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Faculty of Law

University of Nairobi

P.O. BOX 30197-00100

Nairobi

Tel: +254 20 2314371

Email: ealj@uonbi.ac.ke or privatelaw@uonbi.ac.ke

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ACKNOWLEDGEMENT

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EDITORS' NOTE

The Editorial Board of the East African Law Journal is delighted to welcome you to this Special Issue on Gender, Equality and Human Rights. This Special Issue has been made possible through the support of our faculty advisors, the never-ending interest of our readers and the hard work of our editorial staff. It brings a wealth of knowledge on diverse issues of gender, equality and human rights from African scholars. The Issue is structured as follows:

Constance Gikonyo, in "*Kenya's Proceeds of Crime Act: The Asset Forfeiture Regime and Attendant Human Rights Issues*", opens the discussion in this volume by examining Kenya's asset forfeiture regime with the aim of identifying human rights issues arising therein and how they can be judiciously handled.

Coming in second is Nancy Baraza's "*Cohabitation Unions and Neoliberal Discontents: Kenya's Legal Dilemma and the need to rethink family law reforms*", which argues that the legal marginalisation of cohabitation unions in Kenya is influenced by a neoliberal ideology that values marriage which it credits with economic stability as opposed to non-marital relationships which it suspects may instability in terms of economic outcomes.

Bernadette Malunga's "*Theoretical Underpinnings on Women's Informal Cross Border Trade: An African Feminist Perspective*" comes third, explaining the patterns and causes of women's informal cross border trade from an African feminist point of view. The paper uncovers the root causes of women's informal cross border trade, findingtangible solutions to that problem.

Peter Munyi, in "*Beyond the constitutional rhetoric for gender equality and equity: a case for fitting statutory instruments for purpose*", narrates the extent of inequality and discrimination perpetuated against women, in particular, merely because they are women, providing part of the rationale for the constitutional deconstruction of patriarchy, and construction of provisions in the Constitution of Kenya, 2010 (the 2010 Constitution) that explicitly assert equity, social justice, inclusiveness and non-discrimination among others as forming the bedrock for national values and principles of governance.

In "*Case review Mitu-Bell",* Rodgers Garvin analyses the *Mitu-Bell Case* and finds that realising socio-economic rights requires innovative remedies to the violations of the rights. The paper argues that by recognising structural interdicts as remedies, the Supreme Court of Kenya restores hope to many poor Kenyans and ensures that judgements in socio-economic cases are not rendered in futility. The paper concludes that post-judgement

supervision is a way of enforcing socio-economic rights.

Annette Mbogoh follows with "*A Critical Analysis of the Intersections of Women's Multiple Identities and Its Impact on Representation in Local Peace Processes: A Case Study of Mombasa and Kilifi Counties in Kenya*", where she analyses the place of the law in enhancing women's representation, problematises the politics of the representation of women in community-based peace structures, and concludes that for representation to be meaningful, effective and equal it must take into consideration the heterogeneity of the woman and the intersections of difference, build women's capabilities and strike a balance between substantive and numerical representation.

Peter Mburu, on the other hand, in *"Women and Land Registration in Kenya"*, argues that while it is generally held that land registration laws are gender-neutral and that they promote land registration, the fact is that only a small number of women are registered as landowners in Kenya. Building on the evidence collected from selected land registries, Mburu demonstrates that the practice and land registration laws have not promoted women's land rights. The paper concludes there is a need to amend the law and change land registration practice to have more women registered as landowners.

Winifred Kamau in "*Customary Law and Women's Rights in Kenya*", documents relationship between customary law and women's human rights in Kenya, and examines the ways in which conflicts between the different legal systems impact on the human rights of women in Kenya. Kamau argues that there is a need to find ways of reconciling conflicts between customary law and women's human rights in order to enhance women's ability to actualise their rights.

Roseline K. Njogu and Nkatha Kabira combine forces in "*THE WIFE OF LAW: INTERROGATING THE INEQUALITY FRAMEWORK*" to examine the inequality framework in Kenya. The two argue that wifehood remains subjugated to husbandhood despite the presence of many legal declarations and years of extensive law reform. The article concludes that true equality for wives might be found outside of the law.

Rosemary Mbaluto – Mutuku, Nkatha Kabira, Prof. Patricia Kameri-Mbote and Dr. Nancy Baraza, in " *THE CARING WIFE AND DISCRIMINATORY CASE-LAW: FRAGMENTATION IN THE JURISPRUDENCE ON DIVISION OF MATRIMONIAL PROPERTY*", close this year's volume with a detailed investigation of whether or not judgments from Kenyan courts on the division of matrimonial property, reflect the spirit of the Constitution and legislation. The four conclude that the bench has come up with confusing, conflicting and inconsistent judgements leading to the conclusion that the law on division of matrimonial property is 'as long as the foot of the judge' where a non-financial contribution is the main issue under consideration.

KENYA'S PROCEEDS OF CRIME ACT: THE ASSET FORFEITURE REGIME AND ATTENDANT HUMAN RIGHTS ISSUES

Constance Gikonyo*

ABSTRACT

The application of human rights principles in forfeiture cases is a significant issue globally as evidenced in literature and judicial decisions. This paper focuses on Kenya's asset forfeiture regime aiming to identify the human rights issues arising and how they can be handled in a judicious manner. Due to the extant state of none consideration of these issues under Kenyan law, the paper draws on literature and case law from the United Kingdom and South Africa. Evaluating these sources assists in examining, benchmarking as well as providing lessons and guidelines that Kenyan courts may adopt. The analysis demonstrates the issues that could arise. Further, the paper argues that the rule of law requires that a balance be struck between the need to combat serious crime and upholding rights of persons affected by forfeiture proceedings. Generally, the discussion is important to other jurisdictions having nascent asset forfeiture regimes.

* Senior Lecturer, School of Law, University of Nairobi.

I. INTRODUCTION

Asset forfeiture is a crime control strategy developed to deal with proceeds of crime.[1] The aim of asset forfeiture is to take away the financial benefit gained from criminal conduct and consequently act as a deterrence to would be offenders. Additionally, it aids in reducing the profits available to fund further criminal activities.[2] 'The asset recovery process includes the identification, tracing, seizing/freezing, confiscating and returning the assets to the victim jurisdiction.'[3] This process captures four phases. First, pre-investigative phase; for purposes of verifying the accuracy of information before the proper investigations are initiated. Second, investigative phase; the proceeds of crime are identified, located and relevant evidence is gathered. Third, judicial phase; the process of seeking the issuance of a confiscation order through the courts. Four, disposal phase; the actual seizure and disposal of the property by the State.[4] Asset forfeiture encompasses the utilisation of two main mechanisms, criminal forfeiture (post-conviction) and civil forfeiture also known as non-conviction based (NCB).

Criminal forfeiture is a remedial action that seeks to deprive offenders of the proceeds of their criminal conduct.[5] That is, the benefit gained from committing the offence they are convicted of.[6] Accordingly, criminal forfeiture does not function as the imposition of a fine, which seeks to punish an offender.[7] Further a fine 'would be unrelated to what was obtained and would be measured, rather, by the culpability and harm involved in the underlying offence.'[8] The proceedings are *in personam* and are undertaken as part of the sentencing process.[9]

As for civil forfeiture it is an action *in rem*, that is, against the 'thing' itself. The proceedings do not depend on a criminal conviction. NCB can be used to target both proceeds of crime and its instrumentalities. The latter is property used or intended for use to commit crime and it is this association that causes the property

1 M M Gallant *Money Laundering and the Proceeds of Crime* (Chichester: Edward Elgar, 2005), p. 1.
2 C E McCaw, 'Asset forfeiture as a form of punishment: A case for integrating asset forfeiture into criminal sentencing,' [38(2)] *American Journal of Criminal Law* (2011) 181,198.
3 International Centre for Asset Recovery/Basel Institute on Governance, 'Development Assistance, Asset Recovery and Money Laundering: Making The Connection, (2011) 13.
4 Basel Institute on Governance, International Centre for Asset Recovery, 'Tracing Illegal assets', (2015), 19-20.
5 The Kenyan proceeds of crime legislation permits to deprive an individual of assets of equal value to the criminal benefit gained even if he no longer possesses the identifiable rewards of his crime. The specific value of what was obtained is determined and recovered rather than recovering particular property (a value based scheme).
6 N Boister, *An Introduction to Transnational Criminal Law* (England: Oxford University Press, 2012), p. 238.
7 *Crown Prosecution Service* v *Jennings* [2008] UKHL 29 para 13, *NDPP* v *Rautenbach & Another* [2005] 1 All SA 412 (SCA), 61.
8 *R* v *Harvey (Jack Frederick)* [2015] UKSC 73, 55.
9 *R* v *Rezvi,* [2002] UKHL 1, 1-13.

to be 'tainted'. 'Tainting' of the property is established by showing it was obtained in whole or part from unlawful activity.[10]

Criminal forfeiture targets only the property of the defendant and not third parties since it seeks to deprive the benefit one personally gained from committing the offence.[11] Non-conviction based forfeiture can target property held by third parties who may have known or not known of the property's connection to proceeds or instrumentalities of crime.[12] In civil forfeiture proceedings the State, through the authority given the mandate, appears as the plaintiff against the 'tainted' property itself in order to claim title over it.[13] However, individuals with interest in the property are given an opportunity to object the State's claim.[14] Both types of proceedings are civil in nature thus civil rules of evidence and procedure apply in court, as well as having the civil standard of proof; on a balance of probabilities.[15]

Kenya's criminal and civil asset forfeiture regime is contained in a number of statutes. These include, Anti-Corruption and Economic Crimes Act,[16] Bribery Act,[17] Narcotic Drugs and Psychotropic Substances (Control) Act,[18] Office of the Director of Public Prosecution Act,[19] Prevention of Organised Crime Act,[20] Prevention of Terrorism Act[21] and Proceeds of Crime and Anti-Money Laundering Act (POCAMLA).[22] This article will focus only on the regime under POCAMLA. This is because POCAMLA's provisions cover a broad scope in terms of permitting the forfeiture of proceeds from diverse crimes. Whereas the other statutes apply to forfeiture of proceeds from specific offences. Furthermore, of all these statutes POCAMLA contains the most comprehensive provisions on both criminal and civil forfeiture.

Under POCAMLA, the judicial phase in criminal forfeiture is generally done in three stages restrain; confiscation; and realisation. In this order, the stages seek to avoid dissipation of the targeted property, making an inquiry and determination of the benefit gained and finally enforcement. Civil forfeiture is done in two stages; preservation and forfeiture. Respectively, the two stages aims at preventing the wasting of or disappearance of property and determining if the targeted property is indeed the proceeds of or instrumentality of a criminal activity.

10 A Kruger, *Organised Crime and Proceeds of Crime Law in South Africa* (2 ed, Cape Town: Lexis Nexis, 2013), p. 8-9 & 114; E Rees, R Fisher and R Thomas, *Blackstone's Guide to the Proceeds of Crime Act 2002* (4 ed, England: Oxford University Press 2011), p.160; Boister n 6, 240.
11 Boister n 6, 238.
12 POCAMLA, section 92(1).
13 Boister n 6, 240.
14 Ibid.
15 POCAMLA, sections 56(2) & 81(2).
16 Cap 65; Act no. 3 of 2003.
17 Act no. 47 of 2016; section 18(7).
18 Act no. 4 of 1994.
19 Act no. 2 of 2013; section 18.
20 Cap 59; Act no. 6 of 2010.
21 Act no. 30 of 2012; s 40.
22 Cap 59B; Act no. 9 of 2009.

Undeniably, asset forfeiture can potentially give rise to a number of human rights issues such as interfering with one's privacy, property and judicial rights. For example, a defendant in criminal forfeiture is entitled to his rights. In civil forfeiture individuals, whether innocent of association with the predicate offence or not, inevitably have enforceable rights over targeted property. Interference with other rights can occur through the orders made by courts. For example, the right to privacy tampered with via search and seizure orders. As a result, individuals need protection of their rights. Consequently, the aim of this article is threefold. To identify human rights issues that could arise; to discuss justifications for limitation of these rights under the asset forfeiture regime; to consider how interference with human rights can be done in a judicious manner.

To achieve this aim, the article will be structured as follows. Section one and two will consider generally the aspects of limitation of rights in Kenya and the justifications for having limitations respectively. This is for purposes of laying a foundation for examining POCAMLA's asset forfeiture regime *vis-a-vis* the provisions of the bill of rights. Section three examines specific human rights interferences under POCAMLA. Subsequently, having considered the intrusion, section four discusses the necessary safeguards to ensure asset forfeiture does not preclude enforcement of rights or is done in an arbitrary manner. Instead, that it is undertaken in a judicious manner. The final section concludes the discussion by drawing the key findings.

Before proceeding with the examination, it is essential to point out a key issue. To date there is limited Kenyan jurisprudence on the interpretation and application of POCAMLA provisions. The available jurisprudence mainly deals with preliminary issues such as seeking preservation orders and most is dated 2016 to the present. This is occasioned by the extant state of the statute's underutilisation since its operationalisation in 2010. Consequently, this extant position informs the decision to refer to South African and United Kingdom court decisions, throughout this paper. This will enrich the discussion, assist in examination of the Kenyan provisions and benchmarking as well as provide valuable lessons and guidelines that Kenyan courts can adopt.

Justification for taking this approach can be found in the fact that Kenya and South Africa, have similar bill of rights and asset forfeiture provisions.[23] Additionally, South African courts have experience in dealing with human rights issues vis a vis the asset forfeiture regime. Therefore, it is possible to justifiably seek guidance from its jurisprudence. The United Kingdom too has extensive expertise in implementing asset forfeiture laws. Moreover, its courts have been hard pressed to ensure that the interpretation and application of its asset forfeiture laws is in line with the Human Rights Act 1998 which incorporates the European Convention on Human

23 Asset forfeiture proceedings are under the Proceeds of Crime Act 2002 Cap 29 in the United Kingdom and the Prevention of Organised Crime Act 121 of 1998 in South Africa.

Rights at the domestic level.[24] Hence, its jurisprudence will provide an international perspective on the matter under consideration. Overall, the human rights and asset forfeiture provisions in the three jurisdictions are similar since they are modelled on international conventions and standards.[25]

II. LIMITATION OF RIGHTS IN KENYA

The Kenyan Constitution has a freestanding general limitation clause. The provision does not state particular circumstances under which each specific right can be limited. Alternatively, it is applicable to all the given rights and it is up to the courts to interpret the level of limitation with regards to each distinct right.[26] This general limitation stipulation is not unique to Kenya because it has been modelled from similar provisions in other international, and regional instruments.[27] Section 24 provides:

> A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
>
> (a) the nature of the right or fundamental freedom;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The implication of this clause is that in applying a provision of the bill of rights, Kenyan courts are required to develop the law to the extent that it gives effect to

24 Human Rights Act 1998, section 3.

25 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) 20 December 1988, 1582 UNTS 95; 28 ILM 493. Convention against Transnational Organised Crime (Palermo Convention) 15 November 2001, 2225 UNTS 209. FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation.

26 D Ahmed & E Bulmer, 'Limitation Clauses,' (2017) International Institute for Democracy and Electoral Assistance – Constitution Building Primer 11, 12.

27 See Universal Declaration of Human Rights, GA Res. 21711, UN Doc A/810, 71, article 29(2) (1948); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, article 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, article 11(2); African Charter on Human and Peoples Rights, 27 June 1981 UNTS 1520, p. 217, article 27(2).

a right or fundamental freedom. Accordingly, adopt an interpretation that most favours its enforcement. Nonetheless, limitation of a right or freedom is permitted, if done within the confines of the law. Further, the provision lists a number of factors that the courts are to consider when limiting a right. Hereunder a consideration of these aspects identified in the limitation clause is undertaken. Specifically, what is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors"?

According to the Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESR) in defining 'a democratic society' it acknowledges that there is no single model for a democratic society. Nonetheless it does state that a society that recognises and respects human rights elucidated in the United Nations Charter and the Universal Declaration of Human Rights (UDHR) can be termed as a democratic society. Additionally, the imposition of a limitation on human rights should not 'impair the democratic functioning of the society.' Therefore, an open society is one where there is individual freedom, humanness and rational criticism is permitted.[28] Such a society embodies the following values: public adjudication, diversity, transparency, promotes protection of human rights, open justice and promotes accountability and institutional checks and balances that limit State power.[29]

In considering the justification for a limitation, courts are to take into account all relevant factors including those listed in section 24 (1) (a-e). Nonetheless, despite the inclusion of this guiding list, courts have stated that "the factors listed are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination [of] whether or not the limitation of a right is justifiable or not."[30]

Thus, in determining if a limitation is justified a two stage-approach is advocated. The first inquiry is whether the challenged law or conduct violates, denies, or infringes any right. This requires an analysis of the scope and definition of the right, as well as the purpose and effect of the legislation or conduct.[31] The second inquiry is whether there has been a justifiable limitation of the right concerned; a proportionality enquiry.[32]

In the ensuing discussion the conformity of the asset forfeiture provisions vis a vis the human rights provisions will be measured against the standard of, what is the scope and definition of the right, as well as the purpose and effect of the limitation. The "meaning of a right or freedom is to be ascertained by an analysis of

28 *Ferreira* v *Levin*; *Vryenhoek* v *Powell* 1996 1 SA 984 (CC), 50.
29 D W Jordaan, 'The open society: what does it really mean?' [50(2)] *De Jure* (2017) 396.
30 *State* v *Manamela & Others* 2000 (1) SACR 414 (CC), 33.
31 R J Goldstone, 'The South African Bill of Rights,' [32] *Texas International Law Journal* (1997) 451, 461.
32 Ibid.

the purpose of such a guarantee."[33] Whereas, the limitation is measured in terms of whether it is permitted; is it done within the confines of the law and is it reasonable and justifiable in an open and democratic society.

Additionally, in effecting a limitation it must be 'reasonable and justifiable' this requires the court to consider the justification presented for the limitation, is the limitation necessary and whether there are other less restrictive means that can be employed. In determining the factor of 'less restrictive means' courts should not unduly narrow the range of policy choices available to the legislature in a specific area.[34] Further, this requirement "does not postulate an unattainable norm of perfection … the standard [to be applied] is reasonableness".[35]

III. JUSTIFICATION FOR LIMITATION OF RIGHT(S)

The various rights guaranteed in the Constitution are essential to a democracy, nonetheless not all rights are guaranteed in absolute terms. Some rights have to be limited because of the likely adverse impact they can have on other rights or on the society.[36] Principally, limitation clauses acknowledge the possibility for conflict between "(a) private rights and legitimate public policy objectives needed for the common good and (b) the competing or potentially conflicting rights of other private persons."[37] This therefore justifies the need for legitimate objectives limiting certain rights. These objectives include, protecting the rights of others, for public health reasons, national security, public safety or public order, public morals, prevention of disorder or crime and promoting social justice.[38]

With regards to particular legislations limiting certain rights, these justifications can be imputed by considering the legislative intent.[39] That is, an examination of parliamentary material may assist in disclosing the targeted mischief in passing a specific legislation which then limits enjoyment of a right. This is because there is a social need for legislation to address an identified evil that exists in society. For example, the prevalence of serious crime calls for the government to take action. This includes the enactment of legislation such as POCAMLA to deal with this mischief and in doing so limitation of certain right(s) is necessary for purposes of protecting the rights of others and national security. Nevertheless, courts have stated that "the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be".[40]

33 *State* v *Makwanyane & Another* 1995 (2) SACR 1, 9.
34 *State* v *Manamela & Others* n 30, 95.
35 *State* v *Mambolo* 2001 (3) SA 409 (CC), 49; *State* v *Makwanyane & Another* n 33, 104.
36 Ahmed & Bulmer, n 26, 6-7.
37 Ibid, 7.
38 Ibid, 9-10.
39 *State* v *Makwanyane & Another* n 33, 13-14.
40 *State* v *Manamela & Others* n 30, 32.

The basic content of a right is to be ascertained by analysing the purpose of such a guarantee.[41] Nonetheless, the limitation shall not nullify the substance of the right.[42] The essential content of a right should be determined both subjectively and objectively. Subjectively entails considering the right from the perspective of the individual affected by the invasion and objectively by considering the nature of the right and its place in the constitutional order.[43] Further, it is the State that has a duty to justify the derogation of a constitutional right.[44]

Accordingly, in determining if a limitation is justifiable then the two-stage approach is applied.[45] The first stage requires a determination of "the scope of the right and a delimitation of the boundaries of constitutionally protected activity."[46] At this phase courts are free to generously and broadly determine the essential content of a right.[47] The second stage entails establishing whether the infringement of the right is justifiable in an open and democratic society. That is, ascertaining the justification for the qualification of the right. At this point the limitation factors are applied as well as presenting an opportunity to accommodate the State's interests.[48]

This two-stage process leads to application of the proportionality criterion. "Proportionality is a test to determine whether an interference with a prima facie right is justified."[49] Proportionality *strictu sensu* requires measuring the relative intensity of interference in a right with the importance of the aim sought.[50] To achieve proportionality consideration should be given to the nature of the right, importance of the purpose of the limitation (suitability), nature and extent of the limitation (necessity) and the relation between the limitation and its purpose.[51]

Proportionality seeks to ensure a fair balance between the interests of individuals and the community vis à vis the government's legitimate objectives pursued by the limitation of a right.[52] It ensures that the harm to a right is proportional to the benefit gained by the deprivation. It protects against arbitrary interference with rights by the State unless it is authorised by law and meets a basic standard of justification.[53]

41 *State* v *Makwanyane & Another* n 33, 9.
42 Ibid, p. 100.
43 Ibid, p. 132.
44 *Robert Alai* v *Attorney General & Another* Petition no. 397 of 2016 (6 February 2017), 50-55.
45 *Jacqueline Okuta & Jackson Njeru* v *Attorney General & Others* Petition no. 397 of 2016 (6 February 2017); *State* v *Makwanyane & Another* n 33, 100.
46 K Iles, 'A Fresh Look at Limitations: Unpacking Section 36,' [23] *South African Human Rights Journal* (2007) 68, 73.
47 Ibid, p. 71.
48 Ibid.
49 K Moller, 'Proportionality: Challenging the critics,' [10(3)] *International Journal of Constitutional Law* (2012) 709, 711.
50 Y A Takahashi 'Proportionality' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p. 452.
51 E Reid & D Visser 'Introduction' in E Reid & D Visser (eds), *Private Law and Human Rights Bringing Rights Home in Scotland and South Africa* (Edinburg: Edinburgh University Press, 2014), p. 9; Takahashi (n 50), 450-451.
52 Reid & Visser n 51, 9. Kruger n 10, 144.
53 I Currie & J De Waal, *The Bill of Rights Handbook* (Cape Town: Juta, 2013), p 534.

With regards to Kenya, application of the proportionality principle is advanced by section 24(1) of the Constitution. The elements of the proportionality test can be inferred from this provision.

Invariably application of the proportionality elements by a court in asset forfeiture proceedings should most likely ensures that the confiscation or forfeiture order given overall is fair. This is because, the deprivation would be the result of a procedurally and substantively fair process.[54] Additionally, there would be promotion of constitutional principles by guaranteeing a balance between protecting an individual's right(s), yet simultaneously upholding the intentions of parliament and the greater public good.

Finally, linked to these human rights issues is the aspect of constitutionality of asset forfeiture provisions. Accordingly, the issue of justification can be considered from this perspective. Simply, constitutionality is "legality based on agreement with a constitution."[55] In addition, "every law enacted by parliament must pass through the test of constitutionality which is stated to be … a formal test of rationality."[56] That is, constitutionality is a yardstick used to determine whether a statute or legal provision is in conflict with the Constitution. Once a law is declared unconstitutional it cannot be enforced and if the government tries to implement it, an aggrieved person can challenge this action in court. With regards to asset forfeiture, the constitutionality of POCAMLA was considered in *Felix Kiprono Matagei v Attorney General & 2 others; Anthony Kihara Gethi (Interested Party)* and consequently upheld by the court.

Similarly, courts in other jurisdictions have done so too. In the case of *Aboobaker & Another v Attorney General*[57] the court in Malawi upheld the constitutionality of asset forfeiture provisions by declaring the constitutionality of statutory provisions can be justified on the basis of its grounding on the limitation of rights. That is, offenders act in a manner that is prejudicial to the public safety or economy of the State hence this justifies the limitation. Similarly, in the United Kingdom the courts have affirmed this view by stating that the confiscation regime was a proportionate means of combating and deterring serious crime.[58] Additionally, it has been declared that constitutionality is not breached in light of the safeguards built into the statutory regime including the fact that confiscation proceedings are carried out by a court with judicial procedures.[59] These include a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. Likewise, the courts in South Africa have upheld the constitutionality

54 Ibid, p 540-547. *Mohunram & Another* v *NDPP & Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), 56; Kruger n 10, 144.
55 Cambridge English dictionary, https://dictionary.cambridge.org/ (accessed on 14 June 2019).
56 *Law Society of Kenya* v *Kenya Revenue Authority & Another* petition no. 39 of 2017 (14 March, 2017).
57 (1995) 1 MLR 1 (HC).
58 See *Phillips* v *United Kingdom* [2001] ECHR 437; *R* v *Waya* [2012] UKSC 51.
59 *Grayson & Barnham* v *United Kingdom* Application no. 19955/05 & 15085/06 23 December 2008, 45.

of asset forfeiture laws due to the inbuilt safeguards and as a necessary tool to assist in dealing with current trends in serious crime.[60]

IV. HUMAN RIGHTS INTERFERENCE UNDER POCAMLA

The Kenyan bill of rights applies to all laws and binds all persons and State organs.[61] Meaning there is both a vertical (against the State) and horizontal (as against private individuals and bodies) application of rights. The Constitution is explicit in providing the purpose of recognising and protecting human rights and fundamental freedoms. It underscores that human rights serve to ensure preservation of the dignity of individuals, promotion of social justice and realisation of the potential of all human beings.[62]

In applying a provision of the bill of rights, the courts are required to develop the law to the extent that it gives effect to a right or fundamental freedom and hence adopt an interpretation that most favours its enforcement.[63] Nonetheless, limitation of a right or freedom is permitted, if done within the confines of the law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society as discussed above.[64]

The Constitution clearly provides that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and freedoms granted.[65] As such, the courts are required to facilitate the realisation of the rights guaranteed. Therefore, Kenya's asset forfeiture regime must be developed and applied in a manner that promotes such realisation. Various POCAMLA provisions interfere, through the orders made, with the rights of an affected individual and potentially give rise to a number of human rights issues. The relevant rights related to the application of forfeiture proceedings are: right to privacy;[66] right to property;[67] and right to a fair hearing.[68] These rights will be considered in turn.

A. RIGHT TO PRIVACY

Every person has the right to privacy, which includes the right not to have (1) their person, home or property searched; (2) their possessions seized; (3) information relating to their family or private affairs unnecessarily required or revealed; or (4)

60 *Prophet* v *NDPP* 2006(1) SA 38 (SCA) para 34; *NDPP* v *R O Cook Properties (Pty) Ltd; NDPP* v *37 Gillespie Street Durban (Pty) Ltd and Another; NDPP* v *Seevnayaran* 2004 (2) SACR 208 (SCA), 18; *Mohunram and Another* v *NDPP and Another* n 54, 57.
61 Constitution, article 20(1).
62 Constitution, article 19(2).
63 Constitution, article 20(2) (3).
64 Constitution, article 24(1).
65 Constitution, article 21(1).
66 Constitution, article 31.
67 Constitution, article 40.
68 Constitution, article 50.

privacy of their communications infringed.[69] Under POCAMLA, interference can occur in situations of enforcing production orders,[70] monitoring orders,[71] property tracking and monitoring orders[72] and search and seizure warrants.[73] Apart from the search and seizure orders, the other orders are unique to investigations into money laundering and asset forfeiture under POCAMLA. Hence, although they may be akin to certain other orders in the civil procedure code,[74] the other three have been tailored specifically for use under this particular act.

To obtain these orders the applications must be submitted by the permitted officials. For a production order it is a police officer; property tracking and monitoring orders the financial reporting centre; monitoring orders an authorised officer[75] and; search and seizure warrant to a police officer or the financial reporting centre or an appropriate law enforcement agency. The application procedure requires the relevant entity to file an *ex parte* application. This is in form of a miscellaneous application supported by an affidavit to a court of competent jurisdiction.

Searches and seizures are recognised as a lawful limitation of the right to privacy as long as they are done in a licit manner.[76] Generally, a valid search warrant permits an "authority to perform an act which would otherwise be unlawful".[77] Although as stated, production orders, monitoring orders, property tracking and monitoring orders are unique to POCAMLA and each order has certain peculiarities, in general they can be viewed as a special type of search warrant. This is because at the root they all seek to permit the police or other authority to access certain information during investigations for purposes of gathering relevant evidence. Additionally, there is no other way for the required information to be accessed unless the order is given. Accordingly, a valid search warrant, production order, monitoring order, property

69 Constitution, article 31(a-d) constitution; P Kiage, *Essentials of Criminal Procedure in Kenya* (Nairobi: Law Africa, 2014), p. 24.

70 POCAMLA, sections 103-105. A production order is a court order which may be made and served on any person or institution, public or private for example a financial institution, accounting and law firms, Telecommunication service providers, utility companies etc. requiring the production of, or allowing access to, specified material.

71 POCAMLA, section 125. A monitoring order directs the reporting institution to disclose information about transactions conducted through an account held by a particular person during a specific period. The purpose of a monitoring order is to undertake a financial surveillance as it enables investigator to observe the transactions in an account.

72 POCAMLA, section 38. A court order directed at a reporting institution (financial institution/DNFBPs) to provide any document that can assist the FRC in determining whether any property belongs, is in the possession or control of a particular person. It would include normal banking records and documents kept in a safety deposit box.

73 POCAMLA, sections 107-108.

74 Generally, under the civil procedure rules, production orders are in relation to *habeous corpus* applications. Hence, the production orders and monitoring orders as stated under POCAMLA are unique to investigations under the act.

75 An authorised officer. Means a police officer, KRA officer dealing with customs matters, ARA director.

76 Kiage (n 69) at 25. *Standard Newspapers Limited & Another* v *Attorney General & 4 Others* petition no. 113 of 2006 (17 October 2013); *James Njenga Kihato* v *Director of Public Prosecutions & 4 Others* constitutional petition no. 3 of 2016 (7 June 2018), 9-15.

77 *Manfred Walter Schmitt & Another* v *Attorney General & 3 Others* CHR petition no. 293 of 2013 (20 May 2014), 21; see also *Ivanov* v *North West GamblingBoard* (312/2011) [2012] ZASCA 92 (31 May 2012), 15.

tracking and monitoring order permit an authority to perform an act which would otherwise be unlawful.[78] These orders can be recognised as a lawful limitation of the right to privacy as long as they are done in a lawful manner. Under POCAMLA, there are inbuilt mechanisms to ensure this.

Foremost is that the relevant authority or person must apply to court for an order allowing for search or seizure. This process safeguards one's rights in a number of ways. First, the granting of such an order is at the discretion of the court.[79] Therefore, before it is granted, the court can assess its relevance. For example, the court must be satisfied that an investigation might be seriously prejudiced if access to the relevant documents is not granted; the document involved be sufficiently described or identified to enable the granting of the order.[80] Only if satisfied that it is justified in the circumstances, will the order be issued.

Second, if and when an order is granted, it must be specific. This is in terms of providing details as to when and where the search is to be conducted and which documents are sought.[81] This avoids orders that are too wide and arbitrary as they would unnecessarily interfere with one's privacy. In granting the order, the court must be specific as to indicate (i) the purpose for which it is issued, including a reference to the nature of the relevant offence; (ii) a description of the kind of documents authorised to be seized; (iii) a time at which the order ceases to be in force. Specific to search warrants, it must be stated whether entry is authorised to be made at any time of the day or night or during specified hours.

These requirements imposed by POCAMLA for the granting of these orders are in line with section 24(1) of the Constitution since they permit for the limitation of a right if done by law and are judicious and warranted.[82] Besides, the purpose of limiting the right is to access information that may lead to the acquisition of evidence that facilitates the forfeiture of proceeds or instrumentalities of crime. Ultimately, this aims at promoting the public good by denying offenders enjoyment of their illegally acquired wealth or preventing the occurrence of crime.[83]

In addition to the issues discussed above, there are other unique issues linked to violation of the right to privacy emanating from the application of POCAMLA provisions. These are in relation to the banker's duty of confidentiality and privacy of communications between advocates and their clients. Violation of the right to privacy may arise with respect to banks providing information on customers'

78 Ibid.
79 POCAMLA, section 107(3).
80 POCAMLA, section 107 (3) c & d.
81 POCAMLA, section 107 (4).
82 Furthermore section 47 of the National Police Service Act Cap 84 permits the limitation of rights and fundamental freedoms when the police are conducting searches and seizures.
83 *Issac Gathungu Wanjohi & Another* v *Attorney General & 6 Others* petition no. 154 of 2011 (30 March 2012).

account details or transactions to the Financial Reporting Centre.[84] Given that banks owe a duty of secrecy to their clients arising from the contractual obligation. However, interference would be a justified act since it is done in adherence to the law and is specifically permitted under section 17 of POCAMLA as enunciated in the *Tournier case*[85] and endorsed by Kenyan courts.[86]

Privacy of communications can also be infringed in situations where advocates are required to provide information on their clients. If an advocate reveals information, he gains in the course of his professional relationship with a client, this might be an infringement of the client's right to privacy. Although section 17 POCAMLA overrides any obligation as to secrecy or other restriction on disclosure of information whether imposed by law or otherwise. Nonetheless, the act is categorical in stating that client advocate privilege cannot be overridden if it exists in section 18(4).

However, it is important to note that this protection applies only to privileged information. It does not extend to all confidential communications between advocate and client. This is because confidentiality relates to communication made in confidence, while legal professional privilege attaches only if the communication is made for purposes of obtaining legal advice or for litigation purposes.[87] This suggests that advocates can be obliged to disclose confidential information that they are aware of as a result of the client-advocate relationship and can only legally refuse to disclose information protected by legal professional privilege.[88]

Accordingly, in both of the situations highlighted it is evident that potential infringement of an individual's right to privacy does arise. Nonetheless, there are safeguards that are included to assist in addressing these challenges. This is by ensuring that the disclosures are done in a legal manner and permitted by law, in the case of banks and their customers. As for advocate-client privilege the right has specifically been protected in instances where it does arise. Further, it can be justified that the disclosures are warranted and done in the public interest. This is because the information sought from the disclosures is in relation to investigations and proceedings involving potential criminal proceeds. Hence, the disclosures seek to address an identified evil that exists in society, therefore protecting the rights of others.

84 POCAMLA, section 125.

85 *Tournier* v *National Provincial and Union Bank of England* [1924] 1 KB 461.

86 *CFC Stanbic Bank Ltd* v *Danson Mwashako Mwakuwona* Industrial cause 174 of 2012 (12 February 2015), 17. See also C Gikonyo, 'Banks in Kenya and Anti-Money Laundering Obligations: The Conflicts of Interests Arising,' Journal of Money Laundering Control (2020) ahead-of-print. https://doi.org/10.1108/JMLC-01-2020-0008.

87 D Millard & V Vergano, 'Hung out to dry? Attorney-client confidentiality and the reporting duties imposed by the Financial Intelligence Centre Act 38 of 2001,' *Obiter* (2013) 389, 404 – 406.

88 See C Gikonyo, 'The Legal Profession in Kenya and its Anti-Money Laundering Obligations or Lack Thereof,' [22 (2)] *Journal of Money Laundering Control* (2019) 247.

Overall, as per section 50(4) of the Constitution any evidence that is obtained in a manner that violates any right or freedom shall be excluded in court proceedings if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. The implication of this provision, in relation to various orders highlighted above, is that if they are undertaken illegally, without fulfilling the set criteria, then evidence obtained is inadmissible in court. Since this may be considered a violation of ones right to a fair hearing. Consequently, agencies that are granted permission to undertake search and seizures must ensure that they are not conducted in a manner that violates a person's rights.

B. RIGHT TO PROPERTY

The bill of rights guarantees the right to property by allowing a person, individually or in association with others, to acquire and own property.[89] The State or any person is not allowed to arbitrarily deprive, limit or restrict an individual from enjoying their property.[90] However, this right does not extend to property found to have been unlawfully acquired[91] and as with other rights, it is also subject to the limitation clause in section 24(1) of the Constitution.

Undoubtedly, criminal and civil forfeiture proceedings directly infringe on this right by allowing an individual's property to be forfeited to the state. Nonetheless, justification for this infringement may be grounded on section 40(6) of the Constitution which stipulates that the right to property does not extend to property that has been found to be unlawfully acquired. Accordingly, POCAMLA seeks to deprive individuals of the proceeds or instrumentalities of crime. Forfeiture is for the greater benefit of society because it seeks to take away property that can be used to propagate crime and to ensure that crime does not pay. Furthermore, in undertaking forfeiture the courts should apply the proportionality principle as discussed in detail hereunder.

With regard to asset forfeiture, this means balancing between parliament's aim of depriving criminals of the proceeds from crime, safeguarding infringement of property rights and ensuring the property serves the public interest. Applying the proportionality principle ensures that the deprivation, limitation or restriction of the right is not done arbitrarily but after the conclusion of a trial where the affected person(s) is given an opportunity to be heard that is procedural fairness.[92] Substantive fairness is also maintained, in that upon conducting the criminal and civil forfeiture proceedings, the courts are able to establish if the property was acquired unlawfully

89 Constitution, article 40(1).
90 Constitution, article 40(2).
91 Constitution, article 40(6). *Evelyn College of Design Ltd* v *Director of Children's Department & Another* CHR petition 228 of 2013 (27 September 2013), 15-17. *Multiple Hauliers East Africa Ltd* v *Attorney General & 10 Others* CHR petition 88 of 2010 (19 December 2013), 34. *Assets Recovery Agency v Rose Monyani Musanda & 2 others* Civil Application No 2 of 2020 (21st day of September 2020).
92 *Multiple Hauliers East Africa Ltd* v *Attorney General & 10 Others* n 91, 34.

and if so, justify forfeiture. Hence, this creates a valid exception to the protection of the right to property and ensures that the deprivation of property is not done arbitrarily.

