¹⁰⁵ Rikki Holtmaat, ‘The CEDAW: A Holistic Approach to Women’s Equality and Freedom’, *Women’s human rights: CEDAW in international, regional and national law*, Cambridge University Press (2013), 100.

CHAPTER FIVE: CONCLUSION, FINDINGS AND RECOMMENDATIONS

CONCLUSION

The new marriage laws are a testament to the strides made in the reform on gender based issues. To say that the legislation in place is a complete miss would be false. This does not exempt it from criticism, nonetheless. The family is the natural and fundamental unit of society¹⁰⁶, and it has its foundation built on marriage. This shows its importance and explains why it is such an area of focus. A look at the history shows the importance of stability in legislation, which is the only way to ensure that there is uniformity in precedent set by judges.

FINDINGS

From the study it is clear that the marriage laws which were meant to bring stability of property rights for women have failed to do so. The problems set forth at the beginning of the study have been found to be true. Indeed Section 7 of the Matrimonial Property Act is in fact unconstitutional. In addition to this, it provides judges with a wide discretion as to the division of matrimonial property. There does not seem to be much differentiating the current regime with the prior unstable one. In both, courts have great discretion and the current state of things leaves the possibility of a recurrence of a period of differing jurisprudence being produced. Given the fact that non-monetary contributions cannot be quantified, it is probable that most judges will arrive at 50-50 ratio. But those making the laws should be more focused on anticipating future problems as opposed to reacting to them. The fact remains that leaving such loopholes leaves many at the mercy of errant judges.

The objectives stated at the beginning of the study have also been met. On examination of the efficacy of the new laws relating to matrimonial property, it has indeed been found that they are lacking in stability, and leave far too wide discretion for judges in determining entitlement to property rights over matrimonial property. Equality, given the nature of non-monetary contributions, should entitle as the general rule parties to a numerically equal share.

¹⁰⁶ Article 45 (1), *Constitution of Kenya* (2010).

RECOMMENDATIONS

The study therefore recommends that Section 7 of the Matrimonial Property Act be amended to provide for the equal sharing of matrimonial property irrespective of contribution. This would be similar to the provision that was initially tabled in Parliament, but with a slight difference. The Matrimonial Property Act for the Province of Alberta, for example, provides as follows:

If the property being distributed is property acquired by a spouse during the marriage...the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8¹⁰⁷

Section 8 then goes on to list the matters to be considered when determining distribution. It includes: the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent; the duration of the marriage; whether the property was acquired when the spouses were living separate and apart; the terms of an oral or written agreement between the spouses.

The use of a provision that provides for equal distribution as the rule, yet recognizes the existence of scenarios in which equal distribution is not just, would be ideal. It provides the promise of stability, while still acknowledging the possibility of extenuating circumstances.

Another recommendation would be the drafting of prenuptial agreement, an option provided for by the Matrimonial Property Act.¹⁰⁸ The drafting of such agreements is one of the ways to ensure the security of one's interest in property. There may be debate as to the effects of signing such an agreement, with some arguing that it is planning for the failure of the marriage.¹⁰⁹ It is, however, definitely a way to insulate oneself from the whims of the court in the event the law is to remain as is.

¹⁰⁷ Section 7 (4), Revised Statutes of Alberta, Chapter M-8.

¹⁰⁸ Section 6 (3), *Matrimonial Property Act* (Act No. 49 of 2013).

¹⁰⁹ Mahar H., 'Why Are There So Few Prenuptial Agreements?'; Discussion Paper No. 436, 2003, Harvard Law School, 11.

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