Therefore, despite recognising an individual's right to property, it is necessary to give life to the intentions of parliament in enacting POCAMLA, that of taking away the proceeds and instrumentalities of crime from criminals and thus promoting the public interest. Ultimately, application of the proportionality principle in forfeiture proceedings ensures balance of these different interests and maintaining procedural and substantive fairness.

Additionally, the denial of the right to property may also be substantiated on the basis of protecting the public interest. Section 24 (1) of the Constitution provides that a right may be limited by taking into account the importance of the purpose for the limitation vis à vis the right.[93] The confiscation provisions target the forfeiture of proceeds and instrumentalities of crime. Targeting these elements helps to remove the incentives for crime, thereby deterring persons from using or allowing the property to be used for crime. It also eliminates or incapacitates some of the means by which crime may be committed. This cumulatively aids in advancing the ends of justice by depriving those involved in crime of the property concerned.

The position espoused above has authoritatively been stated in South African court decisions in considering similar forfeiture and human rights provisions. In a nutshell, the bench in *Mohunram & Another v National Director of Public Prosecutions & Others*,[94] pointed out that addressing the threats posed by proceeds and instrumentalities of crime, helps advance the public good of limiting crime by removing the means by which crimes are committed. Further that the protection of the public good is greater than the individual's right to illegally acquired property. Therefore, the utilisation of forfeiture proceedings in limiting an individual's rights to unlawfully acquired property is justified.

Nevertheless, unless dealt with circumspectly, forfeiture orders could lead to the arbitrary and unjust deprivation of the right to property. There is a need therefore, in exercising its discretion to grant forfeiture, that the court strives to strike a balance between protecting an individual's right to property on the one hand and protecting the public interest on the other.[95] To achieve this balance, the courts have advocated for the application of the principle of proportionality.

93 See *Issac Gathungu Wanjohi & Another* v *Attorney General & 6 Others* n 83.
94 *Mohunram & Another* v *NDPP & Others* n 54, 57-60; *Prophet* v *NDPP & Others* n 60, 30-34.
95 *Mohunram & Another* v *NDPP & Others* n 60, 57.

C. RIGHT TO A FAIR HEARING

This right encompasses many elements[96] but only those relevant to the current discussion will be considered, viz the right (1) to a fair and public trial;[97] (2) to be presumed innocent until the contrary is proved;[98] (3) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;[99] and (4) the right to legal representation.[100]

i. RIGHT TO A FAIR AND PUBLIC HEARING

In line with the Constitution, POCAMLA is very specific about guaranteeing the right to a public trial for laundering and forfeiture trials. This is because proceedings are to be heard in open court.[101] The only exception is in relation to *ex parte* applications and instances where the interests of justice require a closed hearing or to prevent harm ensuing to an individual.[102] This is in line with similar exclusions permitted under the Constitution.[103] Thus with regard to guaranteeing this right, it is rather straight forward. The contention is in ensuring a fair trial.[104]

For criminal forfeiture proceedings, they are part of the sentencing process which stems from a criminal trial after the guilt of the accused has been established. During the criminal trial, the prosecution must work at adducing sufficient evidence to prove beyond reasonable doubt the guilt of the accused. Various aspects in the trial such as presumption of innocence, right not to incriminate oneself until the prosecution discharges the burden of proof, cumulatively ensure that the accused is guaranteed of the entitlement and application of a fair trial throughout the process.[105]

In civil forfeiture, it may be argued that though the proceedings are *in rem,* ultimately there is a natural or juristic person having an interest in the property. Therefore, they should be granted the right to a fair trial considering they are in jeopardy of having their right to property interfered with. Contemplation of the various provisions that allow interested parties to file applications seeking the court to adjudicate on their rights in relation to targeted property points to this.[106] Such persons are permitted to file applications to determine and delineate their interests. Further, despite the strict time constraints in filing such applications, permission may be granted to file out

96 Under the Kenyan constitution the right consists of seventeen elements see article 50.
97 Constitution, article 50(1).
98 Constitution, article 50(2)(a).
99 Constitution, article 50(2)(o).
100 Constitution, article 50 (2) (g & h).
101 POCAMLA, section 124.
102 POCAMLA, section 124(1) & (2).
103 Constitution, article 50(8).
104 See generally C King, 'Civil forfeiture and article 6 of the ECHR: Due process implications for England & Wales and Ireland,' [34(3)] *Legal Studies* (2014) 371; R Ivory, 'The right to a fair trial and international cooperation in criminal matters: Article 6 ECHR and the recovery of assets in grand corruption cases' [9(4)] *Ultrecht Law Review* (2013) 147.
105 See *Phillips* v *United Kingdom* (n 59) para 34. See also *Gale and Another* v *Serious Organised Crime Agency* [2011] UKSC 49.
106 POCAMLA, sections 68, 93 & 94.

of time. Eventually, the courts are bound to hear and make determination on such interests before the making and enforcement of any forfeiture orders. These work towards ensuring the right to a fair trial. This advances the attainment of a fair trial as enunciated in *Livingstone Kunini Ntutu v County Council of Narok and 2 Others*.[107]

ii. RIGHT TO BE PRESUMED INNOCENT UNTIL PROVED OTHERWISE

The presumption of innocence is infringed if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is 'guilty' before guilt is established by law.[108] Simply, where the accused is convicted despite the existence of a reasonable doubt. As stated earlier criminal forfeiture stems from criminal proceedings which provide for the right to be presumed innocent until sufficient evidence is adduced to prove beyond reasonable doubt the guilt of the offender. Only then does criminal forfeiture follow. Consequently, the right to be presumed innocent will have existed throughout the trial until guilt is established.

However, in theory, presumption of innocence will be difficult to apply in civil forfeiture proceedings. This is because *strictu sensu* the proceedings are instituted against targeted property and not an individual. Nonetheless, it has been argued, albeit controversially, that ultimately there is a natural or juristic person with an interest in the property whose guilt or innocence it is necessary to establish in order to determine if it is fair to take away the property.[109]

It is the nature of civil forfeiture that could provide the justification that the right to be presumed innocent is not denied. In essence, the proceedings are not against an individual but against the 'property' itself. Therefore, no presumption of innocence will be infringed as the right is granted to natural persons and not inanimate objects.[110]Moreover in *Gale v Serious Organised Crime Agency*[111] it was reiterated that civil forfeiture proceedings do not include a criminal charge and therefore presumption of innocence does not apply.

There is also the possibility that civil forfeiture proceedings may be based on evidence that was used in a criminal trial for which an individual was acquitted. English courts in considering the matter have stated that this could be done and it does not interfere with the presumption of innocence. Primarily because although

107 Environmental Land Court case no. 1565 of 2000 (25 February 2013).

108 See *Gale and Another* v *Serious Organised Crime Agency* n 105.

109 Right to presumption of innocence is one of the rights that juristic persons too can enjoy. See P Oliver, Companies and their fundamental rights: A comparative perspective,' [64(3)] *International Comparative Law Quarterly* (2015) 661, 681.

110 Constitution, article 19(3) (a); 'The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.' *Hussein Khalid & 16 Others v Attorney General & 2 Others* CHR petition no. 324 of 2013 (26 August 2014), 53. Rees *et al* n 10, p. 2.

111 *Gale and Another* v *Serious Organised Crime Agency* n 105, 123. This has been reiterated by Kenyan courts in *Assets Recovery Agency v Quorandum Limited & two others* Miscellaneous Application No. 4 of 2017 (21st day of September 2018), 106.

the same evidence proved insufficient to satisfy the criminal standard of proof it may fulfil the civil standard of proof.[112] Therefore, use of the same evidence in finding unlawful conduct with regard to property does not contradict an acquittal in criminal proceedings.[113]

Nevertheless, caution has been sounded that in such cases the presumption of innocence could potentially be interfered with[114] where there is a procedural link between the criminal prosecution and the subsequent civil forfeiture proceedings.[115] A procedural link can be established if the court, in the civil proceedings, casts doubt on the correctness of the acquittal.[116] To avoid this, the court emphasised that the decision should be based on reasoning and language which goes no further than is necessary for the purpose of determining the issue before the court and without making implications of criminal liability.[117] Doing so will ensure that no procedural link is created between the criminal case and the civil forfeiture proceedings.

Bearing in mind that Kenya is yet to consider interpretation of forfeiture provisions in relation to human rights, the discussion above would provide guidance to the courts. Especially on how to ensure presumption of innocence is maintained in civil forfeiture proceedings that rely on evidence used in criminal proceedings that resulted in an acquittal. By doing so, ensuring that the right to presumption of innocence is upheld.

iii RIGHT AGAINST DOUBLE JEOPARDY

The phrase "not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted" in section 50(2)(o) of the Constitution infers the rule against double jeopardy.[118] The implication is, an individual should not be prosecuted or sentenced twice for substantially the same offence.[119] The right to a fair trial and by extension double jeopardy applies in relation to accused persons in a criminal trial.[120] Criminal forfeiture proceedings are *in personam* and are undertaken as part of the sentencing process; seeking to deprive the benefit he personally gained from committing the particular offence one is convicted for. Hence, it is applicable only once in relation to that particular offence. This is because once the sentencing process is complete, the matter is *res judicata* and the courts cannot seek to recover the amount again.

112 *Serious Organised Crime Agency* v *Hakki Yaman Namli & Another* [2013] EWHC 1200 (QB), 30-35.
113 Ibid, p 41.
114 See *Gale* v *Serious Organised Crime Agency* n 105, 134-139*; Serious Organised Crime Agency v Hymans & Others* [2011] EWHC 3332 (QB), 18.
115 *Gale and Another* v *Serious Organised Crime Agency* n 105, 44, 60 & 115.
116 *ibid,* 138; *Serious Organised Crime Agency* v *Hymans & Others* n 114, 18.
117 *Gale and Another* v *Serious Organised Crime Agency* n 105, 138; *Serious Organised Crime Agency* v *Hymans & Others* n 114, 18.
118 *Isaiah Mmuroki Imunya* v *Republic* Criminal Appeal no. 98 of 2018 (4October, 2018), 7.
119 See J A Sigler, 'A history of double jeopardy,' [7(4)] *The American Journal of Legal History* (1963) 283.
120 *State* v *Baloyi and Others* 2000 (2) SA 425 (CC), 20; *Nel* v *Le Roux NO and Others* 1996 (4) BCLR 592, 11.

Moreover, since forfeiture of criminal proceeds is a remedial sanction, not a punishment, it does not offend the double jeopardy rule. This is because double jeopardy only protects against two punishments given in separate proceedings for the same/single offence.[121] Yet, it is permitted for a court to impose both a remedial civil sanction (forfeiture) and a criminal punitive penalty (imprisonment) in the same criminal proceedings.[122] The court only has to ensure that there is proportionality. That is, the court has to take full account of all separate sanctions imposed and ensure that it is commensurate with the defendant's criminal liability.

With regard to NCB, it has been stated that "civil forfeitures generally… do not constitute 'punishment' for purposes of the double jeopardy clause."[123] Essentially, this is because double jeopardy seeks to protect against the following: a second prosecution for the same offence after an acquittal or a conviction and; multiple punishments for the same offence.[124] Accordingly, since civil forfeiture is an action *in rem*, that is, against the particular property and it seeks to take away 'tainted' property used or intended for use to commit crime; it is a remedial action and not a form of punishment against an individual. Additionally, courts in various jurisdictions have held that civil forfeiture proceedings are not criminal in nature and do not impose a sentence.[125] Therefore, the double jeopardy rule does not attach.

Furthermore, whether or not a person can be considered 'an accused' is dependent on the type of proceedings; civil or criminal.[126] NCB proceedings have been upheld as civil in nature both in domestic and international courts.[127] Therefore, in civil forfeiture the owner of targeted property is not an accused person facing criminal prosecution and the potential threat of imprisonment for the owner does not arise or exist.[128] Consequently, the property owner falls outside the constitutional definition of an accused person, who is granted the right against double jeopardy.[129]

. *iv RIGHT TO REPRESENTATION BY LEGAL COUNSEL*

In criminal forfeiture, POCAMLA grants the court discretion to make an order allowing for the provision to pay for legal counsel to be made out of the property

121 'A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple Punishment Prohibition' [90(3)] *The Yale Law Journal* (1981) 632; C B Hessick & F A Hessick, 'Double Jeopardy as a Limit on Punishment,' [97(1)] *Cornell Law Review* (2011) 45.

122 E M Anielak, 'Double Jeopardy: Protection against Multiple Punishments,' 61(1) *Missouri Law Review* (1996) 169, 171. POCAMLA, section 61(1).

123 *United States* v *Ursery* (1996) 116 S. Ct. 2135. *Gilligan v Criminal Assets Bureau* [2001] 4 IR133; *Chatterjee v Ontario (Attorney General)* 2009 SCC 19; C Doyle, 'Crime and Forfeiture,' (2013) Congressional Research Service Report RS22005, 29 – 30.

124 Anielak n 122, 171.

125 *Gale and Another* v *SOCA* n 105, 119 - 124; *Chatterjee* v *Ontario* 2009 SCC 19.

126 See *Nel* v *Le Roux NO and Others* n 120.

127 See *Gale and Another* v *SOCA* n 105; *Chatterjee* v *Ontario* n 125; *Engel* v *The Netherlands (No 1)* (1976) 1 EHRR 647; *Walsh* v *United Kingdom* Application no. 43384/05 (November 2006).

128 D Gupta, 'Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis,' [37] *Harvard Civil Rights-Civil Liberties Law Review* (2002) 159, 170-175.

129 Ibid, p 178. See also *State* v *Baloyi and Others* n 120.

that is to be placed under a restraint order and subsequently a confiscation order. This ensures that the accused can pay for legal counsel and thus enjoy the right to legal representation.[130] In civil forfeiture, it may be argued that this right is not infringed as it is granted to an individual and not a 'thing'. The proceedings are against the property itself. The affected party who appears in the proceedings does so as someone having an interest in the property and not as an accused person. Furthermore, under Kenyan law the right to legal counsel is only granted to accused persons in criminal proceedings only.[131]

Nonetheless, for civil forfeiture although section 88(1) specifically only provides for exceptions in relation to living expenses these may be extended to the provision of legal services. This is inferred from the reading of section 134(i)(c) which provides that the cabinet secretary in-charge of finance matters in consultation with the chief justice are to prescribe the maximum allowable cost for legal services. These costs pertain to an application for a preservation or forfeiture order or for proceedings in defence of a criminal charge related to property that is subject to a preservation order. This indirectly, satisfies the right to legal representation as the affected individual is given the means to pay for such services.

V. SAFEGUARDS TO ENSURE ASSET FORFEITURE DOES NOT INTERFERE WITH RIGHTS UNNECESSARILY

A. PROPORTIONALITY

The principle is of German origin where it was applied in limiting the discretionary powers of the police.[132] Since then it has gradually gained acceptance worldwide and is considered a general principle of international human rights law which is applied by various human rights bodies.[133] Proportionality *strictu sensu* requires measuring the relative intensity of interference in a right with the importance of the aim sought.[134] To achieve proportionality consideration should be given to the nature of the right, importance of the purpose of the limitation (suitability), nature and extent of the limitation (necessity) and the relation between the limitation and its purpose.[135]

Ultimately, the application of proportionality seeks to ensure a fair balance between the interests of individuals and the community vis à vis the government's legitimate

130 POCAMLA, section 68(5).
131 POCAMLA, s 50(2). *Paul Nduati Mwangi* v *Stephen Ngotho Mwangi & 9 Others* ELC petition no. 210 of 2014 (6 March 2015), 25.
132 R Clayton, 'Regaining a sense of proportion: The Human Rights Act and the proportionality principle,' [5] *European Human Rights Law Review* (2001) 504, 504. M C Eliya & I Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013), 24-32
133 See Takahashi n 40 at 449-463; Eliya & Porat n 132, 10-14.
134 Takahashi n 50, 452.
135 Reid & Visser n 51, 9; Takahashi n 50, 450-451; Eliya & Porat n 132, 2.

objectives pursued by the limitation of a right.[136]Proportionality ensures a balance between advancing the aim of forfeiture and avoiding arbitrary deprivation of property.[137] Essentially, the "proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account."[138]

In civil forfeiture, the definition of a proportionality analysis was succinctly stated in *Mohunram & Another v NDPP & Another*. It requires "weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence."[139] The South African courts are more instructive on how to conduct a proportionality analysis.. First, the court must determine whether they are dealing with the confiscation of the proceeds or with instrumentalities of crime. As stated in *S v Shaikh & Others;*[140] distinction has to be made because the purpose for each type of confiscation is different. Therefore, the considerations to be made are unalike. Targeting the proceeds of crime is aimed at ensuring that criminals are deprived of the benefit of their activities whereas targeting instrumentalities aims to prevent the continuation or occurrence of crime.[141] Subsequently, the court needs to establish the proportionate relationship between the scope of assets liable to forfeiture and the underlying criminal activity.

Thus, for instrumentalities, the court should establish that the property in a real or substantial sense facilitates or makes possible the commission of an offence. That the property is instrumental in and not merely incidental to the commission of an offence, as enunciated in *Prophet v National Director of Public Prosecutions*.[142] The court in *FNB & Others v Minister of Finance*[143] further showed that the property must play a reasonably direct role in the commission of the offence. In forfeiture of proceeds of crime, the court must establish the extent to which the property is derived directly from the criminal activities and also consider other penalties meted out on the defendant.[144] Essentially the taint of the property has to be significant. Since a mere

136 Reid & Visser n 51, 9. Kruger n 10, 144.
137 *Mohunram & Another* v *NDPP & Another* n 54, 130; *Van der Burg and Another* v *NDPP* 2012 (2) SACR 331 (CC); *R* v *Waya* [2012] n 58, 20-22; *R* v *Chahal & Another* [2015] EWCA Crim 816.
138 *Jacqueline Okuta & Jackson Njeru* v *Attorney General & Others* n 45, 10.
139 *Prophet* v *NDPP* n 60, 30; *Mohunram & Another* v *NDPP & Another* n 54, 61.
140 *S* v *Shaikh & Others* 2008 (2) SACR 165 (CC), 68.
141 See *NDPP* v *Prophe*t [2003] 8 BCLR 906 (C), 3 & 4; *S* v *Shaikh & Others* n 140, 50-52.
142 *Prophet* v *NDPP* n 60, 27.
143 *First National Bank of SA Limited t/a Wesbank* v *Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank* v *Minister of Finance* 2002 (4) SA 768 (hereinafter *FNB & Others* v *Minister of Finance*). T Roux, 'The "arbitrary deprivation" vortex constitutional property law after *FNB*' in S Woolman & M Bishop (eds) *Constitutional Conversations* (Pretoria: Pretoria University Law Press, 2008), p 265-281.
144 See *Prophet* v *NDPP* [2005] n 60, 36; *S* v *Shaikh & Others* n 140, 64-67.

criminal taint, for instance a modest association between the property and the crime, would not be sufficient.[145]

A granted forfeiture order that does not take these elements into consideration is likely to be arbitrary and unjust. However, the court in *Prophet v National Director of Public Prosecutions* sounded a word of caution that "a mere sense of disproportionality should not lead to the refusal of an order."[146] The court emphasised that for a forfeiture order to be considered arbitrary and unconstitutional, it should be significantly disproportional.[147]

Proportionality in criminal forfeiture is an important issue when considering the total benefit obtained by an accused person. The determination of this amount will guide the court in setting the final amount that the accused will pay by way of the confiscation order. This entails a factual enquiry to establish the exact benefit the defendant received and it requires a factual historical enquiry into past transactions.[148] In *R v Waya*[149] the court stated that where the proceeds of crime are returned to the loser, it would be disproportionate to treat such proceeds as part of the 'benefit obtained' by a defendant; since it would amount to 'a financial penalty' or 'an additional punitive sanction'. In *R v Harvey*[150] the court held that it would be disproportionate to include any value added tax that had already been accounted for and/or paid for, in calculating the total benefit obtained.

To ensure proportionality in cases of joint criminal enterprise the court is to consider the benefit attributable to each defendant. This is achieved by establishing the capacity in which each defendant receives the proceeds of crime. In the case of *R v Ahmad & Another, R v Fields & Another*[151] the court held that it would be disproportionate for the same sum to be recovered from two co-conspirators in respect of the same property which they had obtained jointly.[152] If the benefit was received jointly by the conspirators, each is deemed to have received the proceeds equally. Where there is no evidence to show the proceeds were jointly received, the court is entitled to divide the proceeds by the number of conspirators.[153]

145 *FNB & Others* v *Minister of Finance* n 143, 100; M M Gallant, 'Retreating into doubt: Tainted finance, civil devices and the rule of law' (2012) Conference Proceedings OBEGEF, Interdisciplinary Insights on Fraud and Corruption, available at *http://ssrn.com/abstract=2103785* accessed on 15 April 2015 at 7.

146 *Prophet* v *NDPP* n 60, 37.

147 Ibid. See also *NDPP* v *Gardener & Another* [2011] (1) SACR 612 (SCA).

148 Crown Prosecution Service *DPPs GUIDANCE FOR PROSECUTORS ON THE DISCRETION TO INSTIGATE CONFISCATION PROCEEDINGS* (2009) available at https://www.cps.gov.uk/sites/default/files/documents/news/prosecutors_discretion_280509.pdf accessed on 9/ May 2019 at 3; *R* v *May* [2008] UKHL 28, 48; *NDPP* v *Ramlutchman* (677/15) [2016] ZASCA 202 (9 December 2016), 21; *NDPP* v *Gardener & Another* [2011] (1) SACR 612 (SCA), 28-35.

149 *R* v *Waya* n 5, 28-33.

150 [2013] EWCA Crim 1104.

151 [2014] UKSC 36.

152 Ibid, p 71-75.

153 For further discussion on apportionment in the case of co-conspirators see *R* v *May* n 148; *R* v *Gibbons* [2002] EWCA Crim 3161; [2003] 2 Cr App R (S) 169; *S* v *Shaikh & Others* n 140.

Overall, for criminal and civil forfeiture, when courts are addressing the issue of proportionality where substantive questions of justice are at stake, they must seek to recognise instances of disproportionality, notwithstanding inconvenience in determining evidential issues.[154] Hence, in general, to ensure proportionality the proper legal action requires, a more "purposive approach than the mechanical application of the law of property."[155] This is because

> "there will be obvious difficulties in applying established legal principles to the allocation of liability … as the rules relating to matters such as acquisition, joint and several ownership, valuation of property and interests in property, and the rights and liabilities of owners, both as against the world and inter se, have been developed by the courts over centuries by reference to assets which were lawfully acquired and owned".[156]

Consequently, the approach when dealing with forfeiture of criminal assets adaptation is needed so that the judge is able to give effect to parliament's intention as expressed in the language of the statute, that of dealing with serious crime. Therefore, the statutory language must be given "a fair and purposive construction in order to give effect to its legislative policy".[157] Additionally, the judge is to be guided by the fact that the proportionality test "is a fluid test requiring those analysing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations."[158]

Finally, it is correct to infer that Kenyan courts may be guided by South African and United Kingdom jurisprudence on application of proportionality in criminal and civil forfeiture proceedings. This will ensure that the application of POCAMLA is in line with the bill of rights.

B. PERMITTED EXCEPTIONS AND EXCLUSIONS DURING THE FORFEITURE PROCESS

Provisions for reasonable living or legal expenses of the defendant as well as for enabling the carrying on of any trade, business, profession or occupation, are permitted restraint orders exceptions.[159] For preservation orders, exclusion can only be made for reasonable living expenses.[160] Collectively, these are termed as permitted exceptions under POCAMLA and are applied during the preliminary stages of the asset forfeiture process. Granting these exceptions will mitigate the harsh effect of intrusion into the rights of persons affected by the orders given.

154 *R* v *Harvey (Jack Frederick)* n 8.
155 Ibid, p 11.
156 Ibid.
157 Ibid, p 12.
158 *Jacqueline Okuta & Jackson Njeru* v *Attorney General & Others* n 45, 10.
159 POCAMLA, section 68(5).
160 POCAMLA, section 88(1).

For example, making provision for a defendant's legal representation or an affected party's living expenses from the restrained property would be in keeping with one's fundamental right to legal representation and right to property.[161] Further, it is reasonable that a defendant should not be prevented from carrying on his legitimate business and therefore, making provision for such will enable him to do so.[162] Moreover, the income earned from the business can be used to pay for the person's legal representation.

Making these exceptions, is generally undertaken during the beginning of the judicial phase as part of the considerations to be made by the court in determining whether to give a restraint or a preservation order. However, this could be done as a separate process in certain instances where amendment to an already granted restraint or preservation order is sought. However, in granting these exceptions jurisprudence emphasizes that they should be made only for reasonably incurred expenses.[163]

Permitted exclusions are applied at the final stage of the judicial phase, before the court can issue a final forfeiture order in the civil forfeiture process. In providing for exclusions the aim is to protect the interest(s) in terms of property rights or other personal claim(s) a third party may have in relation to the targeted property, hence ensuring they are recognised and safeguarded by the court. This promotes an individual's rights as it avoids arbitrary deprivation of property.

Two steps are involved in determining whether certain interests may be excluded. First, making an order declaring the nature, extent and value of the person's interest under section 93. Second making an order excluding the declared interests from operation of the forfeiture order under section 94. This implies only a purchaser who buys the property in good faith and without knowledge of the properties illegal origin is protected. Such an individual will have his interests excluded when a forfeiture order is made.

Exclusion will be ordered if the innocent/ignorant owner proves their interest in the property, further that they neither knew nor had reasonable grounds to suspect that the property was an instrumentality or proceeds of crime. For proceeds of unlawful activities that the interest was acquired legally and for consideration, the value of the consideration should not be significantly less than the value of the interest. In determining interest, the widest possible interpretation is given. This means 'any right' that one could possibly have under law, not just ownership, can be recognised.[164]

161 Kruger n 10, 91; *NDPP* v *Meir Elran* 2013 (1) SACR 429 (CC), 27.
162 Rees *et al* n 10, 105.
163 *Serious Organised Crime Agency* v *Azam & Others* [2013] EWHC 1480(QB), 53-55 & 64; S 252 (4) & S 245C (5) Proceeds of Crime Act 2002. S 26(6) & 44(1) Prevention of Organised Crime Act 1998; *NDPP* v *Meir Elran* n 161, 25.
164 *NDPP* v *Cook Properties* n 60, 22.

In relation to instrumentalities, the court must undertake a two-part enquiry.[165] First determine that the property is indeed an instrumentality of an offence and in making this inquiry it is not relevant for the court to consider the owner's culpability. That is guilt, innocence, ignorance or wrong doing of the owner.[166] Only at the second stage as the court considers the exclusion of certain interests does the owner's state of mind become relevant.[167] Essentially, in order to establish if the ignorant or innocent owner's defence can stand the court must consider the culpability of the owner.

In summary, implementation of these exceptions and exclusions will promote enforcement of rights in relation to the defendant or an affected party. They help to mitigate the draconian intrusion into the rights of persons affected by the asset forfeiture orders.

C. RIGHTS TO SEEK VARIATION OR TO APPEAL ORDERS AND TIME LIMITATIONS

Throughout POCAMLA, both for criminal and civil forfeiture the defendant/ interested party is given ample opportunities to challenge a certain order before it is made or to seek for its variation after it has been made. This is done through the right to appeal and by ensuring that the prosecution serves notice on a defendant or interested party of an application that has been lodged. For example, criminal forfeiture section 68(4) mandatorily requires that the court when granting a temporary restraint order (TRO) provide for the period of notice to be given to persons affected by the order. This ensures that any affected person has an opportunity to oppose the TRO before it is made final. This serves to secure the right to a fair hearing of the affected individual. Ultimately, this balances the competing interests. The right to seek variation of a restraint or confiscation order is also provided for.[168]

For civil forfeiture, if a preservation order is granted by the court or a forfeiture application is lodged the Asset Recovery Agency director must within 21 or 14 days respectively serve any interested party.[169] This permits an interested party to lodge a review application. Further, a preservation order expires automatically after ninety days following gazettement, unless there is an application for a forfeiture order over the property subject to the preservation order.[170] For interested parties they too are granted the right to oppose or seek variation or recession of a preservation or forfeiture order.[171]Besides, a forfeiture order cannot take effect until the permitted period for filing an application for variation has elapsed or before such an application or appeal has been determined.[172]

165 Ibid, para 21. Kruger n 10, 147.
166 *NDPP* v *Cook Properties* n 60, 21.
167 Ibid.
168 See POCAMLA sections 68(10), 72(3), 73(3), 74 & 78.
169 POCAMLA, sections 83(1), s 90(2).
170 POCAMLA, section 84.
171 POCAMLA, sections 83(3), 89, 91, 93, 96.
172 POCAMLA, section 92(6).

These opportunities permit an affected/interested individual to be heard by the court and present their arguments, consequently perpetuating procedural fairness as required under the proportionality doctrine.[173] Further, it also promotes substantive fairness since the court has an opportunity to hear both sides before it can establish if the property was acquired unlawfully and if so, justify forfeiture. This too is in keeping with the proportionality doctrine. Ultimately, this upholds the deprivation of property is not done arbitrarily and that limiting an individual's rights to unlawfully acquired property are justified.

D. REVERSAL OF THE BURDEN OF PROOF

The general rule in the conduct of trials is that the burden of proving the allegation(s) rests on the prosecution. However, in certain instances the burden is placed on the defendant hence the term reverse burden of proof. This can be in the form of a reverse persuasive burden or a reverse evidential burden. The former, "requires the defendant to prove his innocence on a balance of probabilities"[174] while the latter 'requires the defendant to raise a matter of exculpation as a genuine issue.'[175]

Under civil forfeiture these provisions are found in section 94 which burdens the owners of property pleading the innocent or ignorant owner with a reverse burden of proof and if unable to discharge it, their interests will not be excluded. For criminal forfeiture, section 65 places an evidentiary burden on the defendant to rebut the assumptions made by the court and failure to dispose this burden may invite the making of a confiscation order against targeted property. The assumption may be that such provisions would interfere with the right to a fair trial, specifically the presumption of innocence and right to remain silent.

Courts at the international and domestic level have upheld the use of reverse provisions.[176] Nonetheless, it has been emphasised that such provisions be confined within reasonable limits[177] and that the proportionality principle is applied to ensure the reversal is justified.[178]Various justifications can be raised for the use of these provisions including the seriousness of the crime, knowledge peculiar to the defendant and difficulties of proof.[179] With regard to asset forfeiture, justification for reverse provisions rests on the fact that since activities involving criminal proceeds

173 See *Peter Igiria Nyambura* v *DPP* Criminal Revision no. 17 of 2018 (20 April 2018).

174 D Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act,' [66(1)] *Cambridge Law Journal* (2007) 142, 143.

175 Ibid.

176 See *Salubiaku* v *France* (1988) 13 EHRR 379, *Sheldrake* v *Director of Public Prosecutions* [2004] UKHL 43, *S* v *Zuma & Another* 1995 (2) SA 642 (CC), *State* v *Manamela & Others* n 30, *Isaac Robert Murambi* v *The Attorney General & 3 Others* constitutional petition no. 3 of 2016 (27 June 2017). Further, articles 12(7) & 5(7) of the Palermo Convention and Vienna Convention respectively, encourage the use of reversal of onus to prove such provisions.

177 *Salubiaku* v *France* n 176, 28.

178 *Sheldrake* v *Director of Public Prosecutions* n 176, 20-21.

179 *State* v *Manamela & Others* n 30, K C Ong, 'Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights,' [32] *University of Tasmania Law Review* (2013) 248, 256-260.

are conducted in a clandestine manner it may be difficult for the prosecution to access the relevant information needed for proof. Yet, such information is within the knowledge of the defendant/interested party. Further, dealing with criminal proceeds is a serious offence considering its implication on the society and that crime should not pay. Hence, asset forfeiture seeks to take away these benefits of crime. As stated earlier this was the one of the motivations for the enactment of asset forfeiture laws. Therefore, this legislative intention can be achieved by imposing a reverse onus as stated in *State v Manamela & Others*.[180]

Further, the risk of reverse burdens can and is addressed through "varying the standard of proof throughout the asset forfeiture process."[181] Under POCAMLA, in criminal forfeiture at the preliminary stage of seeking a restraint order the prosecution's burden is to the level of 'reasonable grounds to believe' which is lower than the balance of probabilities required before a confiscation order can be granted. In civil forfeiture, the preservation order is granted if the prosecution is able to provide 'reasonable grounds to believe' the property concerned is the proceeds or instrumentalities of crime. However, a higher standard of balance of probabilities is required for a forfeiture order to be granted. This two-stage procedure helps to ensure that "the State shows that its suspicions are justified (either as being reasonable or on the balance of probabilities) … [and] also restricts the State's ability to initiate such proceedings without a certain level of proof."[182]

VI. CONCLUSION

By and large, POCAMLA provisions will interfere with the rights of individuals. Specifically, the rights of those who will be subject to or affected by the asset forfeiture provisions. Subsequently, it is for the courts to seek a balance between realisation of the guaranteed rights and achieving the goal of POCAMLA; taking away the proceeds or instrumentalities of crime. In doing so, Kenyan courts and other stakeholders should bear in mind the threat of criminal proceeds in the country, since if retained they encourage the perpetration of serious crime.

Therefore, they should strive to give life to the aim of parliament in enacting POCAMLA, that of depriving criminals of the proceeds of crime while balancing the rights of individuals and public interest as granted by the Constitution. This objective can be achieved by denying individuals the enjoyment of criminal proceeds while protecting affected individuals' rights and the public from the effects of

180 (200) (1) SACR 414 (CC), 89. See also Australian law Reform Commission, 'Tradiational Rights and Freedom Encroachment by Commonwealth Law', (2015) Interim Report 127. *Assets Recovery Agency v Rose Monyani Musanda & 2 Others* Civil Application No 2 of 2020 (21st day of September 2020), 112.

181 M Tromme, 'Waging War Against Corruption in Developing Countries: How Asset Recovery can be Compliant with the Rule of Law,' [29] (140) *Duke Journal of Comparative & International Law* (2019) 165, 203.

182 Ibid.

proceeds of crime. Further, the rule of law requires a balance to be struck between the need to combat serious crime and to uphold individual rights of persons whose property is affected by forfeiture proceedings. This is a prerequisite to the effective implementation of asset forfeiture.

Additionally, in view of the extant state of limited jurisprudence from the Kenyan courts on the application of asset forfeiture provisions and human rights issues, an exploration of United Kingdom and South African jurisprudence is necessary. It would be of persuasive value and provide guidance on the treatment of human rights concerns arising consequent to the application of POCAMLA. This would be beneficial in assisting Kenya develop its jurisprudence in this area.

Ultimately, despite POCAMLA's potential challenge to constitutional principles the courts and other stakeholders ought to recall, the present threat arising from criminal proceeds and that the asset forfeiture regime could assist in dealing with this threat. Moreover, other jurisdictions have affirmed the constitutionality of similar statutory regimes. Therefore, borrowing the words of Cameron J, asset forfeiture should be embraced "as a friend of democracy, the rule of law and constitutionalism and as indispensable in a world where the institutions of State are fragile and the instruments of law sometimes struggle for their very survival against criminals who subvert them."[183] Besides, if the different measures discussed, with regard to securing a balance between implementation of asset forfeiture and protecting an individual's rights are applied, fairness can be achieved. Overall, the courts need to make certain that asset forfeiture provisions are not used to deny individuals their rights as well as ensuring that criminals and illicit proceeds are not protected under the guise of preserving human rights.

183 *National Director of Public Prosecutions V Meir Elran* n 161, 70.

HABITATION UNIONS AND NEOLIBERAL DISCONTENTS: KENYA'S LEGAL DILEMMA AND THE NEED TO RETHINK FAMILY LAW REFORMS

Nancy Baraza*

ABSTRACT

In Kenya, non-marital relationships also known as cohabitations or "come we stay" have existed side by side with the marriage institution since pre-colonial times. Although not celebrated like marriage, these relationships have been part of Kenya's family history and customarily, they formed part of a continuum of the institution of marriage. Most of these relationships are driven by pre-marital pregnancies and lack of resources required for formal marriage affecting most youth. Formal marriages in Kenya presently require huge amounts of money either to meet dowry requirements or weddings, which many youth, who are mostly jobless, cannot afford. This forces couples to cohabit, with the hope that they might one day make money and get married formally. Although these cohabitations are a reality, both the colonial and postcolonial Kenyan States have not been able to legally recognise them. This is a historical problem. Failure to adopt legislation to regulate cohabitations was exacerbated by colonialism and its legal structures, which preferred marriages and frowned upon non marital relationships. Legal intolerance to cohabitations was a Judeo-Christian culture that prevailed in Britain at the time of colonialism.

1. INTRODUCTION

In Kenya, non-marital relationships also known as cohabitations or "come we stay" have existed side by side with the marriage institution since pre-colonial times. Although not celebrated like marriage, these relationships have been part of Kenya's family history and customarily, they formed part of a continuum of the institution of marriage.[1] Kamau states that heterosexual cohabitations have historically been part and parcel of some African customary ways of marriage which traversed the boundaries of legal systems and defy conventional categorisation of family law systems in Kenya.[2] Meekers [3] too argues that cohabitations were part of the continuum of traditional marriages. Marriage and union, in his view, are not clearly defined (such as through marriage ceremony as a discreet event in Western

* The author holds an LLB (Hons), LLM and PhD from the University of Nairobi. She is a Senior Lecturer at the University of Nairobi, School of Law.

1 W Kamau, Customary Law and Women's Rights in Kenya. http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf P 4.

2 Ibid

3 D. Meekers. "The process of marriage in African societies: A multiple indicator approach," Population and Development Review, 1992. 18(1): 61–79, P 71

societies), and customary marriage is a process composed of several stages and it is difficult to determine when a union started.[4]

Cohabitation is becoming prevalent in Kenya. Kabeberi-Macharia and Nyamu note that cohabitation unions are on the increase in Kenya due to *the* reconfiguration of the family units, increased urbanisation and increased isolation of young people from their family networks, as well as economic and social reasons.[5] Recent qualitative data from this study in the Kibera slums of Nairobi reveal that marriage processes are fast changing, favouring 'come we stay', relationships.[6] Most of these relationships are driven by pre-marital pregnancies and lack of resources required for formal marriage affecting most youth. Formal marriages in Kenya presently require huge amounts of money either to meet dowry requirements or the cost of weddings, which a majority of the youth, who mostly are jobless, cannot afford. This forces them to cohabit, with the hope that they might one day make money and get married formally.[7]

Although these cohabitations are a reality, both the colonial and postcolonial Kenyan State have not been able to legally recognise them. This is a historical problem. Failure to adopt legislation to regulate cohabitations was exacerbated by colonialism and its legal structures, which preferred marriages and frowned upon non marital relationships. Legal intolerance to cohabitations was a Judeo-Christian culture that prevailed in Britain at the time of colonialism.[8] Although Kenya gained independence from Britain in 1963, and despite the fact that presently Britain legally protects civil unions that are akin to cohabitations, Kenya maintains intolerance towards them. As a result, the post-colonial Kenyan State has failed to put in place a legislative framework to protect the rights of parties that find themselves in cohabitation unions, exposing them to precarious lives.[9]

Recent legal reforms in family law in Kenya were widely expected to end the historical marginalisation of cohabitation and offer these unions legitimacy. But this was not to be as reforms in the Marriage Act, 2014 failed to do so, hence ccolonial legal institutions that regulated personal laws in Kenya continue to shape the policies of the postcolonial government. This contrasts sharply with Kenya's own reformist spirit in family law over the past few years.[10] For instance, today the laws governing child custody and child support have changed substantially over the last

4 Ibid
5 Ibid
6 J Kabeberi-.Macharia & C Nyamu. 'Marriage by affidavit: Developing Alternative Laws on Cohabitation in Kenya'. 1997, 46 *Zimbabwe Law Review* 14. p 3.
7 Ibid
8 See S Kang'ara, "*BEYOND BED AND BREAD: MAKING THE AFRICAN STATE THROUGH MARRIAGE LAW REFORM -- CONSTITUTIVE AND TRANSFORMATIVE INFLUENCES OF ANGLO-AMERICAN LEGAL THOUGHT*". 9 Hastings Race & Poverty L. J. 353, 2012. available at Comparative L. Rev.
9 Ibid
10 Ibid

few decades, lessening the distinction between marriage and cohabitation in terms of parental rights and obligations. The distinction between legitimate and illegitimate children has virtually disappeared, so that if paternity has been established, child custody issues following the dissolution of a cohabiting union or a marriage are not very different.[11]

Additionally, family law is undergoing significant changes globally, affecting not only marginal issues, but also the very heart of Family Law: marriage and filiation - relationships. In the postmodern world today, families have changed, the ideas about family and family relationship have changed, public policies relating family have changed, and the laws concerning families have changed too.[12] As argued by B.S. Trask, today, and as a departure from the traditional understanding of family, many individuals and families are constructed and maintained through social bonds and support networks instead of biological ties that historically characterise the family. Instead, individuals are forming "families of choice" to whom they turn for emotional, financial, and physical assistance.[13] On this side of the coin and in contrast to formalism, there are genuine concerns that cohabiting families face numerous practical problems as married families and that family law should become more functionalist, intervening to protect whoever may be vulnerable when relationships end.[14]The law is taking on a more versatile nature to address the challenges of postmodern family formations.

The main concern of this article is why Kenya continues to legally marginalise cohabitation family formation even as evidence shows that this is almost the dominant mode of family and in the face of human rights and constitutional imperatives which call for equal treatment of all irrespective of family or marital status.[15] The article argues that continued legal marginalisation of cohabitation unions is influenced by a neoliberal ideology which values marriage which it credits with economic stability as opposed to non-marital relationships which it suspects may cause instability in terms of economic outcomes.[16]

The persistence of colonial family laws and institutions presently sustain the neoliberal agenda of ensuring the efficiency of capitalist markets. Legal recognition and protection of cohabitation unions will, in this view, not serve the interests of

11 W. D Manning & P J Smock. Measuring. Modelling Cohabitation: New Perspectives from Qualitative Data. Journal of Marriage and Family, 2005. 67(4):989–1002, p 990.

12 C Martínez de Aguirr. The evolution of Family Law: changing the rules or changing the game? Conference Paper, · October 2014. Available at www.law.byu.edu/page/categories/marriage_family/conferences/.../evolution.pdf, p 5.

13 B.S. Trask (2010). Globalization and Families: Accelerated Systemic Social Change. (Springer-Verlag New York).

14 Ibid

15 See Article 45 and Article 27of the Constitution of Kenya.

16 S Lundberg, RA. Pollak & J Stearns. Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing,Journal of Economic Perspectives—Volume 30, Number 2, 2016, P 79–102, p 90.

neoliberal capitalism due to the loud 'noises' by religious and moral actors who pose the danger to destabilise the neoliberal market and also subvert the preferred economic model in relation to families.[17] Indeed, the central neoliberal concerns in the period of decolonisation were to constitute market subjects, secure the rights of investors, and inculcate what Friedrich Hayek called the "morals of the market".[18] It should also be noted that Law within a neoliberal context does not necessarily exist for the attainment of universal justice. Hence, the fact that laws are reformed or new constitutions are drafted does not mean that the 'subalterns' of yesteryears will benefit from it to escape marginalisation. Attempts at legal reforms which may threaten the stability of the capitalist market are left to fall by the wayside, as is the case with family law reforms to regulate non marital unions in Kenya. Reformers would rather these unions exist quietly under the radar.[19]

Although neoliberalism underpins the current dilemma for non-marital relationships, few studies have problematised it in that context. Dominant research around the subject has tended to focus on the judicial responses legal problems posed to these relationships, few address the philosophical underpinnings to it. Few also address the issue of the role of law in the legitimisation or delegitimisation of sections of society and hence the need for clear legislation to protect the marginalised. The article argues that unless the law reformers and constitutional framers deconstruct neoliberal laws, human rights a progressive constitution and adoption of international human rights principles and standards will not secure equality, social and economic inclusion for cohabitation relationships. The promise of equality will just remain that – a promise. The inertia exhibited by Kenyan law reformers and law makers in post-colonial era reflects the colonial hangover that numbs them in the face of legitimate social challenges and realities. At the back of their minds are the imperatives to sustain the neoliberal agenda of stability in the markets.

Adopting postcolonial and decolonisation theories, this article argues that unless law makers and law reformers in Kenya call out liberal colonial legal posture and get decolonised, no meaningful transformative law making and law reform will be embraced to accommodate and protect sections of society such as cohabitation family formations that colonialism delegitimised and marginalised.

II BACKGROUND

Historically, non-marital relationships to the Kenyan State are what Gavin Smith calls 'surplus populations which have not attracted State intervention.'[20] Surplus population is used here not in Marx's principle that the existence of relative

17 Ibid

18 F Hayek. The "morals of the market". This article originally appeared in The Unfinished Agenda: Essays on the Political Economy of Government Policy in Honour of Arthur Seldon (1986).

19 Ibid

20 G A. Smith (2011). Selective Hegemony and Beyond-Populations with "No Productive Function"1: A Framework for Enquiry. Routledge.

surplus population is determined by the immanent conditions of the mode of social production. Nor is it understood in the Malthusian theory of population which argues that resources generated by technological progress and land expansion are channelled primarily towards an increase in population size, with negligible long-run effects on income per capita.[21] It is used here to mean a population that is at odds with State power and which destabilises and upsets the economic rules of incomes and consumption. In neoliberal parlance, these are populations with 'no economic capital' to attract State intervention.[22] They are what Gramsci[23] and Spivak call the "subaltern"[24] – a population that colonialism has excluded from the socio-economic and cultural institutions of society.[25] Such sections of society forcefully live outside the law or the law just leaves them to exist without its intervention. The approach adopted by the law in Kenya can be explained by a quotation by Napoléon, '*Les concubinsignorent la loi, la loi ignore donc les concubins*.' This expression essentially meant '[c]cohabitants ignore the law, so the law ignores them' .[26]this has been the fate of cohabitants in Kenya.

In 2010, Kenya adopted a progressive Constitution which is undergirded by internationally recognised principles of equality, non-discrimination, equity, social justice, respect of human dignity, democracy, inclusivity and the guarantee of social economic and cultural rights of all.[27] Kenya is also signatory to a plethora of international and regional human rights instruments which guarantee equality, non-discrimination, and respect for human dignity. These include the International Convention of The Civil And Political Rights (ICCPR),[28] the International Convention of Economic, social and cultural Rights (ICESCR),[29] International Convention of The Elimination of All Forms of Discrimination Against Women (CEDAW),[30] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[31] the International Convention on the Rights of the Child (ICRC)[32]and the African Charter on the Rights and Welfare of the Child, which guarantees human

21 See Thomas Robert Malthus. "Principle of Population" (1798) and modified in 1803. Electronic Scholarly Publishing. Foundations of Classical Genetics.
22 See generally G Kitching. Class and Economic Change in Kenya: The Making of ta African Petite Bourgeoisie 1905-1970.
23 Q Hoare & G N Smith, (Trans. and ed.) (2004). Selections from the Prison Notebooks of Antonio Gramsci. Chennai. (Orient Longman).
24 G C Spivak, "Can the Subaltern Speak?" in Cary Nelson and Larry Grossberg, eds. *Marxism and the interpretation of Culture*. Chicago: University of Illinois Press, 1988: 271-313.
25 Ibid
26 J Scherpe. 'The Nordic countries in the vanguard of European Family Law, 2010. Stockholm Institution for Scandinavian Law, 274. In N. T. Damons. A thesis submitted in partial fulfilment of the requirements for the degree of Magister Legum in the Faculty of Law, University of the Western Cape, 2015, p 1.
27 See the Preamble, articles 10, 27, 28 of the Constitution of Kenya 2010.
28 Kenya ratified the ICCPR in 1972.
29 Kenya ratified the ICESCR in 1972.
30 Kenya ratified CEDAW in 1984.
31 Kenya ratified CAT on February 1997.
32 Kenya Ratification 30.07.1990.

rights of all children, regardless of the marital statuses of their parents.[33] Kenya has ratified the African Charter on Human and People's Rights (ACHPR)[34] as well, and its optional Protocol, the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) 2003.

By dint of Article 2(5) and (6) of the Constitution of Kenya, these international and regional human rights instruments are now part of Kenya's domestic or municipal law and therefore the country is under obligation to treat people equally before the law and promote their human dignity without discrimination. It should also ensure equitable human, social and economic development of each individual irrespective of their social, economic, or marital status among other grounds.[35] Yet, persons who find themselves cohabiting in non-marital or cohabitation relationships are discriminated against and continue to be silenced by law. Most of them, especially the youth, find themselves in these situations for no fault of their own, but rather are forced into the relationships by economic hardships which are a reality in the country.[36]

Cohabitations create relationships which have far reaching implications especially on issues of property access and ownership. Some of the parties in these relationships could have stayed in the relationships for long and could have managed to acquire property together but informally. Such parties are not, however, covered by the matrimonial property regime, which only regulates property acquired by married couples. Cohabitees are also not covered by the law of inheritance and surviving partners suffer at the hands of relatives of the deceased partner in the event of the demise of one of them unless deceased partners wrote wills in their favour.[37] In the absence of a legislative framework, courts have over the years invoked the English common law doctrine of presumption of marriage to offer relief for weaker parties in such relationships, most of whom have been women.[38]However, even if the courts have stepped in to find reliefs for affected parties, they have not given cohabitees a legal status that guarantees them legitimacy and equal protection by the law. Consequently, they are delegitimised, one of the most painful forms of human rights violations under international law.[39]

33 Ratification by Kenya on 25.07.2000

34 Kenya ratified the African Charter on January 23, 1992. Since then, it has domesticated most of the provisions of the Charter through various pieces of legislation. In accordance with Article 62 of the African Charter, States Parties to the Charter are required to submit to the African Commission every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter

35 See Article 27(4) of the Constitution of Kenya 2010.

36 See generally, C Suda, M Amosa & P Onyango. Socio-cultural factors influencing Development in Nyanza Province of Kenya. 1990. Journal of sciences, Series CV: Humanities and Social Sciences (1) p 66-75.

37 Ibid

38 J Kabeberi- Macharia & C Nyamu, supra n. 7, P14.

39 Ibid

In Kenya, the problem of cohabitation is gendered. Studies carried out by the Federation of Women Lawyers in Kenya (FIDA) show that upon the demise of the male partners, his relatives immediately move in to claim all the man's property by denying the existence of any marriage between their son and the widowed partner, even though the two could have lived together for a long time, had children and acquired property together.[40]There is a gendered angle in the problem of unregulated cohabitations, as studies show that women are the weaker parties and they suffer the brunt. In the absence of a formal marriage, women and children are left with absolutely nothing, subjecting them to abject poverty.[41] Upon death, it is impossible for women who were dependents of the men in such relationships or the men who were dependents on the women to inherit from them.[42] The relatives of the parties may argue that they were not married and as such they are not entitled to the inheritance.[43]According to Kamau, cohabiting women often end up in a precarious position in relation to property that the couple acquires during the subsistence of their relationship...[44]

Cohabiting families have tried to speak to family law reforms in Kenya, but their voices continue to be ignored and they continue to remain powerless. However, their very existence should a cause of anxiety and tension in post-colonial social hegemonic relations. It should be disconcerting in any society that lays claims to democracy and rule of law. This is even as the Kenyan State continues to display ambivalence towards them – ignore them legally but judicially provide for them.[45]

III CONCEPT AND MEANING OF COHABITATION

The meaning of "cohabitation" is elusive and complicated to define in precise terms.[46] Existing literature defines cohabitation in several differ rent respects, including as a precursor to marriage, an advanced stage of dating, an alternative to being single, and a viable alternative to marriage.[47] The heterogeneous nature of cohabitation, however, and in combination with data limitations that hinder attempts to disentangle the different types of cohabitation, continues to obfuscate conceptualisations of its meaning. There is limited consensus on what cohabitation represents vis-à-vis marriage.[48] However, some attempts have been made to define it as seen below.

40 FIDA Report: Strategies to Advance Women's Economic, Social and Cultural Rights in Relation to Work. 2009.

41 MF. Brinig &S L. Nock. Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option? 64 La. L. Rev. (2004) Available at: http://digitalcommons.law.lsu.edu/lalrev/vol64/iss3/2.

42 Ibid

43 Ibid

44 *Z Mokomane: Cohabitation in Botswana: An Alternative or a Prelude to Marriage? African Population Studies Vol.20 n°1/Etude de la population africaine vol. 20 n° 1*p 13

45 L Galastri, Social classes and subaltern groups: Theoretical distinction and political application. Capital & Class 2018, Vol. 42(1) 43 –62 © The Author(s) 2017. P 43.

46 Z Wu, Cohabitation and social engagement. Canadian Studies in Population 38, No. 3–4 (Fall/Winter 2011) p 24.

47 In Kenya, it is a part of the customary marriage continuum.

48 W. Kamau, supra n. 1, p 4.

The Black's Law dictionary, for instance, defines cohabitation as the act of a man and a woman openly living together without being married to each other.[49] The Kenyan Marriage Act, 2014 defines cohabiting as living in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.[50]Cohabitations are influenced by many factors in Kenya. Kamau notes that cohabitation refers to the practice where a man and a woman live together in a conjugal union without formalising the union under any of the four systems of marriage. Due to socio-economic changes, there has been growing informality in marital relationships and a rise in the number of cohabitation relationships.[51] Often, parties engage in long periods of cohabitation and procreation before they have a wedding, if ever, and bride wealth is normally paid over a long period of time. This is in keeping with the processual nature of African customary marriage, where marriage is not usually viewed as a single event but as consisting of different phases. Cohabitation is often the start of a process that may eventually culminate in a marriage proper, whether customary or statutory.[52]

This paper concerns itself with cohabitees who have not made a choice between their situation and marriage but those who find themselves cohabiting due to economic and cultural factors. Further, although claims of exclusion by same-sex relationship cohabitees are valid, due to the focus of the paper which will not do justice to same-sex relationships in Kenya, it limits itself to cohabitations by heterosexual people.

IV THEORETICAL PERSPECTIVES

The current disconnect between the law and the lived realities of cohabitating people in Kenya must be understood within the context of colonialism on Kenya's past and present. This paper argues that society and the law itself are shaped by colonisation and therefore we need a theoretical framework that is critical enough to address the colonial past and the present,postcolonial and decolonisation theories are considered suitable. This is because both postcolonial and decolonisation approaches call for paradigm change in legal reforms, from the colonial liberal approaches to family and family law to reflect the realities of postmodern families and the diversity that they entail.[53] Ghutto, Chionga and Diallo rightly argue that changing the law or moving from liberalism-based laws implies legal reform with a view to decolonisation and dismantling the colonial legal edifice. This leads to the formation of a socially transformed state that accommodates diversity.[54]

49 See The Black's Law dictionary. West (Thomson Reuters).
50 See the Marriage Act, of Kenya 2014.
51 W. Kamau, supra n. 1, p 4.
52 Ibid.
53 C. Chimonga & F Diallo, Decolonisation and Teaching law in Africa with Special Reference to Living Customary Law. PER/PELJ 2017 (20) 3.
54 Ibid

The following section examines the postcolonial and decolonisation theories:

A. POSTCOLONIAL THEORY

Many texts grapple with the issues of definition of the now burgeoning body of postcolonial thought. As such, the theory takes many different shapes and interventions. However, it is premised on the unifying idea that seeks to understand the world in relationship to the history of imperialism and colonial rule.[55] It is concerned with accounting for the impact of European colonial rule around the world in the 18th century through to the 20th century.[56] Its focus is the impact of European colonial rule in the world during the era of conquest and the remnant forms of colonial rule that persist to date.[57] As such the theory can be used as a 'critical tool for deconstructing the underlying layers, structures, and forms that were embedded in the colonial past and the postcolonial present.[58] According to Roy, its strength lies not in its historical foundations, but in its enormous potential as a set of theoretical and methodological tools for deconstructing the colonial foundations of contemporary power structures - including legal ones.[59] Fitzpatrick and Darian-Smith suggest that postcolonial theorists have traced the ways in which colonial laws as products of the colonising power, were imposed upon the vast territories of the annexed cultures. Significantly, however, these theorists have also endeavoured to show that the ideological effects of colonial laws continue to have contemporary relevance as they continue to be used as an instrument of control in this postcolonial world.[60]

The work of Edward Said has been foundational in understanding postcolonial theory.[61] Said's unique discursive analysis of colonial systems of meaning opened new ways of understanding the tenacity of colonial power and how it might be resisted.[62] He highlights the West's binary construction of the Orient as Europe's inverse or 'Other', as what Europe is not, in the development of the colonial discourse of European superiority. He suggests that this dichotomy provides an enduring ideological underpinning in the postcolonial era, enabling a continuing alliance between European knowledge and imperial power despite the ostensible 'independence' of postcolonial states.[63] Critical postcolonial thinking draws on

55 B. Ashcroft, G Griffiths& H Tiffin**, (1998**). *KEY CONCEPTS IN POST-COLONIAL STUDIES* London and New York: Routledge.
56 Ibid
57 J. D. Elam, (2019). 'Postcolonial Theory'. (Oxford University Press U.P).
58 S Burney. Edward Said and Postcolonial Theory: Disjuncted Identities and the Subaltern Voice'. Counterpoints 41-2 (2012) 417 <http://www.jstor.org/stable/42981699.>
59 Ibid
60 A. Roy, (n. 24 above) p 319.
61 E. Said, Orientalism (1978/1991). Penguin Modern Classics.
62 D. Otto, Postcolonialism and Law? Third World Legal Studies, Volume 15Postcolonialism, Globalization, and Law Article 1 p vii p viii.
63 Ibid

some of the insights of poststructuralist philosophy. The work of Michel Foucault[64] and Jacques Derrida[65] have been of particular importance in understanding how power and knowledge cooperate as productive rather than repressive forces6, and in comprehending the hierarchies and violence, as well as the co-dependence, of the binaries that create meaning.[66]

An important feature of postcolonial theory is that it does not confine itself to the 'postcolony' in the narrow sense of the Third World nation-state. Postcolonialism is as much a critique of the indigenous elites of the postcolonial state, who have uncritically embraced modernity and reproduced its hierarchical relations of power, as the elites of Europe.[67] But even more expansively, a great deal of postcolonial thought concerns itself with all those who do not occupy dominant, elite or hegemonic positions of power, whom Marxist Antonio Gramsci earlier described as the 'subaltern'.[68] This general concern with those made vulnerable by dominating relationships, and with giving voice to what Foucault has described as 'subjugated knowledges', makes postcolonialism a particularly inclusive theoretical discourse that concerns itself with all systems that hierarchically arrange difference, whether according to class, gender, caste, religion, sexuality, age, office and so on.[69]Herein lie the subaltern non-marital relationships. The inclusivity of critical postcolonialism links it theoretically and practically with other struggles by marginalised groups and releases it from the confines of the earlier anticolonial preoccupation with achieving independence from Europe through nation-statehood.[70]

B DECOLONISATION

Another theory relevant to this paper is decolonisation. Decolonisation is the change that colonised countries goes through when they became politically independent from their former colonisers. However, decolonisation is not merely a matter of political independence. Structures of government and other institutions, the way in which a country is economically organised as well as the way in which former colonial subjects were encouraged to think, are often still determined or influenced by the former colonial powers in post-colonial countries.[71] Several scholars have rightly argued that unless political, institutional and philosophical decolonisation occur,

64 C. Gordon (ed.), (1980). M Foucault, Two Lectures and Truth and Power, in Power/Knowledge 78, 109 In Dianne Otto, Post colonialism And Law? Third World Legal Studies, Volume 15Postcolonialism, Globalization, and Law Article 1 p x.

65 J. Derrida. Positions (Alan Bass trans. 1981); Jacques Derrida, Force of Law: The 'Mystical' Foundations of Authority, 11 Cardozo L. Rev. 920 (1990). In Dianne Otto, Post colonialism And Law? Third World Legal Studies, Volume 15Postcolonialism, Globalization, and Law Article 1 p x.

66 Ibid

67 Ibid

68 A. Gramsci, The Prison Notebooks (Joseph A. Buttigieg trans. (1992). In Dianne Otto, Postcolonialism and Law? Third World Legal Studies, Volume 15Postcolonialism, Globalization, and Law Article 1 p x.

69 D. Otto, supra n. 62 p vii.

70 Ibid p x.

71 R. Oelofsen, Decolonisation of the African mind and intellectual landscape. UNISA Frinimon, Vol. 16 No. 2, 2015. P 131

colonial ways of governance remains long after the departure of the colonialists. In countries such as Kenya, law reforms are still influenced by colonial mentality, characterising most post-colonial law makers and law reformers.[72] Eventhough the former colonial master Britain has made efforts to create legal frameworks to govern cohabitation unions due to the social realities of the day, Kenya is yet to move in that direction. Oelofsen, notably claims that the colonial project stops having an impact on the newly decolonised country and its citizens is to misunderstand how deeply the colonial project affected these countries and their citizens.[73] In order to overcome the legacy of colonialism, it is necessary to also decolonise the intellectual landscape of the county in question and ultimately decolonise the mind of the formerly colonised.[74]

Franz Fanon gives an insight into how to understand what might be involved in the decolonisation of the mind. In his book, Black Skin, white masks" Fanon states that "the juxtaposition of the black and the white "races" has resulted in a massive psycho-existential complex and the black man must be liberated from the arsenal of complexes that germinated in the colonial situation".[75] Ngugi Wa Thiong'o supports Fanon's view and sees the colonial enterprise as still continuous and ongoing, especially as it requires that the colonised person engage in the creative works using the language of the coloniser. Understanding language as both a tool of communication and carrier of culture, he sees scholarship in African languages as a subversive act against the (neo)colonial state.[76] Referring to the work of Fanon, Pyke writes that "(s)everal anti-colonial writers concerned with the psychological effects of colonialism on the oppressed in North Africa and South America described a 'colonial mentality' marked by a sense of inferiority and a desire to be more like the colonisers'.[77] In some cases, the desire can result in situations where the colonised want to outdo the coloniser, as in the case of failing to be at par with the coloniser on issues of dismantling oppressive colonial laws even when the later has moved on.[78] This is the dilemma that Kenya faces in terms of family law and postmodern families.

72 *S. Gutto,* Decolonising the law: Do we have a choice? *Third World Resurgence No. 266/267, October/ November 2012, pp 42-43*

73 R. Oelofsen , n. 71, p 132.

74 Ibid

75 F Fanon, (2008). "Black Skin, White masks". Translated by R. Philcox, p 14. In Rianna Oelofsen (n. 21 above, p 131)53(4).

76 Ngugi wa Thiong'o. Decolonizing the Mind: The Language of African Literature (Heinneman Educational, 1986).

77 K.D Pyke "What is internationalised racial oppression and why don't we study it?" Acknowledging racism's hidden injuries." 2010, Sociological Perspectives, p 551. In Rianna Oelofsen (n. 21 above), p 132.

78 Ibid

V COLONIAL LIBERAL MAKING OF THE NON-MARITAL "OTHER" IN KENYA

The British made Kenya a protectorate on 15 June 1895.[79] Although in African history the colonial experience represented but a brief moment from the perspective of today, this moment is still charged and controversial, since, to say the least, it signified a new historical form and the possibility of new types of discourses of African traditions and cultures.[80]According to Lord Lugard, the advent of Europeans brought with it the mind and methods of Europe.[81]The British "introduced a truncated version of English law as the 'basic' or 'general law' of every territory... but permitted the indigenous populations to continue to be governed by their customary laws.[82] Prior to colonialism, Africans had their own methods of operating governance and justice systems that are difficult to reconcile with the now dominant western approaches.

Consequently, a plural legal system emerged. This judicial system from the onset encompassed various systems of family jurisprudence including statutory law (European) Hindu, Islamic, and African customary law.[83] African customary law regulated and still regulates the lives of various ethnic groups in the country, particularly in those areas that are outside the parameters of state legislation.[84]African customary law catered for the African who did not convert to Christianity or Islam; Islam catered for the Muslim population. The use and effect of customary laws, however, became dependent on the permissive extent of the general law. In its relegated state, its operation became dependent on the satisfaction of the rules of common law equity and good conscience. Other rules as to the amenability of customary law and proof became established.[85] Customary rules and practices 'which did not make sense' to the coloniser were simply ignored and not delegitimised.

Law and legal systems became colonialisms' greatest tool that has shaped both the colonial and post- colonial state. The law was the mouthpiece for the imperial concept of the African under the first current stated above. In Kenya, like elsewhere

79 J O Ambani & O Ahaya, The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era. Strathmore Law Journal, 2015, p 45.

80 C. Ngwena, (2018). What is Africanness: Contesting nativism in race, culture and sexualities. (Pretoria University Law Press PULP), p 1.

81 Regarding the conquest of the relevant regions of Africa, Lugard has written: "During the first half of these thirty years, it was my privilege to assist in some degree in bringing under British control portions of Nyasaland, East Africa, Uganda, and Nigeria…" See, Lugard F, The dual mandate in British tropical Africa, 5ed, Frank Cass & Co, 1965, 7. In Ambani, n. 80, p 46.

82 Y. Gahir, (1987). R. Luckham, & F. Snyder, (eds). The Political Economy of law; a third work reader. (Oxford U.P).

83 B. House-Midamba, "Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance Laws in Kenya", 1994, 49:3 Africa: Rivista Trimestrale di Studi e Documentazione dell'Instituto Italiano per l'Africa e l'Oriente 375.

84 Ibid

85 J. A Yakubu, Colonialism, customary law and the post-colonial state in Africa: the case of Nigeria. Africa Development Vol. 30(4) 2005:201-220 p 201.

in the colonised world, the family and family law became an important tool in the formation of the colonial state, which was underpinned by liberal capitalist economic theory. This was not new, as indeed several scholars argue that the family has historically been a political and economic institution variously used to shape state formations.[86] According to Charrad, the state's assumption of authority over family law has been a crucial part of the state building process, particularly in the poor, weak states created by colonial powers. Bargaining between state leaders on the one hand and religious tribal elites, and the regional elites on the other over the demarcation of legal jurisdiction have often played out on the terrain of family law.[87]

Charrad and Htun note that the content of family law in different countries and regions has always reflected state projects and patterns of state building. Consequently, as the state strengthens and expands, it often but not always seeks to seize control over family law from the sub national rivals of the state such as churches, clans, tribes, and other cultural communities.[88] The sub-national state rivals were historically the undisputed authorities over the marriage, birth, inheritance, institutionalised relations between the state on the one hand and religious groups, clans, tribes and cultural communities on the other.[89] Transformative state projects seeking to secularise, modernise, and civilise the nation and the polity are often played out in the terrain of the family.[90] Philomila Tsoukala argues that the emergence of family law is repeatedly associated with the construction of nation-states in Europe, which influenced the construction of colonial states.[91]

Kang'ara, SUPPORTS THIS VIEW, ARGUING that far from being an act with merely moral significance, family is central to state formation. In this view, defining marriage was an important act of conquest and a corner stone of the market-oriented state that emerged via colonialism.[92]The State's interest in family, families or family formations that it regards as problematic and not useful to its project of the day are submerged. The determining project in most cases has been political and economic.[93]

Characteristic of precolonial customary family laws were cohabitation relationships that were part of the complex African marriage system. Matters changed drastically, however, once the 'visitors' put their imprint on the continental landscape.[94]The legitimacy and significance of cohabiting was undermined. During the initial legal

86 See generally H. Charrad Family Law Reforms in the Arab World: Tunisi A and Morocco 2001; Htun , Sex and the State: Abortion, Divorce and the Family under Latin American Dictatorships and Democracies. Cambridge University Press (2003).
87 Ibid
88 Ibid
89 Ibid
90 Ibid
91 P. Tsoukala, Marrying Family Law to the Nation, 58 AM. J. COMP. L. 873, 2010, p 1.
92 S. Kang'ara, (n. 8 above) p 353.
93 Ibid
94 Ibid

encounter between common law and African customary laws, judges invalidated large swaths of prior legal relations. Starting from an assumption that individual free will was the building block for any civilised legal system, colonial judges invalidated customary marriages as repugnant to English colonial morality.[95] Most significantly was the imposition of the Christian form of marriage specifically targeting African polygamists to abandon their customary way of life and convert to Christianity which was monogamous. The implications of this were dire. Many married families were delegitimised, and swathes of wives were rendered cohabitees by operation of the law, a phenomenon that is felt in the post-colonial state to date.[96]

In Western Judeo-Christian philosophy at the time., marriage was the recognised mode of family formation and it laid the foundation for what was then considered a stable family, necessary for the stability of the state.[97] Wardle ably argues that in the West, the family was, borne out of marriages as the fundamental building block of society," and throughout much of human history such family has not only been the fundamental unit of socialisation, but it has been the basic economic unit.[98] Morgan also states "that the stability of the state depends upon the stability of the family, also understood in the Judeo-Christian sense of marriage."[99] In this view, family matters and the quality and strength of the family directly supports the strength of a nation. Morgan argues that a nation's values and strength are but the sum total of the values and strength of its families Individuals in happy families are likely to be good citizens; whereas unhappy, dysfunctional families can be a catalyst for many social problems and instability.[100] Morgan further states that society's interest in fostering good citizenship, promoting individual happiness, encouraging social stability, and preventing a drastic increase in social problems gives it an incentive to foster happy families" understood in the Judeo-Christian sense.[101]

Kenya inherited this family law philosophy and throughout the colonial period, cohabitation relationships were submerged, save for the courts which intervened to offer relief by invoking the common law doctrine of presumption of marriage.

VI COHABITATION UNIONS AND THE LAW IN KENYA

Unlike the legislature, however, courts have continually taken a pragmatic approach to the reality of problems faced by cohabiting couples to protect the rights of weaker parties in the absence of a regulatory framework. Kenyan courts have traditionally sought reliance on the English common law principle of presumption of marriage

95 Ibid
96 Ibid
97 Black *et al*, *n. 54, p 6.*
98 Ibid
99 D.H.J. Morgan, The Family, Politics and Social Theory 74 (1985). In Lynn D. Wardle, Relationships Between Family and Government. California, 2000. Western International Law Journal Volume 31, p 4.
100 Ibid
101 Ibid

as a vehicle through which cohabitation unions may be legitimised as amounting to a marriage. Section 3 (1) of the Judicature Act identifies common law as a source of law in Kenya. Such a presumption was established in the case of Hortensia Wanjiku Yawe vs Public Trustee,[102] in which **the Court** recognised and approved the presumption of marriage and pronounced two standards for the finding of such presumption. These are; prolonged cohabitation and that the parties held themselves out to the general public as a married couple.[103]In this case, the deceased had declared to another that the appellant was his wife by general repute. Only cogent evidence can rebut such presumption.[104]

The presumption was also applied in the polygamous African customary law setting became applicable where the parties had failed to establish evidence proving that they had been married under customary law. The effect of the decision was that the woman applicant was able to claim part of the deceased's estate in her capacity as the deceased's wife under customary law. The decision in this case was followed in a number of subsequent cases, such as ESTHER WANJIKU NJAU V. MARY WAHITO 105 and is now firmly established as a principle. In ADONGO V. ADONGO,106 the court applied the presumption of marriage in order to hold that a woman in a cohabitation relationship was married to the deceased and as such was a wife for purposes of the Act, thereby enabling the woman to have a share of the deceased's estate. It should be noted that the English common law doctrine of presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary. The fact of its existence must be proved.107

Traditionally, the Western legal principles governing marriage and consensual alternatives to marriage reflected a strong preference in favour of public ordering of behaviour. First and most important, the law distinguished sharply between marriage and other intimate relationships and used marriage or marital status as a criterion for allocating a wide variety of public benefits and burdens.[108] This is the legal attitude that colonialism bequeathed to Kenya and which subsists today.[109] The explanation for this is that whereas the neo-colonial/neoliberal phase of African democratic development has overseen the spread of human rights around the world, it has also posed a contradiction in the application of human rights to eradicate inequality in society. Today's neoliberalism continues to treat cohabitation relationships as 'surplus population' that add little value to the economic project to warrant state intervention. This approach picks up from its erstwhile liberalism

102 C.A. Civil Appeal No. 13 of 1976 (UR) – Kenya.
103 See W. Kamau, supra n. 1, p 2.
104 Ibid
105 Esther Wanjiku Njau vs. Mary Wahito, [2015] Eklr.
106 Adongo vs. Adongo, [2020] eKLR
107 Ibid
108 J. B. Singer, The Privatisation of Family Law. Wisconsin Law Review,1443, 1992 p 1445.
109 See Sections 162, 163 and 165 of the Penal Code, Cap 63 of the Laws of Kenya.

predecessor that rendered non marital family relationships invisible. This is ironic especially considering the inclusive character of human rights and the Kenyan Constitution's claim of equality, non-discrimination and social inclusivity.[110]

Further, most jurisdictions around the world have responded to the realities of postmodern families, including cohabitations, by enacting legislations for their regulation. Scotland and Ireland have recently legislated to provide financial provision remedies as between cohabiting partners on relationship breakdown.[111] Most states in the United States of America and South Africa have enacted legislation that either recognise cohabitations or give them rights equivalent to those availed to married couples or enacted civil partnership legislations that regulate these relationships. England herself is on the path to changes in law, if the recent supreme court decision in the case of a Northern Ireland, woman Siobhan McLaughlin who was refused payments from her former partner's pension has won her battle to extend benefits automatically to those who are unmarried.[112]

Yet in Kenya, recent family law reforms have silenced non marital unions. Several scholars attribute this paradox to the fundamental questions about the nature of the neoliberal legal project, and more specifically the role of the law under a neoliberal construct.[113] It confirms the belief that under a neoliberal model the law is a core tool for the realisation of this efficient economy, and an effective legal system must exist in such a context. The law is therefore not necessarily geared towards the promotion of public goods such as justice or morality. Should justice be served, or should morals be enforced (or rights promoted), that would be a good but not conceived consequence of the application of such a model.[114]The human rights of sections of society that may not promote neoliberal agenda fall through the cracks of law reforms.

VII NEOLIBERAL DISCONTENTS AND FAMILY LAW REFORMS IN KENYA

An understanding of the historical development of constitutional and legal reforms in Kenya, a general view of its history is important. Despite a chequered history in constitutionalism, an African formal purchase in democratic liberalism, which is generally tethered to human rights, values has emerged in two main historical

110 See generally F P Domingo, A McCullough, F Simbiri and B Wanjala, Women and power: shaping the development of Kenya's 2010 Constitution. 2017 ODI Report.

111 A. Barlo.. Legislating For Cohabitation In Common Law Jurisdictions in Europe: Two Steps Forward And One Step Back? https://core.ac.uk/download/pdf/43094634.pdf p 1.

112 *See* RE SIOBHAN MCLAUGHLIN FOR JUDICIAL REVIEW *(*Northern Ireland) [2018] UKSC 48. In this case, Denise Brewster, from Coleraine, had been living with Lenny McMullan for 10 years. They were engaged on Christmas Eve 2009, but he died suddenly in the early hours of Boxing Day morning. Her victory at the Supreme Court marks a significant extension of the rights of unmarried cohabitees. The five justices said that the refusal to pay her the pension was unlawful

113 C. Ngwena (note 80 above), p 3.

114 Ibid

phases in modern times.[115] For the majority of African states, Kenya included, the first phase took place mainly in the 1960s as part of a colonial bequest to newly independent states by erstwhile colonial powers. As transitional constitutional instruments, African states adopted ready-made constitutions that both formed and marked their judicial status as independent countries and inscribed democratic governance, including the protection of civil and political rights contained in a Bill of Rights.[116] However, these were short-lived, and most have been done away with. Kenya's Westminster model 1963 Independence Constitution, much mutilated and amended to serve the interests of the political class at the expense of safeguarding the human rights of the citizens, was repealed in 2010.

The 1990s marked the second phase of democratisation, which continues to date. The second phase has witnessed the demise of one-party state, the introduction of domestic constitutional reforms and the adoption of redrafted constitutions with liberal- oriented Bills of Rights that seek to renew the commitment to democracy and to reinforce the respect, protection and fulfilment of human rights, including the right to equality and freedom of conscience. Basic civil and political rights and those which speak to the influence of western liberal theory are ensconced in African constitutions.[117] Some constitutions, such as Kenya's, have gone further, including socio-economic rights as part of embracing more diverse political philosophies, but without abandoning the core liberal philosophy.[118] In the end, the remaining question is not whether African polities have a purchase in democratic liberalism that speaks to overlapping consensus but rather, to what extent they practice it. An-Naim states that the fundamental framework for liberal democracy can generally be found in every African constitution, Kenya's included. However, the government may be paying lip service to it, when it ignores the inclusionary imperatives of the very constitution.[119]The reason for this discordance lies in the nature of the 'un-decolonised' post-colonial state and its understanding and application of human rights in the context of neoliberalism.

Historically, disenfranchised sections of society therefore remain marginalised, even as the country champions the human rights mantra. Why the paradox? One reason has to do with the fact that human right themselves are part and parcel of the neoliberal continuum, a vehicle for the realisation of the neoliberal economic dream. It has been argued that human rights provide the moral voice for neoliberalism, and its goal is not necessarily to secure protection for marginal sections of society. Tshepo Madlingozi rightly argues that neoliberal laws and human rights, couched in the 'language' of the colonialists, without transformative wording of that law –

115 Ibid p 265.
116 Ibid
117 Ibid
118 Ibid
119 A. An-Naim (ed) (2003). Human Rights under African Constitutions. (University of Pennsylvania Press, 2003) p 266.

and without a challenge to the power constructs that led to the problem in the first place, amounts to complicity with neoliberal marginalisation.[120] As an ideology, it promotes forceful defence of private property, competitive markets and 'individual freedom', in addition to an all-round attack against state intervention, with no attention to egalitarian values.[121]Globalisation promotes increasingly homogenised global modern capitalist culture as well as purporting to expand the culture of 'human rights'.

This paper adopts Ngwena's view that while the colonisers introduced development based on racial stratification, they also imposed their understanding of "the human" and hence the discordance in the application and understanding of human rights in postcolonial states.[122] This present idea of the human was one invented by the European humanists of the fifteenth and sixteenth centuries in contradistinction to the "non-European" barbaric Other.[123]The dominant creed of human rights arose in this context of European expansion/colonisation when the fathers of global/ Western international law had to sketch out the rights that European settler-invaders, the humans, possessed in "Indian" lands. To put it simply, then, "he who spoke for the human also spoke for rights".[124]This understanding of rights was and remains disconnected from the application of human rights in the post colonies. As argued by Woodman Gordon, Kenya's current understanding of legally plural family law and law making are still structured by a scheme of thought developed in Europe under the political influence which in a certain period of history and which were transferred to Africa to meet the requirements of colonial regime.[125]

Why and how did this combination of neoliberal capitalism and human rights merge? Capitalism has always moralised the economy and applied a gloss of righteousness to profit-making and unregulated competition precisely because it is so hard to believe.[126] From Adam Smith's 'hidden hand'[127] to the assertion that unrestrained egotism promotes the common good or that beneficial effects 'trickle down' if the rich get even bigger tax breaks, capitalism has consistently tried to claim the moral high ground.[128] Similarly, human rights and their dissemination are not simply the result of the liberal or charitable disposition of the West. The

120 M. Tshepo, Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution. STELL LR, 2017 1.
121 D. Harvey, (2005). A Brief History of Neoliberalism. (University Press, 2005) P 256.
122 C. Ngwena, supra n. 80, p 102.
123 Ibid
124 Ibid p 136
125 G. Woodman. Legal Pluralism in Africa: The Impact of State Recognition of Customary Laws illustrated from the field of Land Law. Pluralism and Development: Studies in Access to Property in Africa, 2011, p 35.
126 C. Ngwena, supra n. 80, p 3.
127 Ibid.
128 A. Smith (1976), The Theory of Moral Sentiments, vol. 1, p. 184 in: The Glasgow Edition of the Works and Correspondence of Adam Smith, 7 vol., Oxford University Press, 1976).

predominantly negative meaning of freedom as the absence of external constraints — a euphemism for keeping state regulation of the economy at a minimum – has dominated the Western conception of human rights and turned them into the perfect companion of neoliberalism.[129]

Thus, the post-1989 world order combines an economic system that generates huge structural inequalities and oppression alongside a juridico-political ideology which promises dignity and equality.[130] It is therefore apparent that global moral and civic rules are the necessary companion of the globalisation of economic production and consumption - of the completion of world capitalism that follows neoliberal dogmas.[131] Such order does not care much about the real human rights of the 'surplus' populations such as cohabitation families. In Kenya, efforts to legally protect them have been met with uncomfortable 'noises' from the largest feeders of neoliberal capitalism – the religious and political classes. These 'noises' pose threats to the stability in the markets and are therefore silenced through continued legal subjugation of cohabitation unions.

VIII CONCLUSION

This article has demonstrated that cohabitation relationships, although they are becoming the norm in Kenya, remain the submerged group today just as they were during colonial days. Women are the most affected by the failure of the State to recognise cohabitees and give them legal protection. There have been constitutional and legal reforms since 2010 which call for inclusivity, equality and non-discrimination for all persons on account of, among other things, marital status. Howevercohabiting couples continue to suffer discrimination. The colonial liberal Judeo-Christian philosophy of family and family law still dominate Kenya's legal thought in the post-colonial state. As Taylor rightly puts it, neoliberalism is increasingly re-defining the domains of validity, normatively and actuality according to an economic rationale; within these domains the actors frame the problems of social exclusion and choose the solutions to address them.[132] Kenyan law reformers have failed to be decolonised and the overall framework of their reform agenda is guided by neoliberal imperatives which impede any contextualised and critical approach to social exclusion as well as the pursuing of any egalitarian outcomes.[133] In order to overcome status of subordination and achieving inclusive equality, Kenya must develop a remedial theoretical framework for rethinking human rights in ways that are dialogic and, above all, inclusive so as to be responsive to the recognition of needs of all members of society, including cohabitees.

129 Ibid
130 Ibid
131 Ibid
132 T. Francis. Neoliberalism and the marginalisation of social justice: the making of an education policy to combat social exclusion. International Journal of Inclusive Education, Vol. 16, 2012, Issue 11.
133 Ibid

In order to move away from selective protection of families, Kenya's inclusionary Constitution, law makers should adopt a new legislative approach, indeed as required of them by the Constitution. They must deconstruct the concept of families and become responsive to all to fit in the postmodern social reality. This approach demands of us to pay close attention to the ways in which the Constitution can be part of the counter-decolonisation project of masking neoliberal western hegemony and historical conquest through the economy of recognition-incorporation-distribution. [134] Such an approach calls on us to impugn the post-2010 Constitutionalism in a manner that goes beyond immanent critiques to increasing voices for equality and non-discrimination through proper and inclusionary family law reforms.

This mental decolonisation should commence with the amendment of the Marriage Act 2014 to reintroduce a provision on presumptive marriage to read;

> Where it is proved that a man and woman having capacity to marry have lived together openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married. All benefits and protections that accrue to couples in marriage shall also accrue to persons in such relationships.

134 Ibid

THEORETICAL UNDERPINNINGS ON WOMEN'S INFORMAL CROSS BORDER TRADE: AN AFRICAN FEMINIST PERSPECTIVE.

Bernadette Malunga*

ABSTRACT

A lot has been written on the subject of women and trade participation in particular, their involvement in the informal cross border trade. The information has mostly come from empirical evidence that has unearthed women's lived realities in cross border trade. However, little has been explored about what African feminists have written on a theoretical level about women's trade, and what influences women in informal trade. This has caused the debate on the patterns and causes of women's informal cross border trade to lack depth and analysis. Consequently, the solutions offered so far have not helped to address the problem of women's trade. This paper sought to understand the patterns and causes of women's informal cross border trade from an African feminist point of view. This was with the aim of uncovering the root causes of women's informal cross border trade and to find tangible solutions to deal with that problem. The paper finds that African feminists have attributed women's informal cross border trade to a number of factors including, colonialism, lack of women's agency in global trade affairs and archaic customary laws and practices. These factors have privileged men to trade in the formal sector and denied women such spaces. The paper therefore concludes that African states need to arrive at viable solutions to challenge the problems facing women traders by adopting affirmative action measures among other interventions to achieve gender equality and women's empowerment in trade.

I INTRODUCTION

In Africa, informal cross border trade (ICBT) represents a significant proportion of regional cross border trade.[1] However, the exact number of participants involved in this trade is unknown as no official statistics have been collected.[2] Nevertheless, studies show that women constitute the majority of informal cross border traders with an estimation of about 70% in the African region.[3] Women informal cross border traders (WICBTs) usually trade in small consignments. The consignments usually consist of staple food commodities such as maize and rice, and low-quality

* Bernadette Malunga is a Senior Lecturer at the School of Law, Economics and Government, University of Malawi.

1 C Lesser, *Informal cross-border trade and trade facilitation reform in Sub-Saharan Africa* (OECD Trade Policy Working Paper, No 86, 2009) ; USAID, *Women in Cross Border Agricultural Trade* (Policy Brief No 4, 2012) www.agrilinks.org/sites/default/files/resource/files/accessed on 4th May 2016.

2 J Crush, *Calibrating Informal Cross Border Trade in Southern Africa* (Migration Policy Series No. 69, 2015) www.samplonline.org/wp-content/uploads/2016/10/Acrobat69.pdf accessed on 30th March 2017.

3 United Nations Development Fund for Women, *Findings of Baseline Studies on Women Informal Cross Border Trade in Africa* (Brussels, 2009).

consumer goods such as clothes and shoes.[4] The Common Market for Eastern and Southern Africa (COMESA) has defined ICBT as a form of trade which is unrecorded in official statistics. It is, however, carried out by cadres of registered or unregistered enterprises through the avoidance of border stations, concealment, under declaration, misclassification and under invoicing of goods, among other means.[5] Thus, women's informal cross border trade takes different forms.[6] It has been noted by Ogalo[7] and Njiwa[8] that most women traders avoid official border posts. They further note that women who use the formal borders resort to illegal practices such as under invoicing, misclassification of goods and misdeclaration of country of origin.[9] Notwithstanding that most aspects of ICBT are illegal, the trade features highly among women's individual strategies for self-employment, poverty reduction and wealth creation.[10] It provides about 60% of non-agricultural self-employment.[11] As such, there is a strong movement condemning the criminalization of ICBT and a call to mainstream it into formal trade.[12]

The growth of women's informal cross border trade (WICBT) has been attributed to many factors such as un favourable customs clearance rules. Some of these factors work as incentives that attract traders to it while others are problems which push women traders to engage in ICBT.[13] Generally, WICBT has emerged, thrived and strengthened in parallel with formal trading where there are hostile or strenuous regulations and policies related to formal cross border trade.[14] These hostile regulations and policies are evidenced by, among others, high levels of import, export duties and processing fees under customs clearance. They are also evidenced by complex and non-transparent or divergent regulatory requirements.[15] In some cases, this is shown by unfavourable technical regulations and sanitary standards which contribute to high transaction costs.[16] In addition, corruption, insecurity at border posts, low knowledge of trade procedures, education and business management skills, limited market information, limited access to finance

4 OG Tayo and others, 'Violence against Young Women in Informal Cross Border Trading in South West Nigeria: Implications for Economic Development and Poverty Reduction'(2015) 2 International Journal of Gender and Development.

5 D Njiwa, *Informal Cross Border Trade: Challenges and Opportunities. A case of COMESA and its STR Implementing Borders'* (COMESA, 2012).

6 UN Women *Unleashing the Potential of Women Informal Cross Border Traders to Transform Intra-African Trade*' (New York,2011).

7 V Ogalo, *Informal Cross Border Trade in EAC; Implications for Regional Integration and Development* (CUTS African Resource Centre: Nairobi,2010).

8 D Njiwa, 2012

9 D Njiwa, 2012

10 T Ndiaye, *Women Informal Traders Transcending African Borders: Myths, Facts and Ways Forward* (WTO; International Trade Centre,2008)

11 G Alissa, *How to Help Women Cross Border Traders in Africa*(Bridges Africa,2013) www.ictsd.org/bridges-news/bridges-africa/news/ accessed on 3rd May 2016.

12 JK Afrika, and others *ICBT in Africa: Implications and Policy Recommendations(Africa Economic Brief, 2012)* www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/accessed on 8th October,2018

13 V Ogalo, 2010

14 V Ogalo, 2010

15 Ibid

16 C Lesser, 2012

and inadequate border infrastructure have fuelled the growth of WICBT.[17] The above factors are exacerbated by the fact that WICBT also suffer invisibility and their realities are not adequately captured by mainstream trade rules, policies and institutions.[18]

This paper contributes to the discussion on factors that have led or encouraged women's informal trade activities from an African feminist perspective. The paper notes that a lot has been written on women and trade participation, in particular, their involvement in informal cross border trade. The information has mostly come from empirical evidence that has unearthed women's lived realities in cross border trade. However, there has not been much research into what African feminists have written, on a theoretical level, about women's trade and what influences them to engage in informal trade. Furthermore, such African feminists are hardly documented and known. This has led to a debate on the lack of depth and analysis on patterns and causes of women informal cross border trade. Consequently, the solutions offered so far have not helped to address the problem of women's trade especially in relation to informal cross border trade. Understanding the patterns and causes of women's trade from an African feminist point of view may uncover the root causes of women's informal cross border trade and find tangible solutions to deal with that problem.

II CONCEPTUAL FRAMEWORK

This paper is based on feminist economists' theories. Feminist economists mainly theorise on the nature and form of capitalist production, the sphere of reproduction and how these are related to production.[19] In addition, they deconstruct some of the myths of hegemonic economic sciences such as the assertion that the market or economy works neutrally and creates well-being for all men and women indiscriminately. Instead, feminist economists ask about the values being created in economics and also question the beneficiaries of such values.[20] Second, they criticise market-centred economic sciences, arguing that economic activities do not take place only in the market, but rather exist in a mixture of the private market, state benefits, non-profit activities, informal sectors and the household.[21] For instance, Gu¨nseli Berik, Yana van der Meulen Rodgers, and Stephanie Seguino,

17 N Gitonga, *The female face of Africa's trade with a focus on WICBT* (FEWA) https://docplayer.net/75827897-The-female-face-of-africa-s-trade-with-a-focus-on-women-in-informal-cross-border-trade.html accessed on 8 October, 2018

18 T Ndiaye, 2008

19 Margarita Aguinaga, Miriam Lang, Dunia Mokrani, Alejandra Santillana(Development Critiques and Alternatives: A Feminist Perspective)

20 Margarita Aguinaga, Miriam Lang, Dunia Mokrani, Alejandra Santillana(Development Critiques and Alternatives: A Feminist Perspective)

21 Margarita Aguinaga, Miriam Lang, Dunia Mokrani, Alejandra Santillana(Development Critiques and Alternatives: A Feminist Perspective)

2009[22] argue that macroeconomic theory should be constructed within the broader framework of human well-being, rather than being solely concerned with how economies function and the achievement of macroeconomic fundamentals such as price stability and robust growth rates. They continue to argue that human well-being requires, at a minimum, adequate provisioning, enhancing capabilities and promoting agency. Adequate provisioning may be through interconnected paid labour and unpaid care activities and entitlements from the state or community. Enhanced capabilities means the ability to do or be, based on provisioning whilst agency is people's ability to participate in decision making so as to shape the world they live in. Diane Elson, 2009[23] also states that mainstream economic perspectives wrongly put a lot of emphasis on equality of opportunity instead of promoting equality of outcomes based on the argument that it would undermine efficiency or prosperity. Inequality of opportunity, in turn, is linked to poorly functioning markets that must be fixed by fostering greater competition. Diane Elson, however, argues that this approach has led to policy prescriptions that privilege market competition through liberalisation and privatisation. She further states that the notion of competition underlying trade policies envisions an idealised society of small producers as the economic agents who will spur economic growth. This, to her, is a far cry from actual economies in which unequal bargaining power between corporations and wage workers abounds. Further, the mainstream concept of competition does not recognize the social embeddedness of markets and that their operation reproduces the power inequalities and social norms that are inscribed within these institutions.[24]Mainstream perspectives therefore view removing legal barriers to women's participation in labour markets as sufficient for achieving gender equity.

This paper will show that African feminists have dwelt more on enhancing women's wellbeing to achieve their empowerment in trade. Such a perspective agrees with feminist economists' arguments that the State has failed to manage trade policies and activities from a broader framework of human well-being. This is evidenced by the States' failure to enhance women's capabilities and the failure to facilitate women's agency and voice in trade. The paper argues that there are a number of factors that affect women's well-being which, in turn, have an impact on the kind of trade they engage in. Such factors include high illiteracy levels, poverty, gender-based violence, unpaid labour among others. These factors have the power to inhibit women's participation in formal trade activities and women's agency and voice.

22 Gu¨nseli Berik, Yana van der Meulen Rodgers, and Stephanie Seguino, 2009. 'feminist Economics of Inequality, Development and Growth' Feminist Economics 15(3): 1-33

23 Elson, Diane. 2009. ''Gender Equality and Economic Growth in a World Bank World Development Report.'' Feminist Economics 15(3): 35–59.

24 Gu¨nseli Berik et al, 2009

III WHO ARE AFRICAN FEMINISTS?

Harquail, 2019 defines feminism as a movement to end sexism, sexist exploitation and all oppression. It aims to establish political, social, and economic equality and create a world where all people flourish.[25] Harquail explains that feminism aims at addressing all systems of oppression and that it is protective because it defends women and all people hurt by oppression. She further states that it is constructive as it pursues a vision of flourishing for all.[26] Similarly, Mwale, 2002 argues that feminism challenges the prevailing status quo and develops a counter-ideology that questions the prevailing status quo and then attempts to modify it.[27] Feminism is therefore an ideology of action for it motivates people to demand changes in their lifestyles and to modify the existing social, religious, political, and economic relations. A feminist ethic will, therefore, focus on the realisation of equality and fairness for women in all spheres of life and the end of oppressive patriarchy in all its guises. It will also seek to transform societal institutions[28] including trade.

Feminism in Africa has its own specificitiesdue to the problems women face in Africa. However, Africa itself is diverse and talk of an 'African feminism' has sometimes been seen as 'feminism for Africa.' The concept of African Feminism has thus been faulted for essentialising Africa as it seems to suggest that all women living in Africa face the same problems. As such, some scholars such as Atanga, 2013 recommends the wording 'Feminism(s) in Africa' as an alternative to the essentialist-sounding 'African Feminism.'[29] This notwithstanding, feminism in Africa entails specificities. It may have the same broad goals as western feminism but some realities within the African context make its feminism somewhat distinct. This therefore justifies the use of the words 'African Feminism.'

The need for feminism from the perspective of Africans as response to what feminists from Africa viewed as 'western feminism.' Feminists from Africa argued that western feminism does not acknowledge the agency and potential of African women. Western feminism was accused of portraying African women as 'powerless' and unable to determine for themselves both the changes in their lives and the means to construct these changes.[30] Mari Bergman adopts a definition from Desiree Lewis who defines African feminism as a group of women who call themselves African feminists and who share intellectual commitment to critique traditional gender

25 Celia V. Harquail, 2019 *Feminism: A Key Idea in Business and Society* (Routledge)
26 Celia V. Harquail, 2019 *Feminism: A Key Idea in Business and Society* (Routledge)
27 Pascal Newborne Mwale (2002) 'Where is the Foundation of African Gender? The case of Malawi' 11 (1) Nordic Journal of African Studies
28 Angelo Nicolaides (2015) 'Gender Equity, Ethics aknd Feminism: Assumptions of an African Ubuntu Oriented Society' 42 (3) Journal of Social Sciences
29 Lilian Atanga, 'African Feminism?' (2013) in Gender and language in Sub Saharan Africa. Tradition, Struggle and Change. Available at https://www.academia.edu/26547312/African_feminism, accessed 30/5/2019
30 Nnaemeka, O. 2005. "Bringing African Women into the Classroom: Rethinking Pedagogy and Epistemology" in African Gender Studies. Palgrave. (p.57)

norms and imperialism. She points out that the important part of African Feminism is a shared focus to create continental identity that is moulded by the historical relations of subordination.[31] A distinctively African feminism will, therefore, portray women as strong, innovative agents and decision-makers in their specific contexts. It will empower African women and work for them in ways that they want it to.[32] African feminist theory has also been influenced by the socio-economic realities of the African continent and its historical marginalisation and exclusion. African feminist theory therefore recognises the influence of factors such as race, colonialism, imperialism, religion, ethnicity, culture, class and globalisation on African women's experiences. It follows that it considers the multiple and intersecting layers of marginalisation that African women face.[33]However, others have contended that feminism in Africa is still a movement without cohesion because it has failed to achieve a gender consensus, that is, between African men and women about its agenda and causes.[34] There is also a division amongst African women themselves with regard to the issue of feminism. As it stands, there are two separate forms of African feminism, namely intellectual feminism and popular feminism. Intellectual feminism is usually promoted by urban and educated African women. Intellectual feminists have often acquired their knowledge from abroad and have a tendency to export the debate on women's rights outside Africa due to their access to what has been called the "easy option for ideological borrowing." As a result, they seem to condemn aspects of African culture such as polygamy, an attitude that echoes the paternalistic attitude and tone of Western women towards African women. They have often been blamed for only portraying a brief glimpse of the reality and for not allowing serious reflections on African women's condition, and the appropriate solutions to the related problems.[35]On the other hand, popular feminism appeals to African women who consider their culture as vital to their identity. It also tries to find practical solutions rooted in the lived experiences of African women, many of whom have skills that could empower them economically . However, popular feminism is not without limitations. It has been criticised for its complacent and timidity with regard to certain decadent cultural and political practices.[36]

It is argued in this paper that both strands of feminism are important and relevant to achieve women's empowerment in trade. It would be difficult to reduce both strands of feminism into a single theoretical context because of their inherent differences. Despite differences, however, the movements can unite, as long as

31 Mari Bergman, 2016 'African Sisterhood-Conceptualising African Feminist Identity'
32 Okome, M. O. 1999. Listening to Africa, Misunderstanding and Misinterpreting Africa: Reformist Western Feminist Evangelism on African Women. Paper presented the 42nd Annual Meeting of African Studies Association, Philadelphia, Pennsylvania, November 11-14
33 Mari Bergman, 2016 'African Sisterhood-Conceptualising African Feminist Identity'
34 Okome, M. O. 1999
35 Okome, M. O. 1999
36 Okome, M. O. 1999

there is due respect for the differences and a genuine effort to understand the other. Most importantly, these two feminisms are united in their basic cause; the end of oppression against women in whatever manner. Thus, despite their differences, African intellectual feminism and popular feminism have the same basic goal. What is important is that they should both be shaped by African contexts and experiences. It must be noted however, that this paper uses the terms African feminists or African feminism in a loose form. It has included all feminists writing in the African context and for the cause of African women.

IV AFRICAN FEMINIST PRACTICES IN TRADE

Women's involvement in informal trade has not been discussed in direct terms by African feminists. However, this can be inferred from what feminists have discussed concerning women's social, economic and political experiences on the continent which they argue has a great bearing on their participation in public affairs including trade.

A THE COLONIALISM EFFECT

Empirical research has shown that women's participation in informal cross border trade is influenced by their poverty levels. Due to poverty, women have less capital and engage in small scale trade. The women traders avoid the application of high import and export duties which when applied takes up some of their capital for business. Women's poverty can be traced back to colonial economic policies. Eweluka, 2005[37] states that African women's engagement with global economic actors during the colonial period was primarily exploitative. She states that the move from slave trade to 'legitimate commerce' carried with it the promise of mutual benefit for Africans and Europeans. However, the promised gain from trade for Africans proved illusory. This was due to an underlying colonial policy that assigned the colonies an inferior position in global trading arrangements. For example, there were unequal terms of trade between African traders and the 'unofficial representatives of imperialism,' particularly the overseas trading companies, in addition to harsh tax laws and regulations imposed by colonial states. Due to these discriminatory practices, African women found themselves in a very difficult position. They were particularly disadvantaged because they did not enjoy access to the few formal employment positions that were open only to men. Moreover, women were also excluded from the new political structures of power that were established to replace traditional institutions.[38]

37 Uche U Ewelukwa, 'Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the New International Trade Regime' (2005) 20 Berkeley J Gender L & Just 75

38 Uche U Ewelukwa, 2005

McFadden[39], writing about the Zimbabwean context, argues that through colonial legal interventions and the deployment of what became known as 'customary law and practice', black and white men colluded to keep most black women in the rural spaces under the surveillance and control of older patriarchal males. For instance, traditional land tenure systems were maintained, albeit in the limited spaces where Africans were pushed to by white settlers. African women were denied any relationship with the land as a critical resource, except as users for the purpose of reproducing the African heterosexual family. McFadden has contended, therefore, that for the majority of black women today, a relationship with property remains a heavily contested and culturalised issue. This relationship clearly disrupts certain structural and ideological relationships of power between women and men and between women and the State. Women's mobility was also restricted during this time on the grounds that women who left the authentic rural spaces were loose, de-culturalised, and polluted by westernism. Colonial law constructed them as 'interlopers' who had entered the urban civic space illegally, and any man was licensed to 'arrest' such women and return them to the custody of their chiefs or head-men.[40] McFadden argues that such practices are an old form of 'Othering' strategy in patriarchal societies, aimed at keeping women outside those civic spaces that offer the possibility of autonomy and independence from male control and dependence. Consequently, women simply disappeared into what became the informal economy of the countries of the region. Such women, often resorted to prostitution as a means of survival while they sold food and provided entertainment to black men who worked in the homes and industries of colonial capitalism. These became the 'culture-less' women who had positioned themselves outside the control and definition of ancient African patriarchy, and whose struggles for inclusion into the formal economy and the civic spaces of modern African existence continues to this day. McFadden ends by stating that most laws in the region continue to treat black women as interlopers; outsiders in the city, often located on the margins of a rapidly modernizing region.[41]

Women's subordination during the colonial era is explained by Pearce[42] to have been caused by European perspectives on gender relations.[43] She states that at that time, women's economic and legal status had begun to decline in Europe.[44]The centre piece of the home was the conjugal unit in which the wife did not have a separate legal existence under common law.[45] Ideally, women and children were confined

39 Patricia McFadden 'Cultural Practice as Gendered Exclusion: Experiences from southern Africa' In SIDA Studies No 3 (2001) Dscussing Women's Empowerment: Theory and Practice. Available at https://www.sida.se/contentassets/5e45d330e16743179cefc93de34e71ac/15611.pdf

40 Patricia McFadden, 2001

41 Patricia McFadden, 2001

42 T Pearce (2000) 'Gender and Governance in Africa: A Conceptual Framework for Research and Policy Analysis and Monitoring' (Africa Knowledge Networks Programme: Ethiopia)

43 T Pearce, 2000

44 T Pearce, 2000

45 T Pearce, 2000

to the private domestic sphere and were thus economically dependent on a male breadwinner.[46] The European perception of a woman's role was then transferred to Africa and the ideals resulted in women's economic contributions and rights consistently being overlooked or misunderstood.[47]For example, Parpart writes that agriculture development projects in colonial Africa focused on men and ignored indigenous gender relations in land use, crop ownership and women's knowledge.[48] When land rights were recognised, legitimate heads of households, namely men, were given the titles.[49] In addition to these new cultural practices, colonialism instituted discriminatory measures against women. The discriminatory practices were shown in a number of ways including content of educational curricula, laws restricting women to rural areas and lower wages for female labour.[50]

From the above, it is clear that women's disadvantaged position in trade, including their participation in informal trade can be traced back to colonial times. The effects of colonial policies and institutions had a big influence in creating patriarchies and in making hegemonic middle-classed cultures in colonised areas. In the process of building colonial rule, many sexual and class ideologies in trade were born, where men were privileged to trade in the formal sector and women were denied such spaces. However, it should be noted that not all African countries were colonised nor is it possible to make a generalisation of all colonial cultures, but this kind of history sheds some light on women's experiences in the informal cross border trade today.[51]

B LACK OF PARTICIPATION OF WOMEN IN GLOBAL AFFAIRS

Onyango and Tamale, 1995[52] notes that the process of defining, articulating, and executing women's agenda at the international level takes place without the involvement of third world women. They argue that this is due to the differential access to the international institutions of decision making at which such agendas are ratified. They further state that western and multilateral institutions incorporate western women in their design and propagation to propagate African women's agenda. They give an example of the formulation of the 'Women-In-Development' (WID) schema of international agencies to appreciate this point. Onyango and Tamale argue that WID's main objective was to provide inter alia, improved access for women to health care, education, credit, and land. However, WID paid scant attention to the structural conditions that denied women such rights in the first instance. As a result, WID simply sought to pursue the modernisation paradigm

46 T Pearce, 2000
47 J Parpart (1986) *Women and the State in Africa* (Hallifax: Canada)
48 J Parpart (1986)
49 J Parpart (1986)
50 T Pearce, 2000
51 Mari Bergman, 2016 'African Sisterhood-Conceptualising African Feminist Identity'
52 J Oloka-Onyango and Sylvia Tamale, 'The Personal Is Political, or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 Hum Rts Q 691

across the gender divide and as such its ultimate results were little different from the failures in the wider context of underdevelopment as a whole.[53]

Similarly, Eweluka, 2005[54] posits that although global trade manifestly impacts women's lives, the voices of women have been largely excluded from debates about the virtues of trade liberalisation. Adopting the arguments of Orford, she argues that the effect of globalisation is a feminist issue for several reasons. First, women often bear a disproportionate burden of the costs of globalisation. Second, feminists seek to resist the practices of exploitation and division of people against each other that are inherent in notions of competition, comparative advantage, free trade, and the international division of labour. Third, with respect to economics, feminist scholars have argued that it is a means of imagining the world that is premised upon denigrating that which is understood as 'feminine.' She observes that free trade has not benefited third world women because formal and informal international trade rules have frequently failed poor women. She cites a dissonance in the rhetoric of free trade mantra and points out that despite claims about the benefits of free trade, the empirical reality is that rich countries are getting richer and poor countries are getting poorer. This poses a major concern for most women in the third world. She further notes the vulnerability of the agricultural sector in the global economy, the shrinking market share for goods originating in developing countries and the market dominance of transnational corporations as some of the factors that currently account for the gap between theory and practice. She, therefore, suggests that relevant trade for African women in particular must be people-centred, sustainable, empowering, transparent, inclusive, and above all, participatory. As such, she calls for a fundamental reform of international trade rules and structures of governance of the global economy. She also calls for a bold reinterpretation of international human rights norms in light of the numerous challenges globalisation poses.

Onyango and Tamale further argue that African feminism must confront directly and become engaged in the formulation of any international women's agenda and the elaboration of a cogent theory or theories in the area. In the process, attempts must be made to overcome the structures to genuine solidarity and transnational mutual respect and commonality. Such a process must be consciously undertaken not only as part of the transformative challenge, but also in the quest for the cross-pollination and fertilisation of ideas and strategies. They further state that local circumstances and conditions of patriarchy and exploitation in the third world are intricately connected to international conditions. They also note thatthe global public sphere impacts on local space in a variety of different and complex ways, including that of private actors, such as transnational corporations, banks, and arms dealers. As such, in Africa, what appears to be a local political act is compounded

53 Onyango and Tamale, 1995

54 Uche U Ewelukwa, 'Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the New International Trade Regime' (2005) 20 Berkeley J Gender L & Just 75

by the frustrations and tensions set in motion by global forces. They conclude that the failure to fully integrate third world perspectives into theoretical analyses of international feminism will lead only to partial solutions to the problem of the universal marginalisation of women.[55]

Empirical evidence in Africa and Malawi in particular have also alluded to the fact that women's absence in the formulation of trade laws and policies generate unfavourable trade rules which end up pushing the women traders into informal trade and practices.[56] The studies have shown that trade rules and policies in the African countries are influenced by global trade rules.

C LACK OF A WOMEN'S FOCUS IN THE GLOBAL DEVELOPMENT AGENDAS

One key theoretical factor that feminists have stated to lead to ICBT is the lack of a gender focus in trade policies. Randiamaro contends that gender is a key factor in the complex relationship between trade, growth and development. This notwithstanding, there is a widespread assumption that trade policies and agreements are class, race and gender-neutral.[57] Trade policies affect men and women differently due to gender inequalities in access to and control of economic and social resources and decision-making. Their impact is also mediated by the different roles that men and women have within societies – in particular, the gendered division of labour.[58]

In addition to the gender-neutral policies, Ramandiero states the growing number of civil society organisations working on trade still lack concise and easy-to-digest information on the key gender issues in trade, as do policy-makers at the local, national and international levels, including in development cooperation. For example, market access and enterprise development have been touted as fundamental policies through which developing countries will be enabled to engage in international trade. However, in general, liberalisation under the WTO rules has not significantly increased women's access to credit, nor has it provided more opportunities to use domestic savings for entrepreneurial activities. This is because structural gender inequalities in property rights and ownership mean that women have fewer assets that could serve as collateral. Rather than introducing policies to support women's access to credit, profit-driven liberalisation policies have perpetuated the discrimination against poor women in the mainstream financial market by focusing on urban areas and the more profitable economic sectors. This excludes poor women who are concentrated in the informal sector and operate mostly in small and medium enterprises. As a result, poor women and other

55 Onyango and Tamale, 1995

56 Malunga, B (2018) 'Women's participation in Tax Rule Making: A case of Women Informal Cross Border Trade in Malawi' A Dissertation, University of Nairobi

57 Randiamaro, Z (2001) 'Overview Bridge Report; Gender and Trade' (University of Sussex: Brighton) Available at http://www.bridge.ids.ac.uk

58 Randiamaro, Z (2001)

disadvantaged groups have to rely on the informal financial sector for both their survival and economic activities.[59]

In addition to a lack of women's participation in global affairs, writers have also stated that though their participation in global affairs is a human rights issue, the global international agenda has side-lined human rights in its approach to facilitate trade activities. For example, it has been said that no explicit reference to human rights is made in the World Trade Organisation (WTO) laws or rules. Tran- Nguyen states that the multilateral trading regime has been conceived as a system of rules meant to ensure not equal outcomes, but equal opportunities to trade. She argues that WTO obligations are generally obligations of conduct, not obligations of results.[60] Similarly, Boserup in her 1970 book on *Woman's Role in Economic Development* criticised development as being a system that excluded women. She proposed a break from a series of dogmas established in development discourse and policies. She used some empirical research in Africa to question the outcomes of post-1945 development programmes, showing that they had serious implications for women's participation and well-being. Until the 1970s, women had only been included in development policies as passive beneficiaries, or mothers and housewives. In contrast, training, technology and finance were geared towards men. The Western model became widespread through development programmes and focused on the home as a standard recipient unit and particularly on men as breadwinners with a salaried job. Women were dependents in charge of the home. The model ignored the fact that in many cultures women worked in agriculture and food production and that there were different, or much more flexible, sexual divisions of labour. It also ignored the fact that the home, or the household, was a mesh of power relations that did not necessarily convert the aid given to male breadwinners into profit for 'dependents' of either sex.[61]

D CUSTOMARY LAWS AND PRACTICES

Kambirami, 2006[62] argues that archaic customary laws and practices hamper women's participation in public affairs including trade. She states that these customary laws and practices emanate from the family, as a social institution which is a brewery for patriarchal practices by socialising the young to accept sexually differentiated roles. She gives an example of Zimbabwe in the Shona culture, that from a tender age, the socialisation process differentiates the girl child from the boy child. Shona males are socialised to view themselves as breadwinners and heads of households whilst females are taught to be obedient and submissive housekeepers[63]. She concludes

59 Randiamaro, Z (2001)
60 Tran-Nguyen, A. and another, 2004. P 362
61 Margarita Aguinaga, Miriam Lang, Dunia Mokrani, Alejandra Santillana(Development Critiques and Alternatives: A Feminist Perspective)
62 Kambarami, Maureen 'Femininity, Sexuality and Culture: Patriarchy and Female Subordination in Zimbabwe' 2006, (African Region Resource centre: South Africa)
63 Kambarami, 2006

by stating that the socialisation process in the family which instils patriarchal practices into the young does not end within the family but infiltrates into the other social institutions like marriage, religion, education, politics and the economy. This situation is obtaining in almost all African countries, where women continue to exist in roles and relationships that make them subordinate to men. These inequalities severely limit their capacity to engage in and benefit from trade. Acceptable 'gender roles', including the division of labour, create a society where these hierarchies are translated into economic policies and activities. Women's subordination dates back from time immemorial. For example, Pierce[64] writes that notwithstanding that some groups of women had power in some African societies during precolonial times; a foundation for gender inequality was laid during this period through marital systems and continues in today's societies. She cites patriarchal customary practices such as gift marriage, ghost marriage, levirate, widow inheritance, forced childhood marriage, polygyny and even bride wealth that perpetrated gender inequality and placed women at a disadvantage. Further, in some societies patriarchal authority severely limited women's political and economic power. Women in such societies were protected as long as they paid obeisance to patriarchal power. Access to land, for example, depended on the good will of the husband's family.[65]

Feminist economists have linked women's subordination in society to their minimal participation in formal trade. Feminist economists consider men and women's unpaid labour, and their different responsibilities for the care of children and community (social reproduction) as macroeconomic variables. Feminist economic analysis argues that due to different gender roles, the relationship between women and men in society, and women's unequal access to economic resources (such as land, credit and technology), macroeconomic policies have different impacts on men and women. Thus, the conventional assumption that trade policies and trade liberalisation are gender neutral in their formulation and impact must be rejected in favour of much more in-depth examination of their gendered impact. Feminist economic analysis, therefore, seeks to understand the impact of the gendered division of labour on women's empowerment, their well-being and the types of work they undertake.[66]

E THE FAILED PROMISE OF HUMAN RIGHTS LAW

Eweluka, 2005[67] states that International Human Rights Law (IHRL) appears to offer effective emancipatory tools to women whose rights have been affected by the forces and processes of globalisation. This has been made possible with the gradual

64 Pearce,T. 2000. Gender and Governance in Africa: A Conceptual Framework for Research and Policy Analysis and Monitoring. Africa Knowledge Networks Programme: Ethiopia

65 Parpart, J. 1986. Women and the State In Africa. Working Paper No 117, Hallifax: Canada. P2-3

66 Randiamaro

67 Uche U Ewelukwa, 'Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the New International Trade Regime' (2005) 20 Berkeley J Gender L & Just 75

expansion of the legal ideology of international law to accommodate women's rights. However, a closer examination reveals that IHRL does not adequately address the problems women encounter in the global market place. Two factors present major obstacles on efforts to the use of human rights law to address violations of women's rights by global market forces. At the fore is IHRL's obsession with nation-states and the continued exclusion of international institutions, transnational corporations, and other non-state actors from the scrutiny and processes of IHRL. Second is the failure of international human rights machinery to meaningfully and imaginatively address the problems that arise as a result of growing linkages between trade and human rights. IHRL's obsession with nation-states is reflected in the fact that human rights norms impose obligations on states and are primarily binding on states. The design of major human rights treaties appear directed only at constraining state power. Today, however, the exercise of power by non-state actors raises serious questions for international human rights lawyers. Globalisation has therefore radically altered the conditions in which IHRL operates today. States no longer pose a principle threat to human rights but things such as economic restructuring and trade and financial liberalisation are the primary causes of human rights abuses. Thus, although IHRL might have provided effective relief to women in the past, there is need to address the human rights obligations of non-state actors including transnational corporations and global trade and financial institutions.[68]

F REDUCTION OF SOCIAL SERVICES PROVISION

Musasa, [69]states that the reduced presence of the State in the provision of social services and the contraction of a formal permanent labour force after privatisation in many African states have caused an increasing number of families to seek out alternative forms of employment. She states that women and children are entering the informal sector in large numbers to subsidise men's declining involvement in the formal sector. Her argument is that job seekers are driven on the one hand by a realistic fear of falling into extreme poverty, and on the other hand by a desire to "make it" in the fast-paced world of global capitalism. These two factors, coupled with government economic policy, often lead people to seek opportunities outside the legal framework set up by the State. Illegality therefore becomes a legitimate survival strategy in the eyes of those who are faced with the daily constraints of life in a rapidly declining economy with ever diminishing State intervention. As such, entrepreneurship and market competition are now mixed with the anxiety of destitution in a world of scarce resources and non-existent public welfare intervention.[70] Musasa has, therefore, argued that these two factors together have led to the rise in informal activities often bordering on the illegal. She argues that people feel entitled to bypass westernised notions of private property in the name of survival and individual gain. It has therefore

68 Uche U Ewelukwa, 'Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the New International Trade Regime' (2005) 20 Berkeley J Gender L & Just 75

69 Patience Musasa, 'Contesting Illegality: Women in the Informal Copper Business on the Zambian Copper Belt' In Schlyter, Ann (ed) Body Politics and Women Citizens, 1996 (Forest Stewardship Council: SIDA Studies No. 24)

70 Patience Musasa, 1996

been argued that when people illegally appropriate resources from private spaces, they are not actually putting forward a claim over the ownership of these resources, but rather they are pointing out the unfair usage of the same resources by the legal owner.[71]

V CONCLUSION

The above discussion has explained women cross border trader's involvement in informal trade from an African feminist perspective. The paper has shown that although illegal in most African states, women's involvement in informal cross border trade is on the increase. African feminists have linked women's informal trade activities with the historical marginalisation of women. It has shown, for example, that colonialism had a negative effect on women's participation in formal trade. For instance, women were confined to rural areas and not given an opportunity to work and participate in public affairs such as trade. As such women opted for the informal route for their survival. Apart from the colonial effect, several factors such as absence of women's agency in global trade affairs, lack of a gender focus in trade policies and archaic customary laws and practices among others have contributed to women's involvement in informal trade. Consequently, the paper has argued that African states and indeed the multilateral trading system need to do more for women to move from informality to formality in trade. Among others, the existing mechanisms that facilitate trade such as trade policies and international human rights instruments should be used to monitor the gendered impacts of trade policies and agreements and to hold governments accountable to their commitments on gender equality and women's empowerment. Furthermore, the involvement of African women and gender experts in trade policy-making and negotiation processes should be promoted at all levels. In addition, African states should invest more on uprooting negative cultural practices as it has been shown that such practices have a huge bearing on women's trading activities.

71 Musasa, 1996

BEYOND THE RHETORIC FOR GENDER EQUALITY IN THE 2010 CONSTITUTION: USING THE IRISH POTATO REGULATIONS AS A CASE FOR FITTING STATUTORY INSTRUMENTS FOR PURPOSE

Peter Munyi*

ABSTRACT

Gender inequality has given unequal social, economic and political opportunity and access in favour of men and operated to the detriment of women. That patriarchy is engrained in Kenya's fabric is evidenced by the founding constitution of the republic, which has since been replaced. The former constitution discriminated against women particularly in the application of personal laws. The extent of inequality and discrimination perpetuated against women in particular, merely because of being women, provided part of the rationale for the constitutional deconstruction of patriarchy, and construction of provisions in the Constitution of Kenya, 2010 (the 2010 Constitution) that explicitly assert equity, social justice, inclusiveness and non-discrimination among others as forming the bedrock for national values and principles of governance. There have been a mix of successes and failures in actualising gender equality and in extinguishing discrimination against women since the 2010 Constitution came into being. In some areas, success has been progressive and remarkable. Despite the outcomes outlined above, the process of attaining gender equality continues to face a number of challenges in living up to the constitutional expectations at various levels. The most obvious of these challenges lie at the legislative level. The other challenge lies in institutionalising other measures to ensure that all the equality principles enshrined in the 2010 Constitution and as may be legislated upon are observed and attained throughout the spheres of life of Kenyan societies, especially in the absence of the required legislation.

This article focuses on these two challenges. With respect to the first challenge, the article traces the valiant attempts to use legislation as a tool to bring these gender equality principles into approximation with the constitutional requirements and discern whether in the absence of legislative enactment, the 2010 Constitution remains merely rhetoric in this regard. The second part of this article considers whether given the absence of direct legislation contemplated on the issue, other measures could be institutionalised to achieve the constitutional objectives. These 'other measures' as thought would involve retooling statutory instruments to fit this purpose. Perhaps already an inkling of these instruments is already emerging from the raft of instruments on gender policies and gender mainstreaming that are being seen. Consideration for whether statutory instruments may be deployed as viable

tools in the achievement of the constitutional objective is made using the Crops (Irish Potato) Regulations, 2019 (the Irish Potato Regulations) as a case study. Thus, the final part of this article evaluates whether gender impact assessment concerns were adequately considered in the Irish Potato Regulations and the Regulatory Impact Statement (RIS) prepared prior to the gazettement of these regulations, and if not the specific questions that ought to have been posed in the assessment so as to bring gender considerations to the fore

I INTRODUCTION

Gender equality concerns have haunted the Kenyan State even before its formation due to the culture of patriarchy that constitutes part of the State's fabric.[1] This system of power and inequality has given unequal social, economic and political opportunity and access in favour of men and operated at the detriment of women and other marginalised groups.[2] That patriarchy is engrained in Kenya's fabric is evidenced by the founding constitution of the republic, which has since been replaced. The former constitution discriminated against women particularly in application of personal laws. Section 82(4) of the former constitution prohibited discrimination except in respect of non-citizens and in respect of adoption, marriage, divorce, burial, and devolution of property on death or matters of personal law.[3]

The extent of inequality and discrimination perpetuated against women in particular, merely because of being women, provided part of the rationale for the constitutional deconstruction of patriarchy, and construction of provisions in the Constitution of Kenya, 2010 (the 2010 Constitution) that explicitly assert equity, social justice, inclusiveness and non-discrimination among others as forming the bedrock for national values and principles of governance.[4] As a result, the 2010 Constitution is not gender-neutral;[5] it is vehement on equality and freedom from discrimination.[6] It declares that women and men have the right to equal treatment,[7] including the right to equal opportunities and prohibits the State from discriminating

* Peter Munyi is a Lecturer at the Faculty of Law, University of Nairobi and Honorary Research Fellow, Health Law and Ethics Research Interest Group, School of Law, University of KwaZulu-Natal.

1 Loreen Maseno and Susan M. Kilonzo, *Engendering development: demystifying patriarchy and its effect on rural women in Kenya*, International Journal of Sociology and Anthropology Vol. 3(2) pp. 45-55, February 2011.

2 Mbalenhle Matandela (2020) The convergence of patriarchy and democratic roll-back in the east and horn of Africa, in Caroline Kioko, Rosebell Kagumire, Mbalenhle Matandela (eds) 2020,Challenging Patriarchy: The Role of Patriarchy in the Roll-back of Democracy, Heinrich Böll Stiftung, Nairobi.

3 Gender Equality Challenges in Kenya and Africa: key note address by Commissioner Winfred Lichuma EBS, Chairperson National Gender and Equality Commission Kenya during the event- Gender Equality: international challenges and strategies for success, organized by Australian Federal Police at the Australian High Commission in London Officer on 28th June 2017.

4 Article 10(2)(c) of the Constitution of Kenya.

5 The author is cognizant that gender has been defined as a process of judgement and value (a social hierarchy) related to stereotypes and norms of what is to be masculine or feminine, regardless of born sex category. See Connell RW. (2002) Gender, Cambridge: Polity Press.

6 See article 27 of the Constitution of Kenya generally.

7 Article 27 (3) of the Constitution of Kenya.

directly or otherwise against any person based on inter alia, sex and pregnancy.[8] These attributes are very pronounced in gender-based discriminations. The 2010 Constitution further, provides for a right for every person not to be subjected to any form of violence from either public or private sources.[9] Gender based violence remains yet another social ill afflicted to women by men. In fact, the State has to in the duty to observe, respect, promote, and fulfil the fundamental rights and freedoms, address the needs of among other, women.[10]

There have been a mix of successes and failures in actualising gender equality and in extinguishing discrimination against women since the 2010 Constitution came into being. In some areas, success has been progressive and remarkable. This is the case for representative politics where the 2010 Constitution was sufficiently prescriptive in the manner in which gender equality would be attained with the legislature's function in statute enactment being only symbolic. A reservation of a minimum number of seats for women in the National Assembly and Senate is made in the supreme law.[11] The Kenyan electorate has in the two elections since 2010 ably filled this representative quota in the two houses of Parliament. Furthermore, a number of women have also succeeded in being elected in the non-reserved seats to represent constituencies and counties in Parliament.

At the institutional level some state agencies and factions of state have embraced the constitutional call on gender equality and on this basis adopted policies to enable them attain these ideals. Thus, the Ministry of Defence adopted a gender policy in 2017 with a view to purpose gender mainstreaming in the Kenya military.[12] Maseno University[13] and the Kenya National Library Service[14] have each adopted institutional policies on gender aimed at among others, promoting gender equality. Even then, as at 2017/2018, only 12% and 18% of Chairpersons and Chief Executive Officers respectively, out of 198 State Corporations assessed by the National Gender and Equality Commission were women.[15]

Despite the outcomes outlined above, the process of attaining gender equality continues to face a number of challenges in living up to the constitutional expectations at various levels. The most obvious of these challenges lie at the legislative level. Article 27 (8) of the 2010 Constitution requires the State to take legislative measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be on the same gender. Attempts to legislate on this requirement have come to a nought. The second challenge lies in

8 Article 27 (4) of the Constitution of Kenya.
9 Article 29(c) of the Constitution of Kenya.
10 Article 21 of the Constitution of Kenya.
11 Articles 97 and 98 of the Constitution of Kenya.
12 Government of Kenya, 2017
13 Maseno University Gender Policy, 2018.
14 Kenya National Library Service Gender Mainstreaming Policy, 2013.
15 National Gender and Equality Commission, Annual Report 2017-2018.

institutionalising other measures to ensure that all the equality principles enshrined in the 2010 Constitution and as may be legislated upon are observed and attained throughout the spheres of life of the Kenyan societies, especially in the absence of the required legislation.

This article focuses on these two challenges. With respect to the first challenge, the article traces the valiant attempts to use legislation as a tool to bring these gender equality principles into approximation with the constitutional requirements and discern whether in the absence of legislative enactment, the 2010 Constitution remains merely rhetoric in this regard. The second part of this article considers whether given the absence of direct legislation contemplated on the issue, other measures could be institutionalised to achieve the constitutional objectives. These 'other measures' as thought would involve retooling statutory instruments to fit this purpose. Perhaps an inkling of these instruments is already emerging from the raft of instruments on gender policies and gender mainstreaming that are visible . Consideration for whether statutory instruments may be deployed as viable tools in the achievement of the constitutional objective is made using the Crops (Irish Potato) Regulations, 2019[16] (the Irish Potato Regulations) as a case study. Thus, the final part of this article evaluates whether gender impact assessment concerns were adequately considered in the Irish Potato Regulations and the Regulatory Impact Statement (RIS) prepared prior to the gazettement of these regulations, and if not the specific questions that ought to have been posed in the assessment so as to bring into fore gender considerations.

The Irish Potato Regulations and the accompanying RIS are also employed as a proxy to gauge the status of actualising gender equality in the agricultural sector. The agricultural sector generally and the Irish Potato Regulations in particular, are deliberately singled out for a number of reasons: first, the sector is the highest contributor of livelihoods and employment in Kenya and women play a key role in food security.[17] Secondly, as food items move along the chain from the farm to the market and Irish potatoes are not an exception, the role of women in this regard change.[18] There is evidence that in the case of Irish potatoes, decisions with respect to seed tend to be made by women.[19] However, it is not known whether these decisions translate to women participating more in the cultivation of the crop than men given also that land rights are male dominated.[20] The Irish potato is a food

16 Legal Notice Number 17 of 5th April 2019.

17 Shiundu, M. and Oniang'o, R. (2007) 'Marketing African Leafy Vegetables: Challenges and Opportunities in the Kenyan context', African Journal of Food, Agriculture, Nutrition and Development, 7(4).

18 Dolan, C.S. 2001. The 'good wife': Struggles over resources in the Kenyan horticultural sector. Journal of Development Studies, Vol. 37(3): 39-10.

19 Berne Declaration (2014). Owning Seed, Accessing Food: A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, Zurich.

20 Kameri-Mbote, Patricia. 2005. "Inheritance, Laws and Practices affecting Kenyan Women." In Makumi Mwagiru (ed.) African Regional Security in the Age of Globalisation. Nairobi: Heinrich Böll Foundation

security crop with a high potential to contribute to poverty reduction in Eastern Africa (including Kenya) through income increase and improved food security.[21] In Kenya, the crop is cultivated in over twenty nine counties and in thirteen of them it is also considered to be an income earner.[22] Moreover, the agricultural sector directly or indirectly impacts on the twelve critical areas of concern requiring particular action towards advancement of women as identified by the Beijing Platform for Action.[23] Following the evaluation, a brief discussion follows on the possibilities of integrating gender impact assessment as an element of a wider Regulatory Impact Statements for statutory instruments.

The evaluation of whether gender impacts assessment concerns in the Irish Potato Regulations were considered in the RIS is grounded on two tools: (a) the Gender Mainstreaming Toolkit developed by the European Institute for Gender Equality and (b) the Finland Ministry of Social Affairs and Health handbook (The Finnish handbook) for government employees on implementation of gender equality. The latter is in effect an instrument for implementing the EU gender equality *acquis*.[24] The European Union toolkit has been widely used in the European Union as a basis for assessment of governmental structures to use for gender mainstreaming.[25] It is also notable that the European Union does not perform gender impact assessments as standalone exercises, but rather are integrated in the general impact assessment system.[26] However, in using this toolkit, it is recognised that gender impact assessment remains a learning process.[27] The Finnish handbook on the other hand, provides a comprehensive guideline on gender impact assessment distilling EU issues at the national level. The Finnish handbook may therefore be a useful guide for countries such as Kenya, that may wish to similarly integrate gender impact assessments in RIS.

II LEGISLATIVE ATTEMPTS TO ACTUALISE GENDER EQUALITY

Kenya's parliamentary record is awash with attempts to variously legislate on equal rights between women and men, or affirmative action, long before the 2010 Constitution was promulgated and specifically imposed the legislation condition in article 27(8). In 1996, Hon. Charity Ngilu moved a motion to implement the Beijing

21 Gildemacher, P (2012) Innovation in Seed Potato Systems in Eastern Africa, KIT Publishers, Amsterdam
22 National Potato Council of Kenya (2017) Potato variety catalogue 2017, Nairobi
23 These areas are women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanism for the advancement of women; human rights of women; women and the media; women and the environment; and, the girl child.
24 The term 'EU gender equality acquis' refers to all the relevant Treaty provisions, legislation and the case law of the European Court of Justice (ECJ) in relation to gender equality. See European Communities, 2008. EU Gender Equality Law. Luxemborg.
25 European Institute for Gender Equality (2016) Gender Impact Assessment: gender mainstreaming toolkit.
26 Ibid.
27 Ibid.

Declaration and Platform for Action.[28] The motion did not succeed. A year later, Hon. Phoebe Asiyo tabled a bill in Parliament on affirmative action. The bill failed due to lack of support from the male dominated Parliament.[29] In 2000, Hon Beth Mugo sponsored an affirmative action draft Bill that sought to increase representation of not just women, but other marginalised groups in decision-making organs, but primarily in political institutions. The Bill which at first seemed to have received widespread parliamentary support and was to be debated, was opposed by the then President on the argument that he believed in equal opportunities for all regardless of gender. The proposed Bill was subsequently shelved.[30] In 2007, another attempt followed, this time from the then Minister for Justice and Constitutional Affairs, Hon. Martha Karua. Hon Martha Karua tabled a Constitutional (Amendment) Bill, 2007 on affirmative action that aimed at creating fifty automatic seats for women in the 10th Parliamentary elections that were to be held in 2008.[31] The Bill was not adopted and the amendment did not pass. It is in this context therefore that the provisions of article 27(8) of the 2010 Constitution could be seen: the drafters of the 2010 Constitution must have had these valiant yet unsuccessful attempt in mind in giving Parliament specific direction in enactment of law on the two-thirds gender rule with the hope that the prescription would lead to a positive legislative result, and thus succeeding in putting place a measure to foster gender equality.

Since the constitutional prescription, a raft of instruments at the parliamentary and judicial levels have been employed with a view to actualise the two-thirds gender rule. The first instrument was an advisory opinion from the Supreme Court sought by the Attorney General.[32] This opinion was sought due to the Attorney General's concerns of an inconsistency or a potential inconsistency between the equality principles in article 27 of the 2010 Constitution, and the specific provisions on membership of the National Assembly and the Senate, as provided in articles 97 and 98 of the same Constitution. The Attorney General feared then that without an advisory opinion, the inconsistency could lead to a constitutional crisis.

In its advisory opinion, the Supreme Court ruled that Parliament is under an obligation to have a framework on the realization of the two thirds gender rule by 27th August 2015, otherwise it would be rendered unconstitutional.[33] The advisory opinion was buttressed by a further decision of the majority in the Supreme Court

28 The Beijing Platform for Action is considered the most progressive blueprint ever for advancing women's rights. See https://beijing20.unwomen.org/en/about accessed on 14th August 2019.

29 Maria Nzomo, Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action. Accessed from https://ke.boell.org/sites/default/files/uploads/2014/01/affirmative_action-impacts_of_women_in_political_leadership_in_kenya_by_prof_maria_nzomo.pdf on 14th August 2019.

30 Ibid.

31 Adawo, L., Gikonyo, L.W., Kudu, R. M., and Mutoro, O. (2011). History of Feminism in Kenya, a report. Available at http://www.nawey.net/wp-content/uploads/downloads/2012/05/History-of-Feminism-in-Kenya.pdf , accessed on 10th October 2019.

32 In the matter of the Principle of Gender Representation in the National Assembly and Senate (2012) eKLR.

33 Ibid.

in another matter[34] where it was held that the realization of the two-thirds under article 81(1) (b) of the Constitution is progressive. However, a decision from the High Court followed not so long thereafter, wherein the Constitutional Court made an order of mandamus directing the Attorney General to prepare the relevant Bills within 40 days for tabling before Parliament for the purposes of implementation of Articles 27(8) and 81(b) of the 2010 Constitution.[35]

Following the decision of the Constitutional Court two Bills emerged in Parliament, in an attempt to give effect to the gender equality question and the two third-third rule. The first of these was the Two-Third Gender Rule Laws (Amendment) Bill, 2015[36] (infamously known as the Chepkonga Bill). This Bill sought to amend various statutes with a view to promote the representation in Parliament of among others, women and to give the National Equality and Gender Commission powers to among others, monitor implementation of affirmative action programmes. The second one, the Constitution of Kenya (Amendment) Bill, 2015[37] (infamously referred to as the Duale Bill) sought to 'top up' the number of women in the National Assembly should the general election fail to meet the constitutional threshold.[38] Other Bills have followed on the same issue since the two, including the Constitution of Kenya (Amendment) Bill, 2018.[39] These bills have all flopped on the floor of the National Assembly and as matters stand, Parliament is yet to enact legislation to give effect to the two-thirds gender rule. It is also likely that the life of the 12th Parliament will come to and before enactment of a statute on the two-thirds gender rule.

With Parliament's failures as outlined above, a question that follows then is whether there is anything else left at the National Assembly that is worthy of pursuit in addressing, not only the two-third gender rule as a measure, but to also actualise gender equality. In this article, it is argued, that other opportunities exist within the rubric of instruments available in Parliament to achieve the same purpose. These other instruments exist in the form of statutory instruments, whose stature and structure is now clarified and given by the enactment of the Statutory Instruments Act, 2013. This forms the discussion in the next part of this article.

III STATUTORY INSTRUMENTS AS TOOLS FOR ATTAINMENT OF GENDER EQUALITY

In the Commonwealth, it is recognised that Parliament has the ultimate power and authority to make laws. However, laws are also made through other means,

34 In the matter of the Principle of Gender Representation in the National Assembly and Senate (2012) eKLR.
35 Centre for Rights Education & Awareness (CREAW) vs Attorney General & Another (2015) eKLR.
36 Kenya Gazette Supplement No. 52 (National Assembly Bills No. 20)
37 Kenya Gazette Supplement No. 143 (National Assembly Bills No. 16)
38 Lilian Aluanga: 'New Proposals to Achieve Two-third gender rule' Standard Digital, 3 April 2016 https://www.standardmedia.co.ke/article/2000196994/new-proposals-to-achieve-two-third-gender-rule accessed on 12 July 2019.
39 Kenya Gazette Supplement No. 10 (National Assembly Bills No. 4)

including by the courts as they undertake their interpretative functions, and also by the executive-in the form of subordinate legislation under supervision by the legislature. The postwar British Parliament enacted the Statutory Instruments Act, to give better clarity to the process, nature and extent as to the instruments by which statutory powers to make orders, rules, regulations and other subordinate legislation may be made.[40] This statute institutionalizseed the manner in which subordinate legislation may be made, with Parliament retaining powers to scrutinise these instruments with a view to ensuring that these instruments remain within the scope of the enabling statutes.[41]

It is important to note that as at the time of enactment of the Statutory Instruments Act in the UK, statutory instruments were considered narrowly to mean, "orders, rules, regulations or other subordinate legislation…made by His Majesty's Council or … any Minister of the Crown.."[42] This definition has remained to date. However, as the idea of enacting statutes on statutory instruments has dispersed to other countries, so has the understanding of what theymean changed. The process and content of the material to accompany a statutory instrument to Parliament for scrutiny prior to approval has also evolved over time. In the UK, all statutory instruments that are subject to parliamentary procedure must be accompanied by an explanatory memorandum.[43] The explanatory memorandum is a document that explains what the statutory instrument does and why. This memorandum is required to include among others, the consideration of costs of the measure and the outcome of the public consultation exercise, and a Regulatory Impact Assessment (RIA).[44]

A Statutory Instruments Act was enacted by Kenya's Parliament in 2013.[45] While this statute is intended to provide for the making, scrutiny, publication and operation of statutory instruments similar to the correspondent statute in the UK, a major departure from its correspondent statute lies in what it considers to constitute a statutory instrument. Under section 2 of this law, a statutory instrument is defined very broadly to include: rules, orders, regulations, directions, forms, tariffs of costs or fees, letters patent, commissions, warrants, proclamations, by-laws, resolutions, guidelines or other instruments, made or established in the execution of a power conferred under an Act of Parliament.[46] Further, as Parliament may apply this statute in scrutinising its own Bills awaiting parliamentary consideration, then it is arguable that statutory instruments may include proposed statutes.[47] It therefore follows that any action taken by any person pursuant to a power conferred by an

40 Statutory Instruments Act, 1946
41 Section 4, Statutory Instruments Act, 1946.
42 Section 1, Statutory Instruments Act,1946.
43 House of Commons Information Office, Fact Sheet L7, Revised May 2008.
44 Ibid.
45 Act No. 23 of 2013
46 Ibid, section 2.
47 Ibid, section 3.

Act of Parliament may constitute a statutory instrument. While the scope of this definition remains to be tested in courts, emerging judicial decisions on the subject suggests that the construction of statutory instruments under Kenyan law is very broad, and consequently, potentially far reaching.[48]

The objective of putting in place the Statutory Instruments Act in Kenya was essentially to improve legislative quality by promoting its legal effectiveness, clarity and intelligibility to anticipated users.[49] A canonical principle that is established by this statute is the requirement for 'appropriate consultations' being made before making statutory instruments.[50] The consultative process that is required is well articulated and the regulation making authority is imposed upon a duty to test and confirm if consultations have taken place.[51] Specifically, the consultation must draw on the knowledge of persons having expertise in the field relevant to the proposed statutory instrument, and those likely to be affected by the proposed statutory instrument must be given an opportunity to comment on it. This requirement for consultation provides the first opportunity through which it can be ensured that gender considerations are taken into account in decision making process by the State.

Consultation is a norm that has attained legal meaning under Kenyan law. While consultation normally refers to a form of public participation and inclusiveness, it is one of the national values and principles of governance in Kenya.[52] As such, an argument that consultation is one of the national values and principles of governance in a value-oriented Constitution as Kenya's is, is not remote. Courts have held that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability.[53] Given that it is now settled that the national valued as espoused in article 10 of the Constitution constitute elements among which the State must bear in governance, then it follows that consultation, on matters concerning gender from a non-discrimination and marginalisation standpoint, must be taken into account in the statutory instruments making process.

A second opportunity to ingrain gender considerations in statutory instrument making processes lies in the requirement for a Regulatory Impact Statement to be prepared where a statutory instrument is likely to impose significant costs on the community.[54] Regulatory Impact Statements or Regulatory Impact Assessments (RIAs) are said to have originated from Inflation Impact Assessments required

48 In *Republic vs Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries and Others (2019) eKLR*, the court found that a Legal Notice published in the Kenya Gazette constituted a statutory instrument.
49 Statutory Instruments Act (No.23 of 2013), section 4(b).
50 Ibid, section 4(a).
51 Ibid, section 5.
52 Constitution of Kenya, 2010, article 10 (2)(a).
53 *George Bala vs Attorney General (2017) eKLR.*
54 Statutory Instruments Act (No.23 of 2013), section 6.

by the Carter Administration in the United States from 1978.[55] Over time, OECD countries institutionalised RIAs as fundamental tools to examine and measure the likely benefits, costs and effects of new or existing regulation.[56]

Section 7 of the Statutory Instruments Act outlines the content of Regulatory Impact Statements that should accompany a proposed statutory instrument. The key elements through which the impact of a proposed statutory instrument should be measured are provided as: the objective; effect; other practicable means of achieving those objectives including other regulatory and non-regulatory options; and, costs and benefits assessments. The costs and benefits assessment include assessment of economic, environmental and social impact, and the likely administration and compliance costs including resource allocation costs.[57] The list of these elements is not provided exhaustively and section 7(1)(f) provides a window for consideration of other elements in the impact assessment. Coupled by the fact that social impact has to be measured as part of the costs and benefit assessment, a gender consideration could arguably be included as part of the RIA. Experiences from OECD countries suggest that countries have wide latitude in designing the elements for consideration in undertaking RIAs. Emerging and developing countries confront different challenges from those that developed countries do. As such the impact that a regulation may have on small businesses, job opportunities, access to credit, gender and indigenous communities, are becoming more relevant in assessments.[58] Furthermore, an example can be borrowed from Finland which includes gender equality as an element in its RIAs.[59] Norway requires consequences that a regulation may have on gender equality be quantified as far as possible.[60] A study by the World Bank has found that at least twelve countries measure the impact on gender equality within their RIA frameworks.[61]

Thus, as RIAs remain systematic in their approaches to critically assess both positive and negative effects of proposed and existing regulations and non-regulatory alternatives, they are potent tools through which gender considerations can be made in regulation making in Kenya. The wide latitude through which gender impact assessments could be included in RIAs in Kenya presents an opportunity that State and public officers who have powers to make statutory instruments could embrace

55 OECD, 1997. Regulatory Impact Analysis: Best Practices in OECD Countries.
56 OECD, 2008. Building an Institutional Framework got Regulatory Impact Analysis (RIA): guidance for policy makers.
57 Statutory Instruments Act (No.23 of 2013), section 7(2).
58 OECD, 2008. Building an Institutional Framework got Regulatory Impact Analysis (RIA): guidance for policy makers.
59 Ibid.
60 OECD, 1997. Regulatory Impact Analysis: Best Practices in OECD Countries.
61 World Bank Group. Global Indicators of Regulatory Governance: Worldwide Practices of Regulatory Impact Assessments. An undated report. Accessed from http://documents.worldbank.org/curated/en/905611520284525814/Global-Indicators-of-Regulatory-Governance-Worldwide-Practices-of-Regulatory-Impact-Assessments.pdf on 12th October 2019.

in steering forward gender equality principles. In the third part of this article, an attempt is made to consider the sort of considerations and questions that could be raised in undertaking a gender impact assessment of the Irish Potato Regulations.

IV QUESTIONS FOR CONSIDERATION IN A GENDER IMPACT ASSESSMENT OF THE IRISH POTATO REGULATIONS

Gender impact assessment is the process of comparing and assessing, according to gender relevant criteria, the current situation and trend with the expected development resulting from the introduction of the proposed policy.[62] It is the estimation of the different effects (positive, negative or neutral) of any policy or activity implemented to specific items in terms of gender equality. Gender impact assessments as designed in the European Union and also proposed for contemplation as part of RIAs, are ordinarily carried out either *ex ante* as opposed to *ex post*.[63] However, there is no evidence to suggest that an ex post gender impact assessment cannot be considered.

According to the European Commission (EC) guidance on social impact assessment, the questions to be asked when conducting a gender impact assessment are: (a) Does the option have a different impact on women and men? (b) Does the option promote equality between women and men?[64] However, impact assessments are organised in a decentralised way in the European Commission; several EU countries have developed detailed assessment tools in this regard, with additional questions going beyond, the EU Guidelines for Impact Assessment.[65]

Regardless of the elaborate nature of the assessment tools involved in each country, the assessment of potential impacts on gender should consider the existing differences between women and men that are relevant to the given policy field, in particular in terms of participation rates, distribution of resources, benefits and responsibilities in private and public life, and in the norms/values, attitudes and behaviour that influence gender roles. Analysis of impacts on gender means to compare and assess, according to the gender criteria abovementioned and sex-desegregated data, the current situation/trend with the expected developments resulting from the introduction of the proposed policy, in order to ensure that the proposal contributes to eliminate inequalities and promote the European Community objective of equality between women and men.[66] Gender attention is required in particular in the analysis

62 https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en accessed on 8th October 2019.

63 Human Rights Impact Assessment are carried out either ex ante or ex post, that is either as means of ensuring the human rights implications of a policy are considered when that policy is being developed or of assessing the impact of policy or practice on the rights of those affected once the policy is implemented

64 See p. 19, European Commission guidance on Social Impact Assessment.

65 See https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en accessed on 8th October 2019.

66 See p. 19, European Commission guidance on Social Impact Assessment.

of groups affected and "should take into account the existing differences between women and men that are relevant to the given policy field". More specific references are given under job quality, workers' rights, social inclusion and social protection of specific groups of women'[67]

Finland has adopted a more elaborate procedure for gender impact assessments, supported by a handbook to support gender equality work at Finnish ministries.[68] According to the guidelines, the assessment involves a set of general and specific questions. The general questions deal with issues such as whether the proposal promotes equality between women and men; whether women and men are *de facto* treated equally in the proposal; whether the special needs and circumstances of women and men have been adequately identified; whether there are special measures directed at either sex that are needed; and, whether the proposal affects the realisation of gender equality in a longer-term perspective. The general questions mirror those that the EU has provided for guidance.

The questions posed by the EC for guidance together with the detailed Finnish questions provide a sufficient framework against which an evaluation of the gender aspects of Irish Potato Regulations and the accompanying Regulatory Impact Statement (RIS) can be made. While primarily these questions would be posed in the process of conducting a gender impact assessment, in this chapter, this assessment is not done, but rather the questions posed in the assessment form the basis for an evaluation of the Irish Potato Regulations and the accompanying RIS from the gender lens, particularly in establishing whether there is evidence of these questions having been posed in the RIS. As the Irish Potato Regulations are already in force and as such an *ex-ante* assessment is not possible, they could form a framework for the undertaking of an *ex post* assessment.[69] This discuss therefore is only intended to consider whether in the preparation of the RIS, gender aspects were taken into account.

The Irish Potato Regulations, 2009 were enacted in Kenya with a view to provide for registration of the various actors in the Irish potato value chain-growers, dealers, processors, importers, and exporters; provide for quality assurance; establish enforcement standards in grading; sampling and packaging.[70] The expected outcome of the regulation is to promote best practices in the Irish potato sector.[71] The Regulations seek to regulate two general aspects: the first is by establishing

67 Ibid.

68 Ministry of Social Affairs and Health, (2013). Gender Glasses in Use: a handbook to support gender equality work at Finnish ministries

69 Harrison, James, Measuring Human Rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future (November 10, 2010). Warwick School of Law Research Paper No. 2010/26. Available at SSRN: https://ssrn.com/abstract=1706742 or http://dx.doi.org/10.2139/ssrn.1706742

70 Ministry of Agriculture, Livestock, Fisheries and Irrigation (2018). Regulatory Impact Statement for the Crops (Irish Potato) regulations, 2018.

71 Ibid.

a system of registration of all actors in the Irish potato value chain-from growers, dealers, marketing agents, importers and exporters; requirement for growers to subscribe to grower associations and collection centres. Besides, Irish potato warehouses or stores also require registration. The second aspect that is regulated is quality assurance, packaging and marketing, including transportation of Irish potatoes to the market. For the purposes of testing the regulations and the RIS on the gender Issues, only the quality assurance aspect of the regulations is considered. This aspect is picked out on the assumption that quality assurance is a key aspect in the value chain, since as a farm management issue, productivity and yields are mostly affected by it. However, it is worth noting that in an *ex post* assessment, assessment of information concerning registration of the Irish potato value chain actors would be useful in approximating gender participation and consideration for any strategies that may be required to increase participation of either women or men in Irish potato cultivation in future.

Flowing from the EU guidelines, a starting point in undertaking a gender impact assessment of the Irish Potato Regulations would be to pose the following general questions: (a) Does the option have a different impact on women and men? (b) Does the option promote equality between women and men? The option in question here is the quality assurance imposition. A grower of Irish potatoes is required to ensure safe use, storage and disposal of pest control products and in accordance with the Good Agricultural Practices (GAPs) imposed by the State.[72] Besides, the grower shall only use pest control products registered for use in the Irish potato production. Resulting from the above, the relevant questions to be posed would be: (a) Does this rule impact on women and men differently? (b) Does this rule promote equality between women and men? In order to an answer this question, it is necessary to interrogate several issues concerning costs of purchase of the relevant pest control products; the GAPs in Irish potato production that have been imposed by the State if any, and also, whether all growers-women and men readily access information in relation to knowing the prescribed pest control products for Irish potato.

At the core of these general questions is land tenure-whether the 'grower' is also the landholder, and, family finance arrangements at the household level. From a human rights perspective, it is established that restrictions on the use, exchange and sale of protected seeds could adversely affect the right to food as seeds became more costly and harder to access and as the cost of seeds increase, the more household incomes is affected, raising dilemmas at the family level on allocation of income to farm inputs, healthcare and schooling.[73] It necessarily follows that imposition of quality assurance regulations comes at a cost which affects household incomes. How decisions on income allocation are made may vary depending on who controls the

72 Crops (Irish Potato) Regulations, Rule 18

73 Berne Declaration (2014). Owning Seed, Accessing Food: A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, Zurich.

family purse. This may impact on women and men differently. These questions are not raised at all by the RIS; rather, the RIS perceives costs only from the perspective of the regulator and also assumes that the initial costs will be outweighed by the benefits arising from an increase in the quality of the produce.[74]

The second set of specific questions emanate from the Finland Ministry of Social Affairs and Health handbook[75] (the Finnish handbook). In this handbook, the following 11 parameters are provided for testing in gender impact assessment: (1) economic status (2) decision making (3) professional life (4) business and industry (5) education (6) parenthood (7) public services (8) well-being and health (9) safety (10) surroundings and living conditions and (11) leisure time. These parameters are easily relatable in Kenya's situation and would apply in a gender impact assessment of the quality assurance aspects of the Irish Potato Regulations.

On the issue of economic status, the questions considered in the Finnish handbook deal with whether the proposal to impose a quality assurance regulation will have different effects on the economic status of women and men, in relation to pay, taxation, and benefits among others. While the Irish Potato Regulations RIS appears to take a general view that the regulations will lead to a change of the economic status of all actors in the value chain, it does not disambiguate these between women and men pay, and benefits. Broad brush statements such as "improved income distribution" and "decrease poverty level" among farm families are made. Yet women and men play specific roles in the Irish potato value chain, particularly in the provision of labour. For example, as Irish potato is a bulky crop, men undertake the more menial task as loaders at the market place a task whose demand may increase with an increase in yields at the farm level.

With regard to decision making, the questions based on the Finnish handbook would relate to whether the regulation on quality assurance has differing consequences for women's and men's opportunities to participate and influence, or whether both sexes have equal opportunities to participate and make decisions in all areas.[76] Again, there is nothing in the RIS that indicates consideration for women's and men's opportunities to participate, influence and make decisions in all areas. In fact, no evidence is provided of women and men having participated in the making of the regulations themselves, let alone in the design of the quality assurance aspects of the regulations. The extent to which if any, public consultations occurred is put into question, yet it is a key element in the making of statutory instruments. That said, an ex post consultative process is discussed with respect to sensitisation of the public of the regulations. This of course does not meet the meaning of 'consultations'

74 Ministry of Agriculture, Livestock, Fisheries and Irrigation (2018). Regulatory Impact Statement for the Crops (Irish Potato) regulations, 2018.

75 Ministry of Social Affairs and Health, (2013). Gender Glasses in Use: a handbook to support gender equality work at Finnish ministries

76 Ibid.

intended under the Statutory Instruments Act as discussed earlier.[77]

With respect to professional life, the specific questions to be considered based on the Finnish handbook would be the following: does the imposition of a regulation on quality assurance affect women's and men's positions on the labour market differently? Are special solutions needed in order to ensure the labour market status of women or men, or in order to, for instance, further recruitment and career advancement in the field? Is sex segregation in different fields and professions weakened or strengthened by the proposal to impose a regulation on quality assurance? Again, nothing in the regulations nor the RIS touch on these issues. Employment and labour benefits are seen to only arise from the total sum of production process. Thus, statements contained in the RIS such as "*imposed units of measurement will…create wealth and employment for more Kenyan in rural areas*" and "*gender friendly packaging will create employment and improved health for loader*"[78] are at best fallacious as they are not backed by evidence. It is not considered for example, whether the requirement to use pest control products registered for use in in Irish potato production will create small agro-dealer businesses or spur career advancements in the field and whether this may have any impacts on the labour market.

The next set of questions based on the Finnish handbook relate to business and industry. Hereunder, the questions that would be posed are: Does the proposal to introduce quality assurance regulations have a different effect on businesses in female- and male-dominated fields or on businesses of different sizes? Does the proposal to introduce quality assurance regulation weaken entrepreneurship opportunities for either sex? Are special measures needed to support women's entrepreneurship? The RIS does not provide any specifics in this regard. However, there is a general assumption that the entirety of the regulation will improve businesses along the Irish potato value chain. This is obviously a different matter, for the concern about whether these businesses are male or women dominated is not addressed.

On education, questions that would be asked based on the Finnish handbook would be: Does the proposal to introduce quality assurance regulation support the educational opportunities and professional development of both sexes independently of the professional or the educational sector? Are special solutions needed to support the educational opportunities for either sex? Are special solutions needed to alleviate sex segregation in education? This set of questions appear remote to the RIS. However, in the regulations, the education aspect is touched upon in providing the minimum qualification for inspectors.[79] Among the provisions is that a person appointed as an inspector shall be required to be a holder of a Bachelor's degree in agriculture or a related field or a diploma in agriculture with two years'

77 Ibid, note 47.

78 Ministry of Agriculture, Livestock, Fisheries and Irrigation (2018). Regulatory Impact Statement for the Crops (Irish Potato) regulations, 2018.

79 Crops (Irish Potato) Regulations, Rule 22(4).

experience in extension service work. At the very least an assessment on whether a sufficient number of qualified women and men could have been undertaken prior to this imposition.

Parenthood forms the next element that would be considered in the gender impact assessment of the Irish Potato Regulations based on the Finnish handbook, with the following being the questions: Does the proposal to impose a regulation on quality assurance support both women and men in parenting and starting a family? Does the proposal affect differently custodial and non-custodial parents? Does the proposal encourage a more equal distribution of family lives and of sharing caring responsibilities between women and men? Are any special measures needed to strengthen paternity? Again, these issues appears not to have been considered in any way in the RIS.

The next set of questions would concern public services: Are the consequences different for men and women regarding the services and assistance they need? Are special arrangements called for to ensure that women and men both get such assistance and services? Again, the RIS is empty in this regard.

On well-being and health, the questions that would be posed based on the Finnish handbook are: Does the impact of the proposal to impose a regulation on quality assurance differ between the sexes regarding mental or physical health, well-being, or its distribution? Are differences in risk factors for the health and well-being of women and men accounted for? Does the proposal to impose a regulation on quality assurance reduce health discrepancies between women and men or within the respective group? Does the proposal strengthen the social participation and well-being of both sexes? Herein, consideration would include occupation health and safety aspects of pesticides use, and risk factors involved. Evidently, an imposition on use of pesticides is likely to lead to an increase in their use and further the requirement that they are used, stored and disposed safely is expected to lead to an increase in costs. These issues are not addressed or considered in the RIS.

Safety is the next parameter. Herein the question posed based on the Finnish handbook would be the following: Does the proposal to impose a regulation on quality assurance have different effects on safety as experienced by women and men, respectively? Are the different security risks for women and men at home, at work, and in recreation considered in the proposal? Are special measures needed to reduce violence against women? Again, the question whether the safety and security of women and men may change as result of imposition of the regulation is not specifically addressed.

The penultimate parameter concerns surroundings and living conditions. Herein the questions that would be posed based on the Finnish handbook in the assessment would be: Does the proposal to impose a regulation on quality assurance differently impact the living conditions or everyday life for women and men? Has the proposal taken into account the needs of both sexes concerning, for instance, community structure, transport planning, or accessibility? Obviously, considering that it is required under the regulations that pest control products used in Irish potato production should be among others, handled and stored safely, this may impact on living conditions of the women and men growers. Further, studies have shown that transport either of seed potato or the produce itself is a core cost centre in the value chain.[80] The fact that a transporter of Irish potato produce is required to be registered, and with carriage beyond a certain tonnage attracting more regulation, this will inevitably lead to an increase in transport costs.[81] Yet, further interrogation of the observations in the RIS that over 63% of farmers sell their produce directly off the farm and cartels of middlemen exist[82] would lead to high transport costs being one of the reasons why these practices are prevalent in the Irish potato industry. Similarly, there is no clarity on how the costs of establishing the collection centres envisioned under the regulations will be borne and how these will impact on the growers themselves.

The last parameter concerns leisure time. In this regard the relevant questions that would be posed in a gender impact assessment based on the Finnish handbook would be the following: does the proposal to impose a regulation on quality assurance promote both women's and men's opportunities for leisure and hobbies? Are cultural and sports services used by women and men respectively equitably supported? Certainly, this is not a factor that appears to have comes into the purview for consideration in the Irish Potato Regulations RIS.

As stated in the earlier part of this section, in the EU, gender impact assessments are undertaken as part of the social impact assessment of statutory instruments. In the Kenyan case, a social impact assessment is a requirement in the fulfilment of a costs and benefit analysis of a statutory instrument.[83] Expectedly, the RIS contains a section on social impact. Of the four considerations discussed on social impact, none concerns gender. Finally, the RIS contains an assessment of the effect the regulations will have on fundamental rights and freedoms. It is broadly stated in this section

80 A human rights impact assessment of UPOV 1991 found that Irish potato farmers who buy certified seed from the Kenyan Agricultural Development Corporation (ADC) tend to be either those living in the vicinity of ADC, farmers who can afford the transport costs for seed potato or farmers organized in groups as the cost of transport of seed and eventual produce is very high. See Berne Declaration (2014). Owning Seed, Accessing Food: A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, Zurich.

81 Crops (Irish Potato) Regulations, Rule 10(4).

82 Ministry of Agriculture, Livestock, Fisheries and Irrigation (2018). Regulatory Impact Statement for the Crops (Irish Potato) regulations, 2018.

83 Statutory Instruments Act (No. 23 of 2013), section 7(2).

of the RIS that the proposed regulations will engender fundamental rights and freedoms including the rights of all actors in the value chain. However, no specific right or freedom is enumerated and how it will be secured. Had this enumeration been done, then an attempt to demonstrate how gender equality and freedom from non-discrimination will be secured would have been made.

V CONCLUSION

It is evident that since the enactment of the 2010 Constitution, Parliament has struggled in fulfilling its full mandate in providing legislation required on gender equality. Besides, private and public institutions are yet to not only put appropriate policies in place to aid in the attainment of gender equality, but also take tacit measure in the absence of policies in this regard. It is not even clear whether institutions with gender equality policies in place are following them to the letter. A casual examination may therefore lead to a conclusion that the constitutional provisions on gender equality are merely rhetorical.

However, a deeper examination of the matter reveals that the enactment of the Statutory Instruments Act, provides a channel through which gender equality may be actualised. Statutory instruments as governed through this statute provide a pathway through which constitutional requirements towards gender equality can be met. This pathway should be pursued through the refinement of the content and detail of the Regulatory Impact Statement, ensuring that the gender considerations are incorporated in social impact assessments.

The use of the EU model and the Finnish handbook in examining the extent to which gender considerations were made in the Irish Potato Regulations RIS demonstrates that the current design for Regulatory Impact Statements appear not to take have taken gender questions on board. Yet, the that gender issues could have been considered within the social impact matrix in impact assessments. The RIS therefore provides broad latitude through which gender impact assessments may be made, and in this process gender sensitive statutory instruments will result.

The absence of full legislation to meet gender equality provisions of the 2010 Constitution should therefore not be allowed to imply that there are no other avenues through which gender equality may be fulfilled. The Statutory Instruments Act, 2013 provides an alternative pathway through which gender equality may be actualised.

AN ANALYSIS OF THE INTERSECTIONS OF WOMEN'S MULTIPLE IDENTITIES AND ITS IMPACT ON REPRESENTATION IN LOCAL PEACE PROCESSES IN KENYA: A CASE STUDY OF MOMBASA AND KILIFI COUNTIES

Annette Mbogoh*

ABSTRACT

The numerical presence of women in local peace committees and community policing initiatives has not translated to meaningful representation for all women. Women who are members of these local peace structures do not take leadership or decision-making roles. The local peace committees are mainly chaired by men with women playing supportive roles that sometimes relegate them to the oblivion. The domination of men in leadership positions in the local peace committees and nyumba kumi/balozi initiatives placed them at a vantage point in opportunities related to resource mobilisation, consultations and implementation of peace initiatives, collaborations with civil society organisations and consolidation of county conflict and early warning systems. These dominant male leaders only extended benefits to women with whom they shared commonalities for instance same ethnic or religious background. The article analyses the place of the law in enhancing women's representation. The article also problematises the politics of the representation of women in community-based peace structures. Findings are drawn from empirical research conducted in Mombasa and Kilifi counties in Kenya. The article concludes that in order for representation to be meaningful, effective and equal it must take into consideration the heterogeneity of the woman and the intersections of difference, build women's capabilities and strike a balance between substantive and numerical representation.

I INTRODUCTION

The concept of representation is complex and problematic. There have been a number of scholarly debates on representation and what it actually entails. Pitkin identifies four types of representation asserting that only one **acting for representation**" is the authentic kind.[1] She defines **acting for representation** as a relationship

* The author undertook her Bachelor of Laws (LL.B.) degree at the University of Nairobi, School of Law and Postgraduate Diploma in Law at the Kenya School of Law in Kenya. She later pursued a Master in Women's Law (MWL) and Doctor of Philosophy in Law (DPhilLaw) from the Southern and Eastern Africa Regional Centre for Women's Law in the University of Zimbabwe. She has fourteen years experience as a gender and human rights specialist. Her doctoral research revolved around the participation of women in the Truth, Justice and Reconciliation Commission in Kenya using Mombasa County as a case study. Her teaching interests at the University of Nairobi's School of Law are: gender and the law, human rights law, transitional justice, clinical legal education and children and the law. The findings of the present study arose from post-doctoral empirical research funded by NORHED through the University of Nairobi, School of Law. Email addresses: ambogoh@yahoo.com/annette.mbogoh@gmail.com).

1 HF Pitkin (1967) *The Concept of Representation* (Berkeley, Los Angeles: University of California Press, 1967) p. 224

between the represented and representative where the latter is more responsive to the needs of the former. It means, "the wishes of the represented and the action of the representative will converge".[2] According to Pitkin, convergence between representative and the represented is realised when: firstly, the represented give the representatives a clear mandate stipulating what s/he should do and secondly, where the representative is given the mandate to act independently on behalf of the represented as trustees.[3]

Pitkin defines "**formalistic representation**" as "the formal bestowing of authority onto a person to act for others or where a representative is held to account…for what s/he does…leaving no guarantee as to the quality of representation that is provided".[4]"**Symbolic representation**" consists of symbols that are usually arbitrary hence the quality of representation is dependent on the representer's attitudes and beliefs which may be open to manipulation by representatives.[5] A good example of symbolic representation is whereby women may be persuaded to be symbolically represented by male representatives.[6] Finally, **descriptive representation** is whereby "the representative stands for the represented due to similarities in characteristics or connections between them" under the pretext that the correlation in characteristics will inevitably mean that the actions of the representatives will stand for the represented.[7] Pitkin argues that **descriptive representation** results in a focus on the composition of organisations or institutions (in this case, which sex/gender is present) rather than its activities (what do they do).[8] This problematises representation as the representative cannot be held accountable for what she is but only what she has done. Also, the factors that require representation are not always clear.[9]

This article analyses the politics of representation of women in local peace processes, and more specifically the peace committees and community policing initiatives. It uncovers the heterogeneity of the concept of "woman" and her complexities vis a' vis the law on representation. It reveals the importance placed by women on their identities and whether or how they impact perceptions on representation by women in these local peace structures. The study explores whether women's preferred model of representation is strategic or numerical representation. Finally, it recommends possible solutions for effective representation of women within these formal peace processes. The experiences from the counties of Mombasa and Kilifi are used as a case study.

2 *Ibid*,n.2 pp.163-165
3 *Ibid* n. 2.
4 I*bid* n. 2 pp.55-59
5 I*bid* n. 2 p. 100
6 S Childs & M Krook "Should Feminists give up on Critical Mass? A Contingent Yes," Volume 2(4) Journal of the APSA Organised Section on Women and Politics Research (2006) 522-530; J Mansbridge "Should Women Represent Women and Blacks Represent Blacks: A Contingent Yes," in Volume 6(3) *Journal of Politics* (1999) 628–57; A Phillips (1995) *The Politics of Presence* (Oxford: Clarendon Press, 1995)
7 *Supra* n. 2 p. 87
8 *Ibid* n. 2 p. 226
9 *Ibid* n. 2 p.87

II HISTORICAL BACKGROUND ON THE ESTABLISHMENT OF LOCAL PEACE STRUCTURES IN KENYA

The 2007/2008 post-election violence in Kenya was a springboard for the recognition, establishment and replication of local peace committees across the country. Nonetheless, the structure of peace committees began in 1991 in Northern Kenya to address the longstanding conflict in that region. Adan and Pkalya argue that the Wajir peace and development committees were started by a group of women and local traditional elders.[10] It was only in 2001, 2005 and after the 2007/2008 electoral violence that local peace committees were sanctioned by government [11] It was noted that the local peace committees were effective in preventing the escalation of electoral violence in volatile Northern, Coast, Rift Valley and Nyanza regions.[12]

Subsequently, the peace agreement mediated by the late Mr. Kofi Annan on 28th February 2008 mandated such structures for all the country's districts. In particular, the Agenda Item 2 under the National Accord and Reconciliation Agreement recommended the establishment of the district peace committees countrywide. This agenda was later adopted by the National Steering Committee on Peace Building and Conflict Management (NSC).

The NSC, a multi-agency organisation, was established in 2001 within the then Ministry of State for Provincial Administration and Internal Security in the Office of the President.[13] It became operational in November 2002 when a fully functional secretariat was placed. The mandate of the NSC was to facilitate, coordinate, harmonise, monitor and evaluate peace-building and conflict management initiatives in the country.[14] The district peace committees (as they were then called) were placed under the National Steering Committee.

Upon the adoption of the National Policy for Peace Building and Conflict Management by the National Assembly on 27th August 2015 ("the Peace Policy"), the NSC will be replaced by the National Peace Building Commission (NPBC). The Peace Policy was essential to set up an infrastructure for peace, taking into account the context within which it would operate and the appropriate institutional mechanisms for peaceful co-existence among all Kenyan communities and early warning mechanisms on

10 M Adan & R Pkalya, (2006) *A snapshot analysis of the concept peace committee in relation to peacebuilding initiatives in Kenya: Practical action*, (Nairobi: CORDAID, 2006) p. 13

11 A Odendaal & R Olivier (2008) *Local Peace Committees: Some Reflections and Lessons Learned (*Kathmandu Nepal: USAID, 2008) p. 40

12 http://www.ke.undp.org/content/kenya/en/home/operations/projects/peacebuilding/districtpeace.html (accessed on 24 August 2019)

13 D Magotsi "A Review Of Kenya's Experiences In Peacebuilding And Conflict Management In Enhancing Co-Ordination Towards The 2012/2013 General Elections" in JM Nebe (ed.) *Peace building and Conflict Management*: *Civil Conflict Management of the Post-Election Violence 2007/2008 in Kenya Lessons Learnt and the Way Forward* (Trier: University of Trier, 2012) pp. 198-209

14 *Ibid*

social conflict. The Peace Policy proposes cooperation amongst communities, civil society and government to prevent all forms of conflict including cross-border, resource-based, religious, electoral and human-wildlife conflicts. It provides a legal framework for allocation of resources for peace interventions by the government.

The components of the peace architecture are: The National Peace Council, National and County Peace Secretariats, National and County Peace Fora, Local Peace Committees and Mediation Support Units. On the local peace committees, the Peace Policy creates a framework for the committees for the entire country. The local peace committees are closely linked to the district security committees. The policy envisages the establishment of 20 local peace committees every year. Following the adoption of a new Constitution in 2010, the district peace committees were renamed county peace committees to reflect the new devolved structure of government.

One of the objectives of the Peace Policy is "to mainstream gender issues in conflict management with emphasis on the empowerment of women towards long-term conflict mitigation and peace-making." The Policy is based on principles of participation and inclusivity, human rights and gender sensitivity. The Peace Building Policy recognises that women and men experience conflict differently. It promotes gender equality and mainstreaming as an integral part of all programmes and projects. In addition, the NSC developed the National Action Plan on Women, Peace and Security (NAP). The NAP aims to integrate the implementation of the UN Security Council Resolution 1325. The NSC has facilitated the engendering of the local peace committees through training and sensitisation of stakeholders on gender mainstreaming and gender in peace building, gender-based violence among others. Despite attempts to engender peace structures, the situation on the ground does not reflect full, equal and active participation of women.

According to Adan and Pkalya, Kenyan local peace committees were founded on the State's failure to provide security, justice and accountability through the formal judicial system. They state that:

> "…the realisation that community members themselves are better placed to manage their own conflicts was anchored on the inaccessibility of the formal judicial system and lack of trust in government led conflict prevention interventions ..." . [15]

It is clear that local peace committees have the potential to harness all groups of people in the communities that are affected by conflict and violence.[16] Consequently, they have been established and applied in various African countries to mitigate community related conflicts. Conflicts in the villages can be settled amicably by working in collaboration with the various stakeholders, such as elders, women's

15 *Ibid*, n.11 p. 3.

16 Envision Zimbabwe (2015) Building Bridges, https://www.envision.org.zw (accessed on 16-10-2019)

groups, youth, police or religious groups at the community level. [17]

Local peace committees are seen as responsive mechanisms created by local people to take responsibility for their own peace. The legitimacy of these local peace committees is hinged on the traditional institution of "council of elders" and customary approaches to conflict mitigation yet adapted to more modern approaches that included women, youth and civil society.[18] The formal legal system recognises traditional dispute resolution mechanisms; hence decisions by such organisations can be adopted by formal courts and enforced as long as they do not contravene the Constitution and any other written law.[19]

However, sustainable peace through local peace committees can only be achieved with full the participation and ownership by both men and women members of the community. Public participation is essential in the formation of the local peace committees and the delivery of its services to promote peace within the community spaces. Inclusivity in local peace committees is necessary to represent the needs of all social groups and hence address and prevent the emergence of ongoing peace challenges.

In Ghana, traditional mediation through local peace committees helped the country to mitigate conflicts arising from chieftaincy. The system has since been elevated into the national peace structure. On the other hand, in Zimbabwe, informal peace committees have addressed conflict at the local level because conflict stems from communities.[20] A lesson learnt from Zimbabwe was that peace committees had the potential to represent the diversity of its community, which is a contributing factor to the sustainability of the peace committee.[21]

On the other hand, community policing is traced to Sir Robert Peel's enunciation of the concept in 1829 when he created the London Metropolitan Police.[22] The philosophy was later replicated internationally through colonialism, training of

17 N Chivasa, "Efficacy of Informal Peace Committees to peace building: Evidence from Seke District, Zimbabwe," in Vol. 5(2) a241 African Evaluation Journal (2017) 23

18 The dominant traditional conflict management mechanism was arbitration. The council of elders could fine wrong-doers or – in extreme cases - formally curse them (Adan and Pkalya 2006). This approach was effective as long as wrongdoers recognized the traditional authority.

19 Article 159 (2)(c) and (3) of the Constitution of Kenya states: "In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)…
(3) Traditional dispute resolution mechanisms shall not be used in a way that—
(a) contravenes the Bill of Rights;
(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
(c) is inconsistent with this Constitution or any written law.

20 *Ibid* n. 18 p.304.

21 A Moyo, (2015) "Community-based healing and reconciliation in Zimbabwe" http://www.storiesofhumansecurity.net/documents/130967769/130987562/GPPAC_Publicatie_Human+Security_Zimbabwe.pdf/255036f7-4ff4-41c7-96bd-136a51cb7a1a (accessed on 17-10-2019) p. 93

22 L Denney & S Jenkins (2013) *Securing Communities: the What and the How of Community Policing. Background Paper* (London: ODI, 2013) pp.2, 3

foreign police and police reform.[23] With the recognition that security and justice are interlinked and essential to development, security was then hinged on the needs of local communities. The concept of community policing has hence been widely accepted as a mechanism for achieving crime reduction, more accountable policing, improved state-society relations and public participation in the security sector. Community policing is hence applied in Europe, Africa, Asia and Latin America in different ways; in some cases, it is implemented by government and in others by local communities. It may focus on state police or policing practices applied by a plurality of authority structures.

Numerous definitions and criteria have been put forward, including the 'strategy and philosophy' definition, but none has attained overwhelming consensus.[24] The Kenya Police adopts the strategy and philosophy approach and defines community policing as:

> …both a philosophy (a way of thinking) and an organisational strategy (a means to implement that philosophy), that allows the police and community to work together to solve problems of crime and insecurity. Community policing rests on two core pillars:
>
> a. Adopting policing practices that involve communities in making decisions about their own security.
>
> b. Establish a long-term partnership between communities and the Police…[25]

Therefore, Community Policing recognises the independence and shared responsibility of the Police and the Community in ensuring a safe and secure environment for all citizens. It aims at establishing an active and equal partnership between the Police and the public through which crime and community safety issues can jointly be discussed and solutions determined and implemented. Community policing speaks to partnership, community consent, accountability, preventive, responsive and proactive approaches to crime. Community policing may have varying degrees of community participation. It may just refer to policing *with* the community or it may be policing *by* the community. The approach would vary from one jurisdiction to another.

The community policing initiatives in Kenya, like the peace committees, do not receive any funding from the State. The communities through the county administrators appoint individuals to volunteer to work with the police in tackling matters related to insecurity. The volunteers are referred to as *balozi* (meaning ambassadors). Due to the lack of funding of the community policing, some *balozi* are alleged to receive

23 *Ibid* p. 2, 3
24 *Ibid*
25 https://www.kenyapolice.go.ke/pages/links/27-about-us/69-community-policing.html (accessed on 15 October 2019)

bribes from influential people involved in crime yet seeking to evade responsibility. Also, the appointment of community policing committees is ad hoc since guidelines are yet to be developed. Some people remain members for life hence compromising on the quality of services to the communities. Women remain under-represented in these community policing initiatives.

III METHODOLOGY

The present research study employed a qualitative research methodology. Qualitative research has been critiqued as "representations of patriarchal thinking that result in a separation between the scientist and the persons under study",[26] Other researchers argue that qualitative research methodology is not inherently feminist and that the feminist views of developing a non-exploitative research is not necessarily a feminist approach to methodology.[27] In this particular case, a feminist perspective was specifically applied to unveil the patriarchal system that influences attitudes, perceptions and ordering of the society.

The purpose of the research was to provide a deeper understanding of the complexities and politics surrounding women's representation in local peace structures. The field research involved collecting and interpreting women's stories and views around representation politics within peace processes. To achieve this purpose a quantitative research design would have been inadequate as it would restrain delving deeply into the lived realities of the female represented and representatives and the heterogeneity of women. A qualitative research methodology allowed the probing of emerging issues from the field and developing theories grounded in data. A quantitative research design would have been guided by pre-set questionnaires that limit responses of the researched-on matters relating to their personal perceptions and identities.

In addition, the research questions formulated to guide the present study were qualitative in nature. The research questions sought answers on women's views on female representatives, their multiplicity of identities and intersections, preferred form of representation and the interplay between the law and women's lived realities within the context of formalised peace processes. These answers cannot be found in a quantitative study where there is a substantial amount of pre-specification. Hence a qualitative research design is most appropriate due to its flexibility in the collection of empirical data that may prove or disprove the research questions.

26 M Fine "Passions, Politics and Power: Feminist Research Possibilities" in M Fine (ed.) *Disruptive Voices* Ann (Arbor: University of Michigan Press, 1992); DM Mertens (1998) *Research Methods in Education and Psychology: Integrating Diversity with Quantitative and Qualitative Approaches* (Thousand Oaks, California: Sage, 1998) p. 162

27 S Reinharz (1992) *Feminist Methods in Social Research* (Oxford: Oxford University Press, 1992); C Robson (2002) *Real World Research* 2nd ed. (Oxford: Blackwell, 2002) p.198; J Davidson & D. Layder (1994) *Methods, Sex and Madness* (London: Routledge, 1994) p. 217

These research questions also informed the methods of data collection. The research questions were best investigated through qualitative methods of data collection such as in-depth interviews, focus group discussions and observation. As such, in-depth interviews were conducted with key informants including women who were either members of peace committees, community policing or working around peace building in their respective counties. In addition, focus group discussions were carried out involving men and women serving as members of peace committees or community policing. These primary data collection methods were complemented by multiple secondary sources for example reports and previous studies on peace and women's representation.

Lastly, the sampling strategy utilised was a conglomeration of **snowball sampling** and **purposive sampling**.[28] Robson describes **snowball sampling** as involving identifying one or more individuals from the population of interest. In this case, our population of interest was women representatives of formalised peace processes, civil society etc.[29] Once interviewed, these individuals assisted in the identification of other respondents who would be crucial to the study and the cycle went on. The snowball sampling method was particularly useful in locating respondents. For instance, the researcher identified women in peace committees in Kilifi County through a female member of the Coast Region peace committee. The Malindi sub-county peace committee referred the researcher to the Magarini sub-county peace committee and so on.

A RESEARCH METHODS

The choice of research methods was influenced by the qualitative methodology. Through these methods, all elements present in a setting were investigated; respondents were the primary data gathering instruments.[30] The targeted respondents were women representatives in recognised formal peace organisations more specifically peace committees and community policing initiatives, grassroots women and men participants of formalised peace processes, women and men generally and state and non-state actors. The following research methods were used:

In-Depth Interviews: These were the main method of data collection. The interviews were semi-structured to ensure that only **relevant** issues are thoroughly explored. The in-depth interviews were carried out with key informants and respondents in Kilifi and Mombasa counties. A total of twelve (12) in-depth interviews were conducted.

28 Snowball sampling is described by Bentzon et al as the dung beetle method whereby data is collected, sifted and analyzed for purposes of developing new methodologies, perspectives and theories (See AW Bentzon et al (1998) *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Harare, Mond Books and Oslo Tano: Aschehoug, 1998) p.18

29 *Ibid* n. 28,p. 265.

30 AS Tsanga (2004) *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* (Harare: Weaver Press and Women's Law Centre, University of Zimbabwe, 2004) p. 41

Focus Group Discussions: Focus groups are "group interviews" employed to collect the thoughts and comments of respondents on representation politics, preferred form of representation models, multiple identities and heterogeneity of women, intersectionality of differences and recommendation on effective representation of women in formalised peace processes. A focus group interview guide was developed to steer the conversations. Focus group discussions provided an opportunity to engage women and members of the community on their own analysis of women's representation in formalised peace processes. There were three (3) focus group discussions conducted each involving ten (10) participants.

Observation: Unobtrusive observation is defined as being non-participatory in the interests of being non-reactive.[31] This form of observation was employed during the in-depth interviews and focus group discussions. The demeanour, body language and non-verbal cues from the respondents were noted and interpreted. This method added value and gave a background perspective to information acquired through other methods. There was a danger in drawing wrong inferences and interpretations from observed events. Therefore, observed data was triangulated with in-depth interviews and or focus group discussions.

Secondary Data Sources: Library and internet sources played an important role to provide background information on the politics of representation and intersectionality. Internet sources through Google Scholar, journal articles and relevant websites on women's representation and intersectionality were reviewed.

IV THE LAW: A STEPPING STONE OR STUMBLING BLOCK IN WOMEN'S PARTICIPATION IN LOCAL PEACE COMMITTEES AND COMMUNITY POLICING INITIATIVES

Recent developments in international human rights law discourse propagate the full and active participation of women in post-conflict reconstruction efforts. The right to women's participation in peace and security decision-making has evolved as an established international norm and standard with the force of law [32] As a State party to these international instruments, Kenya has a legal obligation to respect, realise, promote and protect women's right to participate in formal peace processes. In fact, article 2(5) and (6) of the Constitution of Kenya describes international human rights treaties that have been ratified as part of Kenyan law.[33] The international declarations and instruments that promote women's participation in peace processes are highlighted hereunder.

31 *Ibid*,n. 28 p. 310

32 UNIFEM (2000) *CEDAW and Security Council Resolution 1325: A Quick Guide* (New York: UNIFEM, 2000) *p. 4*

33 Art 2(5) of the Constitution states "The general rules of international law shall form part of the law of Kenya." On the other hand, art 2(6) of the Constitution adds "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

A INTERNATIONAL DECLARATIONS

Firstly, the Beijing Platform for Action (BPFA) specifically requires gender mainstreaming in peace processes through policies and programmes. Governments, international and regional institutions are obliged under the BPFA to promote equal participation of women in all forums and peace activities at all levels, especially the decision-making level.[34] Secondly, the Outcome Document of the Beijing +5 Special Session calls on state parties to ensure and support women's participation in decision-making and implementation of peace processes.[35] Thirdly, the ground-breaking UN Security Council Resolution 1325 calls on all actors to adopt a gender perspective in negotiating and implementing peace agreements including involving women (UNSCR 1325).[36] The UNSCR 1325 further requires member states to increase the participation of women at decision-making levels in conflict resolution and peace processes.[37] It acknowledges that women and girls have special needs, which must be considered during repatriation, resettlement, rehabilitation and reintegration in post-conflict reconstruction. The resolution further requires all member states to be provided with guidelines and materials on the protection, rights and particular needs of women.[38]

Broadly speaking, the international declarations only recognise the importance of engaging women in peace processes. The declarations do not stipulate the form of engagement. Also, the nature of representation is not described. The declarations apply a liberal feminist standpoint and extend the right to participation in peace processes to women as it has applied to men. However, the declarations do not address the perceptions around representation and its preferred form i.e., substantive or numerical.

B INTERNATIONAL INSTRUMENTS

The Convention on Elimination of all forms of Discrimination against Women (CEDAW), the African Charter on Human and People's Rights (ACHPR), the Maputo Protocol on Rights of African Women among others, recognise meaningful and full participation of women in public peace processes as a human rights issue.[39]

In article 7, CEDAW provides that state parties must take all appropriate measures to eliminate discrimination against women in political and public life particularly in relation to their participation in the formulation and implementation of government

34 Paragraph 142(a)
35 See paragraph 86(b) of the Outcome Document
36 UNSCR 1325 was reached in October 2000, https://kw.awcfs.org/article/in-peace-committees-women-take-subordinate-roles/ (accessed on 24 August 2019)
37 Paragraph 2
38 Paragraph 6
39 See articles 3, 4, 5, 8, 10 and 14 of CEDAW, articles 13, 23 and 29 of the African Charter on Human and People's Rights, articles 9, 10 and 11 of the Maputo Protocol, paragraphs 1, 2 and 8 of the UNSCR 1325 and paragraphs 1, 6, 7, 8, 10, 14 and 15 of the UNSCR 1889.

policy. The State is directed to ensure women participate in political processes within government or civil society organisations at all levels. Peace processes are public functions thereby the State has an obligation to ensure women's participation and eliminate any form of discrimination against women therein. Similarly, the African Charter on Human and Peoples' Rights (ACHPR) states that both men and women have the right to national and international peace and security.[40] This right is only fairly conferred if both sexes are involved in peace making. Article 13 guarantees women's participation in political processes such as post-conflict reconstruction.

The Women's Protocol to the ACHPR provides the right to women's participation in peace processes and post-conflict reconstruction.[41] It states that women have the right to a peaceful existence and to participate in the promotion and maintenance of peace. State Parties are directed to take appropriate measures to ensure increased participation of women in the following: programmes for peace education, creation of a culture of peace, structures and processes for conflict prevention, management and resolution at national, regional and international levels, and planning, formulation and implementation of post-conflict reconstruction and rehabilitation. Finally, article 9 of the Women's Protocol directs State parties to promote participative governance and equal participation of women in the political life of their countries through affirmative action, national legislation and other measures. This right is bolstered by article 2 of the said instrument, which places a duty on States Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

The international instruments only acknowledge the need for full and active involvement and or participation of women in peace and political processes. The international framework does not stipulate the form of representation that State parties ought to adopt to achieve this international obligation. The international instruments, like the declarations, conceptualise women as a homogenous group as opposed to applying an intersectional approach. Consequently, there is a naive presumption that the participation of a woman in these political and or peace processes results in representation of priority needs and concerns of all women.

C NATIONAL LAWS

In the same vein, national laws appreciate the need to incorporate women in peace and reconciliation processes. The Constitution of Kenya 2010 promotes democratic forms of governance, including enhanced participation of women, which ensures sustainable peace. It enumerates participation of the people as a national value and principle of good governance; the term "people" including both women and

40 See Article 23.
41 Article 10 of the Women's Protocol

men.[42] In article 10 (2) (b), the Constitution identifies other national values and principles of governance as "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised." Therefore, all persons, State organs, State officers and public officers are bound by these national values and principles whenever they:

a) Apply or interpret the Constitution;

b) Enact, apply or interpret any law; or

c) Make or implement public policy decisions[43]

All persons have a constitutional duty to implement these national values and principles. The full realisation of these values and principles would translate into the meaningful participation of women in formal peace structures such as the peace committees and or community policing.

The Constitution makes comprehensive provisions on the right to equality and non-discrimination. In article 27 (1), states, "every person is equal before the law and has the right to equal protection and equal benefit of the law." Article 27 further provides that:

(1) ***Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

(2) ***Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres***.

(3) ***The State shall not discriminate directly or indirectly against any person*** on any ground, including ***race, sex***, pregnancy, ***marital status***, health status, ***ethnic or social origin***, ***colour, age***, ***disability, religion***, conscience, belief, ***culture***, dress, language or birth.

(4) ***A person shall not discriminate directly or indirectly against another person*** on any of the grounds specified or contemplated in clause (4).

(5) To give full effect to the realisation of the rights guaranteed under this Article, the ***State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination***.

(6) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

42 See article 10(2)(a) that expounds on "patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people" as national values and principles of governance of the Republic of Kenya.

43 See article 10(1) of the Constitution

(7) In addition to the measures contemplated in clause (6), ***the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender***. *(Emphasis added)*

To a great extent, the Constitution seeks to improve women's legal status by requiring that they have equal treatment and equal opportunities with men in all spheres of life namely social, cultural, political and economic. In a sense, the right to equality and non-discrimination for women is constitutionally safeguarded in both the public and private sphere. The Constitution extends the duty of non-discrimination not only to the State actors but also to non-state actors.

The Kenyan constitutional framework on non-discrimination is inspired by liberalism. In article 27(1), the Constitution states that "every person is equal before the law and has the right to equal protection and equal benefit of the law."[44] Additionally, article 27(3) provides that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." To a great extent, the Constitution improves women's legal status by requiring that they have equal treatment with men in all spheres of life.

That notwithstanding, the Constitution of Kenya also applies an intersectional approach in dealing with discrimination. Article 27(4) incorporates a multiplicity of differences that African women may face in their day-to-day lives namely marital status, age, race, colour, disability etc. However, the "gender" difference is omitted. Some may argue that the ground of "sex" if widely interpreted may include "gender".[45] However, feminist scholars attribute "sex" to biological differences of what is male and female, and "gender" to social constructions of what is feminine and masculine. Consequently, it can affirmatively be argued that the Constitution does not acknowledge discrimination on the grounds of socially constructed differences of masculinity and femininity.

44
(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

45 Article 27(4) of the Constitution acknowledges that grounds of discrimination may be inexhaustible and uses the term "any" when referring to them.

Article 27(5) provides for both direct and indirect discrimination on the multiplicity of difference. Paragraph (6) requires the State to implement legislative and non-legislative measures to address inequality for example affirmative action programmes for social groups that have been excluded from public processes. These legal and non-legal mechanisms may be inadequate and deficient as women are added into an already patriarchal and engendered order. In addition to the measures under paragraph 6, the State is obliged to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.[46]

The right to non-discrimination has been qualified in its application. Article 24(4) states:

> The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

The Constitution hence provides a claw back clause to the right to non-discrimination in so far as Muslim law is concerned and in matters relating to personal status, marriage, divorce and inheritance. The limitation does not extend to public affairs matters such as participation in public and peace processes. In addition, the limitation to the right to non-discrimination applies only where Muslim parties subject themselves to the jurisdiction of the Kadhis' courts.

The Constitution of Kenya is progressive in ensuring women's involvement in public processes. Article 81 (1) of the Constitution provides the principles of the electoral system. In paragraph (b) its states that:

> "Not more than two-thirds of the members of elective public bodies shall be of the same gender."

The inclusion of this provision ensures that women participate equally in public bodies. The question is whether the phrase "elective public bodies" may be extended to appointive bodies. This is particularly important as membership in the local peace committees is not constituted by way of an election but by way of appointment.

D USING THE LAW TO SPEARHEAD FEMINIST INTEREST IN LOCAL PEACE STRUCTURES: A MIRAGE OR A REALITY?

It is clear that both national and international law create a platform or basis for advocating for women's participation in peace processes. Despite extensive legal provisions, the women respondents experienced exclusion, discrimination and marginalisation in their participation within local peace committees and community

46 Article 27(8) of the Constitution

policing initiatives. Women's involvement remained unequal to men's involvement.

Smart faults modern liberal feminists for thinking that the law could be a useful tool for the emancipation of women.[47] She affirms that the first wave liberal feminists used the concept of equal rights to fight against legally imposed barriers. At this time, the law openly distributed privileges and power to men to the exclusion of women. These nineteenth century liberal feminists agitated for the removal of male, legal privileges. Once the law ceased to allocate rights to men alone, advocating for legal rights in the present day to remove other forms of discrimination, is an illusion. The radical feminists acknowledge that the law can only assist women to the extent to which it reflects the interest of patriarchy or men. Edwards argues that international human rights are "male rights" which privilege men and side-line or silence women's interests.[48] The legal system is hence systematically gendered to prioritise male interests over female interests. Women become the exception to this general rule requiring a deliberate departure from the male standard to encapsulate female experiences, needs and interests. Due to the complexities of these contestations in law, not all government institutions and or agencies take and or are conscious of the need for this deviation.

The study found that to some extent, the law contributed towards the numerical presence of women in local peace structures due to the conscious effort of the appointing authority to create spaces for women's participation. The guidelines on quotas for women was only applied in the appointments to the local peace committees. Consequently, it was found that women's numerical presence was greater in the local peace committees than in the community policing initiatives which are commonly referred to as *nyumba kumi, balozi*. It was estimated by the respondents that membership of women in local peace committees was estimated at fifty (50) per cent. However, the membership of women in community policing initiatives (*nyumba kumi/balozi)* was only at thirty (30) per cent.

In compliance with the Constitution of Kenya, the guidelines of engagement in the local peace committees require 1/3 of the membership to be reserved for women and at least one member to be from special interest groups such as persons with disability. It was found that where local peace committees did not comply with these guidelines, the NSC would disqualify them. However, the quotas for women were not always applied strictly in the appointments to the community policing structure. Most members were old men who had retired from employment.

This position was confirmed by another key informant who is a member of the Regional Peace Committee. She indicated that the affirmative action policy has been

47 C Smart, (1989) *Feminism and the Power of Law* (London and New York: Routledge, 1989)

48 A Edwards, "Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies" in Vol. 18 Texas Journal of Women and the Law (2008) p. 9

used to limit the numbers of women to only the one-third of the membership. On the other hand, the community policing initiatives known as "*nyumba kumi*" had even fewer women participating. It was noted that the community policing initiatives had no particular guidelines on gender considerations in election of members. Again, the constitutional provisions on affirmative action were disregarded and misapplied.

In other words, for women's participation in the peace structures to be realised, there was a need for deliberate action by mandated institutions to appoint women into those positions. The question then is why should there be "deliberate effort" to include women in peace structures that are within the community.

Local peace committees are aimed at encouraging and facilitating collaborative and inclusive peace making and peace building processes within their own contexts. They are in a sense aimed at achieving restorative justice. On the other hand, community policing initiatives are more security oriented. They are aimed at establishing an active and equal partnership between the Police and the public through which crime and community insecurity can be discussed and solutions determined and implement. Whilst, the concepts of peace building and security may be intricately related; the former focuses on restoration while the latter on retribution and crime prevention. Restorative justice moves beyond the rather masculine discourse of crime and punishment embodied in retributive justice.

Gilligan describes the masculine mode of justice as "inexorable, unemotional, impersonal and objective".[49] Restorative justice centres on a more feminine discourse of the notion of repairing relationships. The pursuit of restorative justice through local peace committees may hence be arguably more appealing and accessible to women due to their deliberate incorporation and its emphasis on rebuilding communities and relationships. The findings of the present study confirmed this argument. Further, women's theories of sustainable peace were relational and based on the care and maintenance of societal relationships. Women related the concept of peace with cohesion, restoration, reconciliation and repairing of broken relationships within their communities. The local peace committees provided an avenue for achieving these ideals. However, the community policing initiatives were structured differently and seemed to embrace the masculine mode of justice. Hence fewer women participated within these spaces as they were already gendered and male-oriented.

Women in the focus group discussions gave varied reasons for their low participation in local peace processes. Some of the were:

49 *Ibid* n.46 p. 73

- We are discriminated against, as people think that women cannot bring forth a worthy discussion. Women are only to be seen in the kitchen and to take care of the children. Women are not given opportunities in formal processes.
- Also, ethnic discrimination causes women from certain communities to be locked out of opportunities to be involved in peace processes. In the Coast region, only women who are indigenous or in *buibuis* get opportunities to be involved in peace processes.
- Women have low capacity and capability to meaningfully participate in the local peace processes.
- Culture; women are not allowed to talk in public spaces; they do not have a voice.
- Men use propaganda to stop women from vying for leadership positions.
- Women are scorned and ignored.
- Women have no funds to support their involvement in local peace processes as such positions are voluntary; funds are needed to respond to conflicts within the community and to facilitate movement
- Family responsibilities as a wife and mother can be a barrier to women's participation

That notwithstanding, some women were appointed to serve in the local peace committees and or the community policing initiatives. All the female members of the local peace committees asserted that they were already deeply involved in community interventions and or their own peace activities prior to the appointment. The profile of the women members of the local peace committees was mainly that of a married woman, vocal, actively involved in community work, commanding respect within the community and at least 40 years of age. The respondents interviewed highlighted the following qualities of women who are appointed to serve in local peace committees or community policing initiatives:

- A mature woman
- A woman with good values
- A woman who hails from the area or has some form of permanent residence in the area ("*Ni wehu*" meaning "she belongs to us")
- How she interacts with men in the community
- Respects culture of the community

Patriarchal notions can be attributed to the marginalisation of women participants within the peace committees and community policing initiatives and women non-participants of such peace infrastructure. Women who were participants in local peace committees and community policing expressed the existence of barriers that then hindered the efficacy of their participation.

The resistance towards women's participation in local peace committees and community policing initiatives emanated from the community and from within the structures. A Muslim, female member of the local peace committee shared her experiences around community reaction to her position:

> As a Muslim lady, you are not supposed to be heard. You are only to be seen. When you speak up, people start gossiping about you. I told myself that I would work so that I can be a role model for other Muslim girls. The resistance is there. I see it more for Muslim women yet the problem is not religion. The wife of the Prophet Muhammad went for war. The problem is the interpretation of the Holy Book and the lack of information.

Some women peace committee members expressed frustrations from within the local peace committees. One Christian, female member of a local peace committee in Kilifi County shared that the greatest barrier to her involvement was the leadership of the peace committee. She stated:

> My greatest barrier is the chairperson of my peace committee and gender-based violence network; he is a man. He colludes with his treasurer- a woman from his community. They feel threatened by me; they fear that I will outsmart them. Hence, they always exclude me from the peace activities.

Another female member of the local peace committees stated as follows:

> Our peace committee has more than ten members. At almost 50%, women have a good number of positions. The women in our peace committee are strong members. They speak up their minds and they are doing their own peace interventions outside the committee. Yet our proposals are not all taken. Our views are not taken into consideration just because we are women. We chose to come together as women within our peace committee so that we could support one another.

Women's gender roles, cultural and religious norms hindered their full and active participation in local peace processes. The women who were members of the local peace committees intimated that their participation was only made easy where there was support from their spouses. One particular female respondent categorically stated that she limited her participation to peace activities within her county due to mothering and wifely duties; travelling outside her county for peace activities was not acceptable to her husband.

Another Muslim female peace committee member indicated that when she begun peace interventions in her community, she received a letter from the Council of Imams prohibiting her to participate in such public activities. However, she received moral support from her husband. She stated:

> My husband stepped in to assist me when I received a warning letter from the Council of Imams. I reasoned that if the work I do is not sinful, I will continue doing it. I started as a teacher. I mentored and rescued many girls from early marriages. I was later appointed as a member of the peace committee.

For women to effectively exercise their political right of participation they had to balance their roles within the private and the public spheres. It was important that local peace structures were sensitive to women's traditional gender roles and its impact on women's engagement because the public realm (where women are underrepresented and subordinated) is an extension of the private realm (where women are represented yet subordinated). The local peace structures ought to be sensitised on issues such as the timings of interventions, venues and structure of its processes. These seemingly minor issues have a considerable impact on women's full and meaningful participation.

The issue of funds to facilitate activities of the local peace committees and community policing was raised as a challenge. Consequently, the peace structures could not carry out any activities within their communities. In fact, the only activities that they were involved in were funded by civil society organisations. In some local peace committees, the criteria for selection of members to participate in the civil society events was shrouded with nepotism, favouritism, ethnicity and corruption. These dynamics impacted on which members would be selected to participate.

Due to the informality of the rules of the game, the spaces of participation were marred with irregularities, bias, unfairness and gender inconsideration. The outcome of such a process was gender imbalance, lack of accountability and transparency and exclusion of the powerless from peace interventions and activities of the local peace committees.

V THE POLITICS OF REPRESENTATION IN LOCAL PEACE COMMITTEES AND COMMUNITY POLICING INITIATIVES

Many feminist theorists have rejected the idea of a universal woman without explicitly interrogating the concept of intersectionality. They argue that the "woman" is herself a contested and fractured terrain and her experience is made up of subjects with different interests.[50] Feminism has been described as being inept of speaking universally for all women due to the unique limitations of gender as a single analytical category.[51] Consequently, feminists embraced intersectionality as a central category of analysis to fight feminist hierarchy, hegemony and exclusivity. [52]

The term "intersectionality" was first coined by Crenshaw when the concept emerged in late 1980s and early 1990s from critical race studies. She described

50 J Nash, "Re-thinking Intersectionality" in Vol. 89 Feminist Review (2008) 4

51 L McCall, "The Complexity of Intersectionality" in Vol 30(3) Signs: Journal of Women in Culture and Society (2005) 1771

52 *Ibid* no. 49 p. 1771; *Ibid* no. 48 p. 1

intersectionality as underscoring the "multidimensionality of marginalised subjects' lived experiences.[53] McCall defines the term "intersectionality" as "the relationships among multiple dimensions and modalities of social relations and subject formations".[54] Crenshaw explains that "the concept of intersectionality [is used] to denote the various ways in which race and gender interact to shape the multiple dynamics of black women's employment experience".[55] Additionally, Nash asserts that intersectionality is "the notion that subjectivity is constituted by mutually reinforcing vectors of race, gender, class and sexuality".[56] Davis defines intersectionality as "the interaction between gender, race and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power".[57]

The concept of intersectionality was particularly useful for problematising the law's purported colour blindness, neutrality and objectivity. Consequently, the present study theorised not only on the differences between men and women in representation at local peace processes but also on the differences between women as amongst themselves, and the woman as within herself. The intersectionality analysis was imperative to reveal the complexities involved in participation of women and representation politics.

The intersectionality of ethnicity, age, background, class, religion and gender in relation to participation in peace processes subtly reveals itself through the voices of women in the grassroots. It was found that women's multiple identities founded on their differences had an impact on perceptions on representation within local peace committees. It was found that despite the female presence in the local peace committees, some women who were outside the local peace committees remained cynical that their interests and needs would be addressed. These differences are so real in the lives of women that were interviewed that they impacted on whether women for example from certain social classes or ethnic backgrounds will perceive themselves as being represented by women from a different social class and or ethnic background. The law, in requiring representation of women, conceives women as being homogenous. However, in reality, sameness amongst women is a façade; does not exist in so far as representation is concerned. Spade argues that when gender and race neutral legal and administrative systems are not scrutinized,

53 K Crenshaw "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination doctrine, Feminist Theory and Antiracist Politics" in University of Chicago Legal Forum (1989) 139

54 *Ibid* n. 49

55 K Crenshaw "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color" in Vol. 43(6) *Stanford Law Review* Vol (1991) 1244

56 *Ibid* n. 49 p. 1772

57 K Davis "Intersectionality as Buzzword: A Sociology of Science Perspective on what makes Feminist Theory Successful" in Vol. 9(67) *Feminist Theory* (2008) pp. 67-85

they reproduce and maintain gender and race categories that then have an impact on life opportunities.[58]

The collective representational rights through the reservation of seats for women within the local peace committees were part of the bargain struck to achieve democracy and social justice. However, critics say that group representational rights may increase in-group inequality, benefit the already affluent and worsen social divisions.[59] The respondents' sentiments insinuate the existence of in-group inequality among women of different social and academic status. One key respondent stated:

> The seats in local peace committees are only reserved for women who are Muslim or from the Coast region. Women from upcountry like myself are not appointed even although we are born and raised at the Coast. My marital name has caused me to lose many opportunities…I almost decided to drop my marital name and continue using my maiden name. I however learnt to embrace my identity; he was my husband and I must be identified by his name. I choose to work around peace on my own; where I need support, I seek assistance from the church.

It was found that effective representation was only possible where the representative had undergone a similar experience as that of the represented. The represented needed to be able to associate himself or herself with the representative. Representation was a complex concept; perceptions of representation varied from one person to another and were influenced by differences. From a radical feminist standpoint, only women could provide adequate representation for other women.

Again, women must be viewed from a heterogenous perspective where multiple differences and identities are at play. The social divisions amongst women as a group were cited as ethnicity, religion, class, social status, disability, age and victimisation. These multiple, complex identities and differences in the woman interact within their lives and had an impact on their interactions within the political space. For instance, a *Giriama* lady living in Kilifi County, the county of origin of *Giriama* people, opined that she encountered resistance as a representative in the local peace committee. She said:

> I am a *Giriama* from Malindi. I sit in the Malindi Peace Committee. I experienced resistance from the community as a member of this peace committee. My fellow *Giriamas* see me as a *mdzomba* just because I am a Muslim. They say I am not one of them; that I am a Swahili. I heard them complain that they had been brought a *mdzomba*. It pains me.

58 D Spade "Intersectional Resistance and Law Reform" in Vol. 38(4) Signs (2013) p. 1031

59 M Htun "Is Gender like Ethnicity? The Political Representation of Identity Groups" in Vol 2(3) Perspectives on Politics (2000) pp. 439-458

Another key respondent reaffirmed the importance of having representatives that could relate to the represented. She stated:

> Instead of deploying a female lawyer, who is not familiar with the Bamba, Kilifi County, the community will reject her in favour of a man. They say, "*Ni mama lakini hatufai; wakatuletee baba ambaye anatufaa*". [60]

Furthermore, both the descriptive and substantive representation, essentialise women and their interests as a social group as it assumes homogeneity of women's lives. They allow elite women to decide what "women" as a social group need hence applying a paternalistic approach to women's interests. Weldon states that, "If (a representative) is a white, straight, middle class mother, she cannot speak for African American Women, or poor women, or lesbian women on the basis of her own experience. Women's group perspective emerges only when members of the group come together, (when) they can compare…and each person gains a greater understanding of the larger puzzle".[61] These sentiments were made by women respondents who thought that descriptive representation was necessary however it was not adequate. Women should sensitise and lobby men to ascribe to the feminist agenda but not fully rely on men to represent their interests in peace processes. One respondent stated:

> 50:50 numerical representation is better as women and men can inspire each other to change things. It is also important to have the right women appointed. We must have women who can express themselves and be courageous to defend rights and rectify problems.

Descriptive representation was preferred by most of the respondents. The respondents argued that through an increase in the number of women in the local peace committees or community policing initiatives, the cooperation would be greater. The views of the respondents were as follows:

- Men forget many things. It is better to increase the number of women in local peace structures. Men cannot represent women's interests.
- Women's numbers must be added. Cooperation and collaboration becomes greater. The village will also expand.
- Women have great ideas; their numbers should be increased.

It was found that effective representation was only possible where the representative had undergone a similar experience as that of the represented. From a radical feminist standpoint, only women could provide adequate representation for other

60 Translated from Swahili as follows: She is a woman but she is not useful and fit for us. Bring us a man who is useful to us.

61 SL Weldon "Beyond Bodies: Institutional Sources of Representation for Women in Democratic Policymaking" in Vol. 64(4) Journal of Politics (2002) p. 1156

women. Again, women must be viewed from a heterogenous perspective where multiple differences and identities are at play. The social divisions amongst women as a group were cited as ethnicity, religion, class, social status, disability, age and victimization. These multiple, complex identities and differences in the woman interact within their lives and had an impact on their interactions within the political space.

In the same vein, the ethnic identity of women was prominent. As a result, women did not consider themselves involved in the local peace process where they were not ethnically represented. The system of ethnic discrimination has been so profound in Kenya that the majority of women seem to first and foremost identify themselves with their ethnic community rather than their gender identity. The ethnic identity was strongly felt as the local peace committees are established within respective communities' contexts, which are based on ethnicity. Consequently, in both Mombasa and Kilifi counties, the members of the local peace committees were mainly indigenous to those particular counties. In the focus group discussion conducted, women shared that:

- Ethnic discrimination causes women from certain communities to be locked out of opportunities to be involved in peace processes.

Women viewed themselves primarily as members of a particular ethnic community, then a certain social class, religion, political party member and finally a particular gender. The gender identity was a secondary consideration. These differences, whether real or perceived, greatly impact on whether women from a certain social class will perceive themselves as being represented by women from a different social class.

Consequently, the law in requiring representation of women simplifies "the woman" as a human being with a single identity-the gender identity. The concept of sameness defies the intersectionality of the multiple dimensions of difference within the lives of women. The construction of the law ratifies invisible intersections that actually underlie the social divisions and competing agendas within political movements for increased equality.[62]

The numerical presence of women in local peace committees and community policing initiatives has not translated into meaningful representation for all women. Women who are members of these local peace structures do not take leadership or decision-making roles. The local peace committees are mainly chaired by men with women playing the supportive roles that sometimes relegate them into the oblivion. The domination of men in leadership positions in the local peace committees and *nyumba kumi/balozi* initiatives placed them at a vantage point when it came to

62 S Cho et al "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis" in Vol. 38(4) Signs: Intersectionality: Theorising Power, Empowering Theory (2013) p. 802

opportunities relating to resource mobilisation, consultations and implementation of peace initiatives, collaboration with civil society organisations and the consolidation of county conflict and early warning systems. These dominant male leaders only extended benefits to women with whom they had commonalities for instance. The same ethnic or religious background. Four (4) strong female members of local peace committees who felt excluded, frustrated and stifled by dictatorial male leadership opted to initiate their own peace activities outside the purview of the committees e.g. with civil society, private sector or county administration.

Feminists have conceptualised descriptive and substantive representation as "being like" and "acting for" or "speaking for" women.[63] Proponents of descriptive representation stress on the reassurance that the representatives would do and act as the represented. Descriptive representation is viewed as a way of avoiding representatives from taking care of their own interests rather than those of their represented. There is a definite link between women's descriptive and substantive representation. Pitkin argues that emphasis should be on what representatives do rather than what they are.[64] Phillips argues that the sex of the representatives may impact how they act-whereby female representatives may result in women's substantive representation.[65] The rationale is that women have specific knowledge and experience as women to make successful claims for women. However, this should not be all that matters as men too may be actors crucial for substantive representation as women may not automatically act in the interest of other women. The local peace structures have emphasised descriptive representation, what position was informed by the Constitution of Kenya and the National Peace Policy.

Recent scholarly work criticizes descriptive representation on the basis that it ignores the difference among women and overlooks the potential of men as actors on behalf of women as a social group.[66] As discussed, there are real and perceived differences amongst women in Kenya. Hence substantive representation that takes into consideration that the heterogeneity of women needs to be promoted alongside numerical representation. In the same vein, men ought to be enlisted as allies in the promotion of a feminist agenda by informal peace structures. Substantive representation would mean diversifying committees to ensure wider inclusion and representation of the heterogeneity of women on the basis of age, background, ethnicity, religion, class and disability etc. Further, committee members ought to be sensitized on the complexities of gender and ideals of feminism; greater

63 *Supra* n. 2 p. 63; n 8

64 *Ibid*

65 A Phillips "Democracy and Representation: Or, why should it matter who our representatives are?" in A Phillips (ed.) *Feminism and Politics* (New York: Oxford University Press, 1998) pp. 224-240

66 S Childs & M Krook, "Should Feminists give up on Critical Mass? A Contingent Yes" in Vol 2(4) *Journal of the APSA Organised Section on Women and Politics Research* (2006) pp. 522-530; SL Weldon, "Beyond Bodies: Institutional Sources of Representation for Women in Democratic Policymaking" in Vol. 64(4) *Journal of Politics* (2002) 1153–74

understanding on priority concerns affecting women is essential for enhanced and improved gender-based and women-centred interventions relating to peace.

VI CONCLUSION

Participation is viewed as a deeply political issue dependent on the identity of the participant and the purpose of the process. Different actors bring with them different meanings and nuances of participation to spaces of engagement. As a result, different actors will have diverse experiences and impressions of negotiating participation and accountability. The actors who are able to create and sustain spaces for participation will exercise considerable power in defining their possibilities.[67] The study illustrates that majority of women are unable to sustain spaces for participation and set a feminist agenda aimed at transforming the lives of other women.

Numerical representation is crucial in enhancing physical presence, inclusion and diversity within spaces that previously excluded marginalised and vulnerable groups such as women. The legal requirements for numerical presence of women ensure that peace institutions appoint and involve women in their interventions and processes. Consequently, the law may be used as a tool to enhance women's representation. It was noted that women's participation in local peace committees was more active than that in community policing initiatives. One underlying reason is that neither law nor policy demand community policing structures to appoint women as members. On the other hand, local peace committees are by law required not to have more than two-thirds of its members from the same gender.

However, the study reveals that numerical representation is insufficient. Increasing the numbers of women does not translate into representation of feminist concerns within the local peace processes. Women have multi-layered identities that have a bearing on their real and perceived perceptions on representation. The multiple identities of women are hinged on age, background, ethnicity, religion, political affiliation, and class among other variables. Hence, it is essential to complement increased numbers with strategic and substantive representation, which envisions the heterogeneity of the woman and transformative change.

VeneKlasen asserts that participation is the starting point for the realisation of rights, development, engagement in political processes and public policy and strengthening of political consciousness and agency.[68] The study unveils women's incapability, which hinder effective advocacy, design, execution and representation of a feminist agenda. The diminished capabilities of women arises from entrenched gender stereotypes, socialisation and a patriarchal social order.

67 A Cornwall, "Making Spaces, Changing Places: Situating Participation into Development" in *IDS Working Paper* (Brighton: Institute of Development Studies, 2002) p. 170

68 L VeneKlasen et al, *Rights-Based Approaches and Beyond Linking Rights and Participation: Challenges of Current Thinking and Action* (IDS and Just Associates, 2004) http://www.ids.ac.uk/ids/particip/ p.12

VII RECOMMENDATIONS

For women to effectively participate, they need to be endowed with a personal sense of citizenship, self-worth, knowledge, and capabilities. The female key respondents alluded to the lack of capacity to participate in peace committees and community policing initiatives. The enhancement of women's capacities and capabilities including instilling a sense of consciousness and self-worth and awareness will enable them to venture more into the public arena where peace processes are undertaken.

The emphasis should be placed on the need to enhance women's capabilities to be able to advocate for their rights. In order for women to advocate for their rights they need to have a deep understanding of self as the subject of rights by developing a "critical consciousness and ability to act that involves self-discovery, learning, collective awareness and analysis".[69] Women ought to view themselves as entitled citizens with the capacity to engage with and re-shape power .[70]

In patriarchal societies, the female gender is oppressed and suppressed. Hence, women need to be empowered to move out of constrained and isolated spaces into invited spaces and or spaces that they create and or claim for their participation. This kind of empowerment requires women to unlearn life principles acquired through socialisation. It is recommended that the discourses within spaces of participation be transformed to create an enabling environment for the voices of the powerless, such as women, to be heard.

The local peace committees created spaces for women's participation in peace processes through the numerical presence of female members. However, there is need for tactical engagement or creation of more spaces to overcome rules of the game that disable women's participants to enter the public sphere armed with a means to assert themselves. The strategies include popular education, widening spaces for involvement in decision-making, assertiveness training, building skills of argumentations, sensitisation of men to become advocates of feminism, advocating for inclusion of women from all walks of life or providing women with information on the rights and policies that they are being consulted about. Women ought to be equipped with the "weapons of the powerful" which Cornwall explains as the language with which they can argue with technical specialists or understand the complex mandate of truth commissions to be able to make valuable input.[71] The school of thought is drawn from Smart's proposal of raising consciousness about what is truly female without the influence of male power.[72]

69 *Ibid*, p. 8
70 *Ibid*,p. 10
71 *Ibid*,p. 76.
72 *Ibid* p. 51.

It is further recommended that public education programmes aimed at changing patterns of gender stereotypes ought to be undertaken throughout the country by State and non-state peace actors. The positive results of these programmes may take a considerable time to transform gender stereotypes and structural patterns of gender discrimination. Such sensitisation programmes will encourage local peace structures and community members to respond to societal and gender barriers affecting women.

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GENDERED LAND REGISTRATION: IS WANJIKU A REGISTERED LANDOWNER?

Peter Mburu*

ABSTRACT

Women face multiple exclusions from participating in the general development agenda based on traditions, religious believes, political connotations, and other social norms. Women all over the world are inevitably excluded from leadership in most spheres of life and this exposes them to discrimination and oppression. Eventually women are excluded from participating in land management and administration leading to non-recognition and non-registration of women land rights.

This paper argues that while it is generally held that land registration laws are gender neutral and that they promote land registration, the fact is that only a small number of women are registered as landowners in Kenya. Building on the evidence collected from selected land registries, I will demonstrate that the practice of and the land registration laws have not promoted women land rights. There is therefore a need to amend the law and change the practice of land registration in order to have more women registered as landowners.

The problem statement is that "land registration laws in Kenya and the practice thereof do not specifically promote the registration of women as landowners." Indeed, women in Kenya have been discriminated against and excluded from land ownership and it is not possible to tell with certainty the percentage of women landowners. The main objective of this paper is to assess to what extent women land rights in Kenya are recognised and registered in the post 2010 Constitutional era.

I INTRODUCTION

Land rights are human rights.[1] Article 14 of the African Charter on human and People's Rights provide that '*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*'[2] It does not indicate the right to own property '*by men*,' nor does it indicate that property rights can be encroached upon in the interest of men needs. We say this because many times, human rights

* Registrar of titles Ministry of Lands Kenya and Part-time Lecturer University of Nairobi pngash2000@yahoo.com

1 A Rwegasira (2012) *Land Right as a Human Right; A History of Land Law and Practice in Tanzania* (Mkuu na Nyota Publishers Dar es Salaam Tanzania, 2012), p. 19; UN (1948), Universal Declaration of Human Rights Art. 17

2 Organization of African Unity (OAU), (1981) *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html (last accessed 15 May 2021)

and other laws are interpreted in a way that favour men. If such interpretation is not challenged, men continue to take undue advantage in the enforcement of many provisions of the law.

This leads to inferiorisation of women in the cultural context which makes women and girls vulnerable and discriminated against where land ownership and control in concerned.[3] Indeed, in many jurisdictions, the national laws as well as social norms and customs are patriarchal.[4] This to a large extent prevents women from holding rights in land and thus very few women are registered as landowners.[5] In sub-Saharan Africa, it has been reported that only about two to three per cent of land is owned by women, although we note it is difficult to make generalised statements about land ownership data percentages globally or even regionally.[6] This is oppressive and an act of discrimination considering that women make up half of the world's population. This trend is reflected the world over (Western cultures included); *women are often discriminated against in property registration programs due to gender-biased social and cultural norms and practices*.[7]

There is a connection between land ownership and gender inequality. Moser indicates that poor women in cities are able to wiggle out of poverty through property accumulation, for instance owning a house.[8] Land is a major factor of production and therefore people who do not own land may be exposed to poverty, unemployment, diseases and low standards of living. In labour and land studies, women have been shown to be predominant in the lower levels of the system, owning negligible amounts of land and ranking low in formal employment.[9] They are increasingly putting in more labour but they are highly underrepresented in both labour management and land ownership.[10] This is as a result of discriminatory practices and gender segregation in the society. Women are also the highest contributors of unpaid and poorly paid labour in agriculture, within the household and in other places working the second or third shift per day with little to show for it.[11]

3 E Chigbu, G Paradza and W Dachaga 2019 Differentiations in Women's Land Tenure Experiences: Implications For Women's Land Access & Tenure Security in Sub-Saharan Africa, (Available at Land. 2019; 8(2):22. https://doi.org/10.3390/land8020022) p. 5

4 P Kameri-Mbote (2005) *The Land has its Owners! Gender Issues in Land Tenure Under Customary Law.* (UNDP-International Land Coalition Workshop: Land Rights for African Development, Nairobi, Kenya 2005) p. 1

5 KJ Moyo (2017) *Women's Access to Land in Tanzania* – (PhD Thesis Royal Institute of Technology Stockholm, 2017)

6 UN & United Nations Entity For Gender Equality and the Empowerment of Women, (2020) *Realizing Women's Rights to Land and Other Productive Resources* (New York & Geneva 2020), p. 11

7 FAO (2021), *Realizing Women's Rights to Land in The Law* – (Rome 2021), p. 22 JC Luttrell, (2020) Women's Work and Assets: Considering Property Ownership from a Transnational Feminist Perspective." *Feminist Philosophy Quarterly* 6 (1). Article 2. P. 10

8 C Moser (2016) *Gender, Asset Accumulation and Just Cities* (Routledge London: 2016) p. 7

9 Supra n 8 (Luttrell J. 2020) p. 5

10 S Chant (2007) *Gender, Generation and Poverty: Exploring the "Feminisation of Poverty" in Africa, Asia and Latin America* (Cheltenham, UK: Edward Elgar Publishing, 2007) p. 331

11 C Moser (1993) *Gender Planning and Development: Theory, Practice and Training* (New York: Routledge, 1993) p. 15 and S Chant and C McIlwaine (2016) *Cities, Slums and Gender in the Global South: Toward a Feminised Urban Future* (London: Routledge, 2016) p. 221

A patriarchal society perpetuates gender discrimination with regard to inheritance rights. Almost all property is in the name of the father or the husband in the family.[12] Women are rarely registered as land owners, individually or jointly with their husbands or even under business partnerships.[13] This results in, women playing a minor role in the decision-making process. Indeed, the lack of access to natural resources including land is the main cause of women's subordination and consequently poverty takes a gender dimension.[14] It has been shown that where women co-own properties with their husbands or other men in their lives for instance siblings, they are able to make more decisions and gain respect from the society. Women owning and having land registered in their names is thus not only material but symbolic.[15]

In order to bring out the gender disparities in Kenya's land ownership, the researcher carried out desktop research as well as case studies from the land registry. There are 60 land registries spread across 42 counties. Three land registries were selected for this study. These include Thika, Kajiado and Eldoret. The choice of these was informed by the fact that Thika is highly cosmopolitan and situated adjacent to Kenya's largest city Nairobi. This would bring out the near true picture of how the moderate to the elite people in Kenya hold land in terms of gender. The choice of Kajiado and Eldoret was to enable capture land ownership trends in Kenya's rural areas. In fact, the researcher concentrated on registration blocks that are located in the interior, and just a few in the townships.

The researcher deliberately applied the disaggregation of land registration data by sex but because the land-register does not have a sex/gender box, our research team relied on the names in the land register to affix gender. The lands that appeared to be registered in the names of body corporates were not studied further, because this would have required us to carry out searches at the company registry in order to establish share ownership by gender. In any case, only a negligible number of land parcels are registered in the names of companies especially in the rural areas.

It is important to point out that the majority of the lands registered in Kenya are comprised mainly of private lands which make up 19 per cent of Kenya's total land mass. Community lands comprise about 65% of Kenya's total area. Out of this,

12 Supra n 5 (P Kameri-Mbote 2005), p. 14

13 Georgetown University Law Center (2009) *Women's Land and Property Rights in Kenya; Moving Forward Into a New Era of Equality; A Human Rights eport and Proposed Legislation*, https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/08/3-Property-Report-508.pdf. (last accessed on 5 June 2021) p. 3

14 Republic of Kenya (2019) The National Gender and Development Policy Sessional Paper No. 2 of 2019, Government Printer, Nairobi, p. 14

15 Supra n 8 (JC Luttrell 2020) p. 9 and N Datta (2006) *Joint Titling—A Win-Win Policy? Gender and Property Rights in Urban Informal Settlements in Chandigarh, India* Feminist Economics 12 (1-2): 271–298. doi:10.1080/13545700500508569. (Published online in 2008), p. 291

about 90 per cent (of the community lands) is not titled.[16] Most private lands are in the townships, trading centres and lands near and adjacent to municipalities and cities. Since majority of Kenya's land records are still manual, we are not able to tell with certainty, the exact percentage or acreage of community lands registered so far. This paper's Part (i) discusses the concept of land registration generally, Part (ii) delves in the international and regional legal instruments that relate to women's land rights, at Part (iii) the paper outlines and analyses land registration laws in Kenya, while Part (iv) lays bare the research findings and discussions and lastly Part (v) are the recommendations and conclusions.

II LAND REGISTRATION

Land registration refers to the recording of the legally recognised rights in land.[17] It is carried out by States through their appointed agencies which could be the judiciary (for instance in the USA), a department in the executive (for instance the Ministry of Lands in Kenya), or even by semi-autonomous agencies like the Dutch Kadaster.[18] Generally this body is always the land registry populated by officers known as land registrars. The output of land registration is the land ownership documents known as the land titles or deeds.[19] Closely linked to land registration is conveyancing which refers to the whole processes of transfer of interests in land from a party to another culminating in the act of land registration. We can therefore safely argue that land registration is one of the very final steps in conveyancing.[20]

In order to secure title to land, one has to undergo several procedures many times running into several years especially if it begins with land allocation. Indeed, conveyancing has been termed as one of the very complex branches of law.[21] It requires the skill and use of several professions at the level of both the private and public sectors in-order to conclusively secure title to land. This is the case in many countries around the world. The prospective landowner and title-holder is expected not only to know but also to engage these professional experts. In order for the State to succeed in running proper and modern land registries, it must employ and make use of the right mix of these professions and in the modern world, the right technologies.[22]

16 A Wanyonyi et al (2017) *Land For Infrastructure Development; Compulsory Acquiscition and Compensation of Unregistered Land in Kenya.* A Paper prepared for presentation at the "2017 WORLD BANK CONFERENCE ON LAND AND POVERTY" The World Bank - Washington DC, March 20-24, 2017, p. 11

17 CHJ Lemmen (2012) *A Domain Model For Land Administration* (PhD Thesis. Delft University of Technology. The Netherlands, 2012) p. 6

18 D Steudler (2004*) A framework for the evaluation of land administration systems* (PhD Thesis, Department of Geomatics, The University of Melbourne, Melbourne, Australia 2004), p. 82

19 JA Zevenbergen (2002) *Systems of Land Registration – Aspects and Effects*, (PhD Thesis. Delft University of Technology. Netherlands Geodetic Commission. (NCG) 2002), p. 27

20 PN Mburu (2017) *Strategies to Modernize The Land Registration System in Kenya*, (PhD Thesis, Groningen University, The Netherlands 2017) p. 17

21 A Dobhal and M Regan (2016), *Immutability and Auditability: The Critical Elements of Property Rights Registries*. (A Paper presented at the World Bank's 2016 Conference on Land and Poverty), p. 5

22 Supra n 21 (PN Mburu 2017) p. 208

Owing to the complexities in conveyancing and land registration, many countries and especially the developing countries have only a small portion of their landmasses registered.[23] Where processes are complicated, it follows that complexities are even higher when it comes to women rights because as seen earlier, women face exclusions from the general development agenda.[24] This fact is demonstrated by the number of land titles registered in favour of women and by the number of mortgages secured by women from the financial institutions in Kenya.[25]

Land registration is further nuanced by the existence of legal dualities and or pluralities in terms of religion, culture, inheritance and succession, land administration amongst others all which seem to favour men or in the least to hold them at a higher pedestal as compared to women.[26] African traditions for instance have for a long time held that land should be held by the elders who are old men and in that case, most lands are registered in the names of old men for and on behalf of the other members of the family and society.[27] In some cultures, women are not capable of owning land because they are viewed as part of property that men own.[28]

In the case of Kimani Gituanja v Jane Gituanja,[29] the appellant averred that his mother was a *muhoi*[30] on his land. In this appeal, the appellant being the step-son to the respondent told the court that he relied on his belief that he inherited the land from his grandfather and he gave permission to his own mother and step-mother Jane Njoki among other persons, to build on the land. He had earlier contended that his deceased father inherited the land from his grandfather who in turn customarily bequeathed it to him as the male heir. Fortunately, the court dismissed his appeal and held that the correct legal position was that in as much as the appellant was the registered owner, he held the property as a trustee for himself and other family members not listed in the title. Thus, locating the doctrines of overriding interests and customary trusts in this case.

Despite t the existence of enacted laws to reverse these cultural practices, it has taken time to effectively enforce them across the various regions.[31] Changing the deep-rooted beliefs and cultural practices will not only take time but tact and well thought out strategies which will gradually yield.[32]

23 FIG. (2014) *Cadastre 2014 and Beyond*. Copenhagen, Denmark. 56
24 Supra n 14 (Georgetown University Law Center, 2009)
25 Supra n 15, (Republic of Kenya 2019) p. 16
26 ibid, p. 6
27 Supra n 5 (P Kameri-Mbote 2005) p. 11
28 Supra n 14 (Georgetown University Law Center, 2009) p. 8
29 Kimani Gituanja v Jane Njoki Gituanja [1983] eKLR
30 *Muhoi* is a Kikuyu customary term used to refer to a licensee accorded cultivation rights on the land of another.
31 Human Rights Watch, (2020) *Once You Get Out You Lose Everything; Women and Matrimonial property Rights in Kenya*. https://www.hrw.org/report/2020/06/25/once-you-get-out-you-lose-everything/women-and-matrimonial-property-rights-kenya. (Last accessed on 5 June 2021)
32 UN-Habitat (2012), *Handling Land – Innovative Tools for Land Governance and Secure Tenure*, (UNON Publishing services, Nairobi, 2012) p. 48

It must be recorded that land registration is not only important for all members of the society but it also helps women to actively participate in the development of a nation and in self-realisation. Land registration and titling in favour of women helps to uplift their standards of living whether or not they are married or raising single headed families.[33] A simple and clean land administration system enables the society to exploit the wealth in land.[34] Land registration has numerous benefits both for the State and for the individual and even better if both men and women are registered as land and title-holders. Key among the benefits of land registration are security of tenure, the fact that one can use their land title to secure loans and mortgages, facilitation of collection of taxes, facilitation of planning and environmental protection, facilitation of settlement of land ownership disputes, protection of State and community lands and enables governments to keep and maintain a register of land within its jurisdiction amongst others.[35]

III INTERNATIONAL & REGIONAL LEGAL INSTRUMENTS

The International Covenant on Civil and Political Rights (ICCPR) provides for and encourages member States to promote equality between women and men.[36] This is echoed by the Maputo protocol to the African Charter on Human and Peoples Rights.[37] The ICCPR also prohibits the discrimination of anyone based on sex[38] and provides for equality before the law for both men and women.[39] These provisions are applicable in protecting women against any form of gender discrimination in all spheres of life worldwide. However, there isevidence of marginalisation of women be they wives, daughters, or siblings in the area of ownership and control of land across all regions.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a crucial piece of international law applicable in Kenya.[40] It encourages State parties to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'[41] Further, the Treaty directs all State parties to do all that is required to ensure the full realisation of human rights and the enjoyment

33 Supra n 8 (JC Luttrell 2020) p. 8
34 Supra n 22, (A Dobhal & M Regan 2016), p. 4
35 C Nilofer (2012) *Land Administration For Macroeconomic Management*, (PhD Thesis. The University of Melbourne, Australia 2012), p. 13
36 The United Nations General Assembly, (1966). *International Covenant on Civil and Political Rights. Treaty Series*, *999*, 171 Art 3
37 African Union (2003) *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. Art 8
38 Supra n 37 (UNGA 1966) Art 2
39 ibid Art 26
40 UN General Assembly, (1979) *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, available at: https://www.refworld.org/docid/3ae6b3970.html (last accessed 5 June 2021)
41 ibid Art 2 (f)

of fundamental freedoms by women to be enjoyed on a basis of equality with men.[42] Article 4 of CEDAW encourages State parties to adopt temporary measures that will uplift the status of women to the same level as men and which measures should not be viewed as discrimination. The convention advises that these measures be dropped once the objectives of equality are met.

More importantly and directly touching on land ownership, CEDAW provides that States shall promote 'The same rights for both spouses in respect of the ownership, acquisition, management, administration enjoyment and disposition of property, whether free of charge or for a valuable consideration.'[43] These provisions although applicable vide Art. 2 (6) of Kenya's Constitution have been domesticated variously by Statute law.

According to the Maputo Protocol, a woman shall have the right to acquire administer and control property during her marriage.[44] In case of separation or divorce or annulment of her marriage, a woman has the right to an equitable share of the joint property deriving from her marriage.[45] The protocol also calls on State parties to 'Promote women's access to and control over productive resources such as land and guarantee their right to property;'[46] Right to adequate housing,[47] and the rights to access clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.[48]

With regard to right to inheritance, the Maputo protocol asserts that women and men have equal rights to inherit their parents' properties. Women also have an equitable right to inherit their deceased husbands and shall have the right to matrimonial properties and which rights shall not be lost on remarriage.[49] This protocol further provides that women have a right to equal partnership with men in matters pertaining to national development programmes, State policy formulation and implementation.[50]

Alhough these international and regional instruments of law are applicable in Kenya vide the Constitution and variously under Statute law, the implementation has been slow. The women of Kenya have not fully realised equality under the law and practice of law.

42 ibid Art 3
43 ibid Art 16 (1) (h)
44 African Union 2003, Art vi (j)
45 ibid Art vii (d)
46 ibid Art xix (c)
47 ibid Art xvi
48 ibid Art xv (a)
49 ibid Art xx
50 ibid Art ix (c)

IV LAND REGISTRATION IN KENYA

Kenya occupies an area of approximately 582,646 km^2. Out of this, community land is estimated to be in the range of 396,315km^2, with privately owned lands occupying an area of 107,953km^2 and public lands comes in last at an area of 77,792km^2.[51] Kenya's population is now estimated to be well over 45 million out of who 51% are female but majority who do not own land.[52] The fact that women do not own land especially in the rural areas places them in a vulnerable position owing to the fact that land is a key factor of production. This exposes women to poverty and the attendant risks such as hunger and disease. This is especially the case in single parent families that are female headed. The fact that land is the most acceptable form of security to guarantee financial accommodations for instance bank loans only leaves women more helpless.[53]

Kameri-Mbote asserts that the hallmark of African customary law is the dominance of older male members over property and lives of women and their juniors. Mbote further avers that

> *"Women who comprise over half of the world's population, rarely own any reasonable forms of property; do not have adequate access to the same, and do not even make major decisions pertaining to allocation and use of such property. Among farming communities where the basic property is land, women's access to it is determined by men as a matter of patriarchy cultural tradition. ….. women only own land to the extent that they perceive or believe this be the case especially within marriage or other cohabitation relationships. It only dawns to them that they neither own nor control property when such relationships go sour"*.[54]

Kenya's statutory law of succession provides for inheritance by women. However, some cultural practices have contributed to gender imbalance in land ownership. While it is true that most women provide labour in lands through cultivating and other forms of agriculture, men continue to hold the legal ownership of lands through registration.[55] This is also recognised by the National Land Policy (NLP).[56] It states:

> *Culture and traditions continue to support male inheritance of family land while there is lack of gender sensitive family laws. There is a conflict between the constitutional provisions and international treaties on gender equality vis-à-vis customary practices that discriminate against women in relation to land ownership and inheritance*.[57]

51 A Wanyonyi et al (2017) *Land For Infrastructure Development; Compulsory Acquiscition and Compensation of Unregistered Land in Kenya* (A Paper prepared for presentation at the "2017 WORLD BANK CONFERENCE ON LAND AND POVERTY" The World Bank – Washington DC, March 20-24, 2017), p. 7

52 Kenya National Bureau of Statistics (2019), *2019 Kenya Population and Housing Census* Vol. *1*. 7

53 M Oyuga and N Ikinu (2017) *Land as Matrimonial Property in Kenya*, (A Paper Presented at the World Bank Land & Poverty Conference. 2017, Washington D.C. USA) p, 5

54 Supra n 5 (P Kameri-Mbote 2005) p. 1

55 Supra n 7 (UN & United Nations Entity For Gender Equality and the Empowerment of Women 2020)

56 Republic of Kenya (2009) *National Land Policy*. (Government Printer, Nairobi 2009)

57 ibid, para 220

Further the NLP decries that the women of Kenya are not represented adequately in land management and this leads to disposal of property in land without proper consultation and consent from women. Only a few women have land registered in their names and this disqualifies them from being meaningful participants in the land market. Alhough the Government of Kenya has ratified international treaties that push for the recognition of women's rights in land, this has not been translated into Kenya's legal practice.[58]

The following part of this paper will analyse Kenya's laws in relation to land administration and management and examine if indeed they promote women rights in land through recognition, protection and registration.

A CONSTITUTION OF KENYA[59]

The Constitution of Kenya 2010 has been hailed as one of the best constitutions in Africa and indeed globally. Right from its preamble, there are very constructive ideologies that can be picked. For instance, line 5, states; ***COMMITTED*** *to nurturing and protecting the well-being of the individual, the family, communities and the nation*. This is a Constitutional principle which seems to suggest that in our quest for development, every individual is important and their wellbeing must be taken into consideration. There are various other articles in the Constitution, though not directly addressing the land registration question, will lead to gender equity/ equality in land registration. Article 27 on equality and freedom from discrimination under its various sub-articles provides:

1) *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

(2) *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

(3) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

(4) *To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individual*s or groups because of past discrimination.

58 ibid, para 222

59 Republic of Kenya (2010) *Constitution of Kenya*, Kenya Gazette Supplement No. 55 (Government Printer, Nairobi, 2010)

Article 40 provides that;

> *Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property––*
>
> *(a) of any description; and (b) in any part of Kenya.*

In as much as these constitutional provisions are gender neutral, there are many instances where land ownership and land registration in Kenya has openly been coloured by gender discrimination. This is as a result of the pluralism of our legal systems which are based on both the written statutes and the unwritten customary laws. In some communities, women who insist on controlling land are seen as totally misbehaved while those who buy land are seen to have sinister motives.[60] This situation is further nuanced by the fact that Kenya's land registration system is generally manual such that even the small number of women registered as land owners cannot be verified adequately. It is not possible to say with certainty what percentage of women own or are registered as land owners.[61]

The Constitution further provides 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 marriage.[62]

This study is of the view equal rights in a marriage with regard to property ownership should translate into the registration of matrimonial properties in joint names of the spouses.

The Constitution has dedicated chapter 5 (Articles 60 – 80) to the subject of land and environment. One of the principles of land policy spelt out at Article 60 (1) (f) is: *Elimination of gender discrimination in law, customs and practices related to land and property in land.*

This provision could not get any better. The Acts of Parliament emanating from these Constitutional principles should seek to eliminate gender discrimination in matters land management including land registration. Article 67 (2) (f) read together with Article 2 (4) will yield the same effect as at Article 60. This is because Article 67 suggests the application of traditional dispute resolution mechanisms in land disputes while Article 2 represses application any law including customary law that would be inconsistent to the Constitution. This study commends the Constitution for its provisions into the gender equality in land ownership.

60 Supra n 5 (P Kameri-Mbote 2005), p. 13
61 Supra n 21 (PN Mburu 2017), p. 217
62 Supra n 60 (Rep. of Kenya 2010), Art. 45 (3)

B THE NATIONAL GENDER & DEVELOPMENT POLICY[63]

The National Gender and Development Policy was adopted in the year 2019 as Sessional paper No. 2 of 2019. It replaced the gender policy of year 2000. The purpose of this policy is to deal with gender discrimination issues because, despite the existence of progressive laws in the area of gender equality, the same has not been achieved in practice.[64] The policy is designed to ensure that all planning, programming, budgeting and implementation of development programs include a gender perspective.[65] This is because as the policy rightly observes, the gender inequalities have been perpetuated by the patriarchal social order in statutory, religious and customary laws and practices in Kenya; further aided by chauvinistic administrative and procedural mechanisms for accessing basic human rights.

The gender policy recognises that Kenya's development programs and plans, policies and legislation in general should promote gender equality in their letter and spirit. In particular, it highlights vision 2030 and Kenya's Economic Recovery Strategy for Wealth Creation (2003-2007).[66] In addition, it mentions gender-aware policies such as the National Land Policy (2009) which recognies women's rights to own property on an equal basis with men; the National Policy for Prevention and Response to Gender Based Violence;[67] and the National Policy for the Eradication of Female Genital Mutilation have been adopted.[68] The Land Act,[69] the Land Registration Act,[70] the Matrimonial Property Act,[71] The Marriage Act,[72] the Citizenship and Immigration Act[73] and the Succession Act[74] have also been mentioned in the 2019 gender policy as having adopted gender equality principles thus securing women's rights to land.[75]

Despite this position in law and policy, the sessional paper decries the existence of gender discrimination in almost all areas of Kenya's development agenda. This results in;

63 Supra n 15 (Republic of Kenya 2019)
64 ibid p. 9
65 ibid p. 12
66 Republic of Kenya (2003) *Kenya's Economic Recovery Strategy for Wealth & Employment Creation 2003-2007* (Government Printer, Nairobi)
67 Republic of Kenya (2014) *National Policy for Prevention and Response to Gender Based Violence* (Government Printer, Nairobi)
68 Republic of Kenya (2019) *National Policy for the Eradication of Female Genital Mutilation* (Government Printer, Nairobi)
69 Republic of Kenya 2012, *Land Act* No. 6 Government Printer, Nairobi
70 Republic of Kenya 2012, Land Registration Act No. 3 Government Printer, Nairobi
71 Republic of Kenya 2013, Matrimonial Property Act No. 49 Government Printer, Nairobi
72 Republic of Kenya 2014, The Marriage Act No. 4 Government Printer, Nairobi
73 Republic of Kenya 2011, Citizenship and Immigration Act Cap 172 of the Laws of Kenya, Government Printer, Nairobi
74 Republic of Kenya 1981 [1972], Succession Act Cap 160 of the Laws of Kenya, Government Printer, Nairobi
75 Supra n 15, (Republic of Kenya 2019), p. 12

'a) Gender inequalities in the job market with a percentage of women in formal employment in Kenya accounting for about 30 per cent; b) Women working in poorly paid jobs in the largely unregulated informal sector worsened by the majority of women working in family owned and home-based businesses where their work is subsumed into unpaid domestic labour; c) Macro-economic and sectoral policies are not gender responsive; d) Women and youth lack collateral including land ownership that restricts their access to credit; and, e) Balancing the social and economic roles which hinders women's effective participation in entrepreneurship.'[76]

Very few women have land registered in their names, yet women provide 75 per cent of farm labour in the agricultural sector. Further, land rights of married women and widows are not secured in practice despite positive provisions in law.[77] The policy pushes for the full implementation of the Constitutional provision on the two thirds gender principle in all sectors of the economy including institutions managing and carrying out the business of land administration.[78] In its monitoring and evaluation chapter, the policy calls for concerted efforts to enhance research on gender equality, women empowerment and the use of and analysis of sex disaggregated data in the evaluations.[79]

C THE NATIONAL LAND POLICY[80]

The National Land Policy (NLP) sessional paper No. 3 of 2009 was put together after an extensive consultative and public participatory process drawing stakeholders from various sectors of the economy.[81] This paper sought to address all issues touching on Kenya's land administration including the recognition of land tenure for all including women. It is important to note that the policy is based on several principles among them gender equity and values among them, gender sensitivity.[82] The policy reiterates, *'gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in land decision making processes.'*[83]

The NLP also sets goals for future management of land; which includes the need for reforms because of the massive inequitable access to land particularly for women, children, minority groups and the differently abled persons.[84] It proposes that in-order to rationalise private rights in land, the State should take into account the rights of spouses and children. It therefore means that, laws emanating from this

76 ibid p. 16
77 ibid p. 18
78 ibid p. 32
79 ibid p. 48
80 Supra n 57 (Rep. of Kenya 2009)
81 ibid, p. vii
82 ibid 2, para 7 and 8
83 ibid para 24 (c)
84 ibid 12, para 37 (e)

policy issue should authorise properties to be registered in the names of both (or all) spouses. In the alternative, there should be a creation of trusts at registration of lands in favour of spouses and children.

On succession and inheritance, the policy recognises the need to sensitise and educate Kenyans on the provisions of the Law of Succession.[85] This means equality at inheritance where both sons' and daughters' shares are in the ratio of 1: 1. If this was to be carried forth to land registration, it would go a long way towards leveraging land ownership between men and women.

As pertains to general land management, this study sees a huge gap in the involvement of women in major processes. This is in the NLP's provisions on land administration, settlement, allocations, surveying and mapping, land adjudication and registration. Women's participation has not been directly provided for and this could have a negative effect on women's right to own and have land registered in their favour. Another point where the policy failed to support women in land registration is at the land administration information system provision (LIMS).[86] At this point we feel that there should have been a clear provision; '*to facilitate the establishment of an efficient LIMS the Government will promote clear classification of land including lands owned by men and women'*. This would in-turn avail data and thus clear indication of the equalities or the inequalities in land ownership and land registration in terms of gender.

At paragraph 171 however, the policy provides that women's land rights alongside other land rights do require special attention. Indeed, this study proposes that there be enacted an Act of Parliament specifically dealing with land rights that require specialised attention. This study is alive to the fact that there are several Statutes dealing with these issues but there is need to bring this under one Act. This is especially so because these various statutes deal with women land rights from a peripheral angle.

The policy on a positive note proposes that women land rights in the pastoral communities be recognised and protected.[87] It suggests that while such recognition is key, it must be done in conjunction with all stakeholders considering such societies' patriarchy norms. It must be conducted with a lot of training and education for the locals and their leaders. While recognising that few women have land registered in their names, the NLP proposes that Government shall make provisions for joint spousal registration and documenting of land rights. This, among other documents should include joint consent to land disposals applicable for all forms of land tenure.[88]

85 ibid 22, para 91 (a)
86 ibid at para 3.5.6
87 ibid 45, para 183 (e)
88 ibid 53, para 223

Other proposals that are enlisted at this section include that the Government shall:

(a) Enact appropriate legislation to ensure effective protection of women's rights to land and related resources;

(b) Repeal existing laws and outlaw regulations, customs and practices that discriminate against women in relation to land;

(c) Enforce existing laws and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;

(e) Secure inheritance rights of unmarried daughters;

(f) Facilitate public awareness campaigns on the need to write wills to protect dependents;

(g) Carry out public education campaigns to encourage the abandonment of cultural practices that bar women from inheriting family land; and

(h) Ensure proportionate representation of women in institutions dealing with land at all levels.

While these propositions of the NLP may have been provided for in various statutes, this study proposes that indeed, there ought to be enacted a special Act of Parliament to purely deal with land and the gender question, or in the least an Act on 'land rights that require special attention'. This could also be done by enrichment (amendment) of the existing land laws. It is important to note that the NLP was adopted before the Constitution of Kenya 2010, and the land laws that were eventually passed by Parliament in the year 2012. Some of its (NLP's) recommendations have been adopted while others have not.

V LAND LAWS

Kenya's land laws were enacted following the Constitution of Kenya 2010. This was in line with the proposed timelines, culminating in the enactment of three statutes in the year 2012 (Land Act, Land Registration Act, & National Land Commission Act). Later on, in the year 2016, the Community Land Act was passed by parliament while the Environment & Land Court Act was enacted prior in 2011.

A LAND REGISTRATION ACT (LRA) NO 3 OF 2012[89]

This law deals directly with land registration. It is seen as a progressive law having come as a cure to revise, rationalize and consolidate the multi-layered land registration system in Kenya at the time. Both the National Land Policy of the year 2009 and the Constitution of Kenya had made proposals for enactment of such a law. Amongst other things, this law provides for titling of all lands in the country under one system and the conversion of all the existing titles registered under the various laws that existed prior to its enactment. We now examine how this law aids the registration of land in favour of women and how this law leverages gender issues in land registration.

89 Supra n 71 (Republic of Kenya 2012)

Section 93 (1) (a) stated that spouses are generally presumed to hold land as joint tenants. This was however deleted by the 2016 Land Laws (Amendment) Act. This same law is responsible for the deletion of section 28 (a) where spousal interests in land are no longer listed as overriding interests. The theory that informed these amendments is that it was seen to hamper transactions in land in that, every married landowner, man or woman could not freely transact without involving their spouse(s). Further, it made it so detrimental to land and property business in that transactions that were entered into without the necessary spousal interest could become voidable at the instance of the uninformed spouse.

Section 91 (4) provides that no joint tenant is allowed to separate such joint tenancy or to transfer a part thereof, and that any dispositions that are not jointly consented to shall be void. The Act further expounds on the meaning of joint tenancy in that '*on the death of one joint tenant, that tenant's interest shall vest in the surviving tenant…. or tenants jointly*.'[90] Section 60 moves the discussion further in providing that on the death of a joint proprietor, the registrar shall upon proof of death delete the name of the deceased tenant by registering the death certificate. This scenario simplifies transmission as compared to the death of spouse who was registered as a sole proprietor or as proprietors in common provided for under section 61. This is because the processes provided for under section 61 are in practice much more lengthy, expensive and complicated. The processes require family agreements, court processes, issuance of grants of probate or of letters of administration, court fees, lawyers' fees, gazettement fee, and registration of grants and assents at the land's registry.

This sometimes leads to family feuds amongst the children, spouse(s) and/or other dependents of the deceased and this could extend to the extended families and the judiciary as well. It becomes worse if the deceased is the husband and his relatives decide to disinherit his widow and children. All these issues could be avoided or immensely simplified had the acquisition of the properties been done and registered in the names of husband and wife or wives. If either spouse dies, only two processes are carried out. Firstly, the registration of death (issuance of the death certificate) and secondly, registration of the death certificate with registrar of titles against the subject property. No stamp duty is required and registration is quite fast and simple.

The Act provides that:

> *Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act."*[91]

90 ibid sec 94 (1) (b)
91 ibid Section 93

We feel that in as much as this Act has made such provisions, it is too little. This is because it has been left open to willing husband wiling wife to register their properties either separately or jointly. We can tell that owing to Kenya's moral and social fibre, which is highly patriarchal, more men are purchasing land and other forms of property and inheriting or getting direct land allocations. These are registered in their sole names without involving their spouses.

It is this study's suggestion that it be made a Government policy such that no acquisition of land undertaken by a legally married person male or female shall be registered in the sole name of the acquirer. It should be made in the names of the acquirer and his or her spouse(s). This policy formulation as is the law should be twinned with public participation and training as pertains the benefits of such registration. We also suggest that the LRA be amended to reflect this policy position. Advantages of such an amendment are that:

a) It enables families to know when and where they acquire land. Today there are quite a number of unclaimed assets including lands whose sole owners died without family/spouse/children knowing of existence of such property.

b) This cultivates openness and disclosures in property ownership in the family setup.
c) In case of death of either spouse, the administration of the estate is much cheaper and simplified in that;

    - There is no legal fee incurred,
    - There are no court fees,
    - The procedures are highly reduced,
    - There is no need for appointment of administrators.

d) The process is less time consuming,
e) This also reduces chances of dis-inheritances especially from the extended families and helps keep the property within the nucleus family.

The LRA has also made provisions that enable the court, the registrar or any interested party including the registered owner of land to apply for the registration of an inhibition, a restriction or a caution respectively. These are provided for under sections 68, 76 and 71. The effect of these sections is that they enable an interested party to restrict or stop any dealings in land, which dealings they may consider prejudicial to them. Though these provisions do not directly aid in the registration of land in favour of women, they help to stop any dealings in land that may affect women adversely. These could for instance be mortgages, sales, or leases that a husband, brother or a father may seek to transact without involving the wife, sister(s) or daughter(s).

These sections thus help to preserve the property interests of any persons including women and to that little extent, this study considers the same to be gender friendly, all be it not adequate. Indeed, in practice, many wives, widows, sons, daughters, husbands, and even sisters do apply variously to the land's registry in-order to have their interests preserved.

At section 94 (3) (e) and (f), this statute provides that where partitions in relation to spouses' land are likely to result in homelessness, the registrar may not proceed to register them. Before being amended in the year 2016, LRA at section 93 (3) had indicated that where a spouse holds a matrimonial property individually, any disposition was to be accompanied by the other spouse's consent. Alhough this part was deleted in the LRA, the Matrimonial Property Act provides for the requirement of spousal consent.[92]

In conveyancing practice, this contradiction of the two laws is eminent with some registrars insisting on consent before disposal of matrimonial property while others are not bothered about the consent. The banking industry is however very keen to have written spousal consent before they advance any loans whose security is matrimonial property.

B THE NATIONAL LAND COMMISSION ACT NO 5 OF 2012[93]

The National Land Commission (NLC) is a Constitutional commission whose functions are spelt out at section 5 of this Act as well as at Article 67 of the Constitution. The NLC's functions do not have a direct linkage to the rights of women in land nor the registration thereof. However, in implementation of its mandate, there lie opportunities in that, the NLC should carry out its functions in a manner that is gender sensitive.

The object and purpose of this Act as stated in section 3 is to enhance land management in Kenya in accordance with the principles of land policy set out in the Constitution. One of the principles reads: *'elimination of gender discrimination in law, customs and practices related to land and property in land.'*[94]

This means that all the functions of the NLC should eliminate gender discrimination when carrying out its primary mandate which is to manage public lands on behalf of national and county governments. One of the limbs of management of public lands includes allocation of lands and if this was to adhere to gender equity, then, allocations and registration of lands and issuance of titles thereof, would result in a higher number of women being registered as land owners. Another function of the

92 Supra n 71 sec. 12
93 Republic of Kenya (2012) National Land Commission Act No 5 (Government Printer, Nairobi 2012)
94 Supra n 60 (Rep of Kenya 2010) sec 60 (1) (f)

NLC is to encourage the application of traditional dispute resolution mechanisms in resolving disputes in land. This does not sound 'gender equity' friendly but a cautious yet legal application of these functions presents a great opportunity for gender equality in land administration.

C MATRIMONIAL PROPERTY ACT NO 49 OF 2013[95]

This statute comes across as one of the offshoots of the National Land Policy which proposes formulation of laws for those categories of persons that require special attention. This Act defines matrimonial property as:

1) *For the purposes of this Act, matrimonial property means –*

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.[96]

Section 9 further defines matrimonial property providing that:

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other

spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

Section 4 declares equal status of spouses as follows:

> *Despite any other law, a married woman has the same rights as a married man –*
>
> *(a) to acquire, administer, hold, control, use and dispose of property whether movable or immovable*

Alhough these provisions do not directly provide for land registration in the joint names of parties to a marriage, , if implemented they would lead to the same. This statute also provides for property rights in polygamous marriages which is interestingly creative. Section 8 states that a polygamous husband can hold properties jointly with his wives depending on their contributions and also when they were married. It also allows that the husband can own a property with one of his wives to the exclusion of the other wives in case there exists a clear agreement to that effect. Another crucial provision in this law is at section 12 which prohibits any alienation of matrimonial property without prior written and informed consent of the spouse(s). Section 14 provides the presumption that where a spouse holds

95 Supra n 72
96 ibid sec 6

property individually, he or she holds such interest in trust for his or her spouse as well, and where jointly registered, there is a rebuttable presumption that their interests are equal.

After the 2010 Constitution, case law on matrimonial property continued to evolve with the division of matrimonial property being settled at 50:50 rations. In Agnes William v Jacob Nicholas[97] the court held that Echaria[98] was not good law and invoked Article 45(3) of the Constitution. In his judgment the learned Judge opined that, *the new Constitution is expected to re-shape the legal landscape. A positive feature of this new Constitution is that it has the principles of equality and social justice woven through it. It places an obligation on all persons to live up to the national values set out therein.*

> He continues to observe, "*Article 10 (2) includes sharing, equity, social justice and protection of the marginalised. Having said that, there are specific articles that deal with women's property rights. Article 45(3) of the Constitution provides that the parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However, pursuant to Article 68 Parliament is obligated to pass laws to recognise and protect matrimonial property, particularly the matrimonial home.*"

In 2013 Lady Justice Mary M. Gitumbi ruled in favour of a woman's equal right to marital property. In C.M.N. v. A.W.M. the husband had made 100% of the monetary contributions to the family home and sought 100% ownership of that home.[99] The Judge however, ruled that 'the legal provisions in force now under the new Constitution require the court to apply the principles of equality instead. This Court is duty bound to share the suit property equally between the Plaintiff and the defendant.'

> In FIDA Kenya v The AG, the court in reversing the 50:50 rule said;[100] '*The interpretation preferred by the Petitioner in my view is an open invitation to this Court to open the door for a party to get into a marriage and walk out of it in the event of divorce with more than they deserve.The law recognises equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.*'

97 Agnes Nanjala William v Jacob Nicholas eKLR Civil Suit No 1 of 2011
98 Echaria v Pricsilla Njeri Echaria eKLR Nairobi Civil Appeal No.75 of 2001
99 C.M.N. v. A.W.M., High Court at Nairobi, Environmental & Land Case No. 208 of 2012
100 Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR

Suffices to conclude that in as much as the majority matrimonial properties are not registered in the joint names of both husbands and wives, the courts have done well to uphold the rights of women in land. This study however would prefer to have a written law that directs all matrimonial properties to be registered in the joint names of spouses. Spousal land rights should be incorporated in all land titles registered in the names of private landowners.

D THE LAND ACT NO 6 OF 2012[101]

This law similar to the LRA, was enacted to revise, rationalise and consolidate the pre-existing land laws so as to provide the platform for sustainable administration and management of land and land-based resources. Article 4 (2) (f) provides that in carrying out its mandate, the NLC or any other State or public officer shall be guided by values and principles which include the elimination of gender discrimination in law, customs and practices related to land and property in land. Subsection (k) provides for non-discrimination and protection of the marginalised while (l) provides on democracy, inclusiveness and participation of all peoples in land management.

Indeed, if these principles were to be adhered to, to the letter, the rights of women in land and in property in land would not only be recognised but also registered alongside those of their male counterparts. It means that the registered properties in land, the bulk of which are matrimonial in nature, should not only be registered in the names of one person but indeed in names of husband and wife (or wives). Sections 49 and 50 are the direct replication of sections 60 and 61 at the LRA respectively discussed above.

This Act provides for the award of compensation during compulsory acquisition under section113 and the inquiry as to compensation at section 112. This study proposes that these two provisions be worded in such a way that matrimonial interests in land areincluded, in which case, compensation ought to be made to the joint spouses notwithstanding registration to the contrary. This would give women a bigger say and a footing in relation to the land market allowing them a platform to make decisions with regard to where else to acquire matrimonial properties.

This would go a long way towards eliminating the misuse and misappropriation of funds where after compensation of compulsorily acquired properties, some men end up re-marrying in total disregard of their responsibilities with regard to their initial families only to return home after they are fully spent. With the establishment of the settlement schemes at section 134, little has been done to provide for and protect women land rights save for to have appointment of women representatives at the sub-county selection committees.

101 Supra n 70 (Republic of Kenya 2012)

E LAW OF SUCCESSION ACT CAP 160[102]

This is the law that governs inheritances or transmission of property upon death, intestate and testamentary succession and administration of estates of deceased persons. A key provision in this law as relates gender equality on inheritance of land reads:

> *"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."*[103]

This means that without distinction by gender, both male and female children are entitled to inherit their parents equally. This gender equality principle is seen again at section 35 (5) which states:

> *"……. subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."*

Sections 40 and 41 provides for the same principle of equality, with section 40 relating to polygamous marriages. More importantly it provides for division of the estate amongst the polygamous houses according to the number of children per house.

However, this law isdiscriminatory because it provides that if the estate of a deceased husband is left to the widow, she is only allowed Ksh. 10,000/- or 20% of the net estate whichever is higher and a life interest on the whole of the remainder, provided that such interest is determined should the widow re-marry.[104] This is because there is no such provision in case of intestacy of the wife. This means that the widower could deal with the estate of his deceased wife without any guidance under the law, but the widow is restricted. The widow however gets to inherit personal and household effects of the deceased absolutely and has powers to appoint power on all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children.[105] This power of appointment can however be challenged by the children.

In definition of dependants, it is interesting to note that husbands/widowers are not listed here.[106] Wife or wives and children of the deceased are however clearly defined as dependants. Section 32 makes a mention of properties that are not under

102 Supra n 75 (Republic of Kenya 1981)
103 ibid sec 38
104 ibid sec 36
105 ibid sec 35 (1) and (2)
106 ibid sec 29

the provisions of this Act to include agricultural lands and crops and livestock thereon in 12 districts. Section 33 stipulates that the laws applicable hereon are the law of custom adhered to by the deceased prior to their demise.

Section 68 allows parties to an estate in the process of administration to raise objections with the succession court should they feel aggrieved by an application of grant of representation. This objection has to be within the specified notice period. Section 26 provides that where parties to an estate feel inadequately provided for under will or intestacy could also make application to court for variation of such provision.

Section 82 in protection of the deceased's estate provides that no immovable property can be sold before confirmation of the grant. After confirmation this section provides for assenting of the net estate and vesting the same to the beneficiaries. This is key because assent in case of registered lands translates to actual registration of the property in land in the names of the beneficiaries as provided for under succession. This presents the opportunity to have women registered as landowners. Thereafter, they are the registered owners and they can relate to the lands with full authority as the legal owners. Section 85 also reaffirms this necessity to record assent in-order to complete the legatee's title.

It is this study's view that over 50% of all the women registered as landowners in Kenya are so registered following succession processes. This law has thus to a great extent aided women of Kenya to have land registered in their names. This indeed shows that, little efforts here and there will get women recognised and registered as landowners.

F COMMUNITY LAND ACT NO. 27 OF 2016[107]

This Act was enacted in the 2006 to recognise and give protection of community lands. Section 3 states that:

> *In the performance of the functions and exercise of powers under this Act, every person dealing with community land shall be guided by the following principles –*
>
> *1. (a) the principles of land policy set out in Article 60 of the Constitution; and*
>
> *2. (b) the national values and principles of governance set out in Article 10 of the Constitution.*

These principles among others include human dignity, equity, non-discrimination, and protection of the marginalised, including 'elimination of gender discrimination in law, customs and practices related to land and property in land.'[108]

107 Republic of Kenya (2016) *Community Land Act,* (Government Printer, Nairobi, 2016)
108 Supra n 60 (Republic of Kenya 2010) Art. 60

Section 15 of this Act mandates the communities that have community lands to set up a committee for purposes of creating a comprehensive register of the community land rights holders. It is our strong opinion that this section should have elaborated who these rights holders include, and which elaboration should include women as key community landholders.

While dealing with land adjudication under this law, section 14 requires that consideration of gender equity must be adhered to with equal treatment of applications made by both men and women. These provisions are quite daring considering that majority of community lands are in the pastoralist communities which are considered to be highly patriarchal. As indicated however, with education of the masses and a careful balancing of application of this law, women will be included in the community registers of landowners.

VI FINDINGS & DISCUSSION

A FINDINGS

The researcher employed various methods of data collection including: desktop research, direct interviews, administration of questionnaires, field studies and the Internet. The research applied these methods variously. Desktop research was applied at almost every step. Direct interviews and observations enabled the study to deduce how women viewed their right to land and also how men approached the issue of land registration and issuance of land titles to women.

Internet materials enabled the study to further develop a proper analysis on the role of gender and women in land ownership and land registration. The field studies were carried out in selected land registries to aid in the collection of empirical data and to ascertain the numbers and percentages of land registered in favour of men, women, joint men and women (as spouses) and body corporates. Desktop research aided the study in carrying out a comparative study and eventually enabled the study to make proposals to better the situation in Kenya.

The research sampled about 500 parcels in each lands registry out of approximately 200,000 green and white cards. The sampled cards revealed data as shown in the table:

Thika Lands Registry		
	Ownership by men %	Ownership by women %
Analysis by No. of parcels	73	27
Analysis by size of land	83	17

Kajiado Lands Registry	**Ownership by %**			
	men %	women %	Joint men & women	Corporates
Analysis by No. of parcels	76	18	2	1
Analysis by size of land	77	20	2	1

Eldoret Lands Registry	**Ownership by %**			
	men %	women %	Joint men & women	Corporates
Analysis by No. of parcels	90	7	1	2
Analysis by size of land	90.5	7	0.5	2

This study also revealed that different research projects carried out under this same theme of ascertaining the number or the percentage of land held by women, have all yielded different results. A study carried out by the land Alliance in the year 2019 found that only two per centof land in Kenya is held by women.[109] Yet an earlier study by the International Women's Human Rights Clinic (IWHRC) at Georgetown University Law Center in partnership with FIDA-Kenya in the year 2008 had reported a one per cent women land holding in Kenya with five per centjoint holding with their husbands.[110] The National Policy on Gender and Development states that eight per cent of Kenya's women are shown to own a house while seven per cent own land.[111] It is indeed difficult to get generalised statements about land ownership data.[112] These variations captured in different studies are due several factors; firstly, Kenya's land administration system is highly manual and so the access to land ownership data is a difficult task. Second is the fact that studies in different regions are likely to show different numbers because of culture and the level of land registration which differs from region to region and lastly lack of correctness and up-datedness of the available data. Indeed sometimes, land data is completely unavailable.[113]

109 Kenya Land Alliance (2019) *Women's Land Rights in Settlement Schemes in Kenya*: *an Analysis of Gender Disaggregated Data of Allocation in Select Settlement Schemes* July 2019

110 Supra n 14 (Georgetown University Law Center, 2009) p. 6

111 Supra n 15 (Republic of Kenya 2019) p. 18

112 Supra n 7 (UN & United Nations Entity For Gender Equality and the Empowerment of Women, 2020)

113 Supra n 21 (PN Mburu 2017), p. 160

B DISCUSSION

The field study in the three registries reveal one common trend, that there are more men registered as land owners than women by huge margins. There are however slight variations depending on whether the particular location is within or near a township, in which case the number of pieces of land registered in favour of women slightly rises. Alhough this study did not ask the question why there is a slightly higher number of women in townships and municipalities, we have settled on several assumptions to account for this small but significant variation.

Our first assumption is that there are more land parcels registered within townships as opposed to the case in the villages. Some of these increased transactions registered in land, capture women land rights especially succession and inheritance rights. Second is the assumption that, in the towns we find more empowered women through education and engagements in businesses which make more women and men gender sensitive. These women are more aware of their rights to land and have some form of financial muscle to secure their rights to land through registration.[114]

If we take a simple median of the three land registries ((22 + 19 + 7) divided by 3), we come up with a 16% rate of lands registered in favour of women. It is important to note that this is out of the private lands registered totalling to about 19% of Kenya's total land mass. Owing to the fact that the vast community lands (formerly trust lands) would largely be held by men culturally (or the community this would leave us with an aggregated 3% of lands registered in favour of women in the whole country ($16 \times {}^{19}/_{100}$).

This research was informed that, where land titles are in the names of women or where the only surviving person to collect the titles happen to be female, they have many times declined to collect the titles indicating that title matters are left to the elders and men.[115] While property ownership is the lever that turns the momentum of poverty, Luttrell avers that sometimes land titling in favour of women increases gender violence, because men see women's land rights as a threat.[116] This could be one of the reasons why women do not want to collect land titles. Indeed, in our field study, we were informed of various instances of violence at the family level meted on members who championed women land rights and in some instances leading to arson attacks and murders.[117]

When men die intestate (or even testate), there are many instances where the sons have challenged their sisters' and mothers' share of inheritance. These have on many occasions led families to the succession court with sons fighting their mothers' share of the estate as indicated above in Gituanja and Gituanja.[118]

114 Supra n 4 (E Chigbu 2019), p. 10
115 Interview with land registrar 301
116 Supra n 8 (JC Luttrell J. 2020) p. 8
117 Interview with land surveyor 303
118 Supra n 30

> 'Locke's theory of ownership provides a normative connection between women's work and their assets. *Though the earth, and all inferior creatures be in common to all men, yet every man has a property in his own person. This body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. (Locke, Second Treatise, ch. 5, sec. 27).* One need not be a natural-rights inclined Lockean to believe that women who occupy and labour in their homes have a right to them.'[119]

The Lockean theory of property in a way supports the recognition and protection of women land rights vide registration. This is because women till the land and do much of the home chores. They mix their labour with land. Consequently, both men and women should have their names jointly registered on the land ownership documents.

In Rwanda it has been shown that 81 per cent of land is owned jointly by men and women, with only 6 per cent held solely in the names of men, and 11 per cent is owned by women.[120] Yet another study has shown that 49 per cent of lands were jointly held by men and women, 19 per cent owned by women and 11 per cent of lands in Rwanda were held by men solely.[121] This has been greatly attributed to positive steps taken under the land tenure regularization support programme (LTRSP) to implement gender equality policy objectives and the fact that after the 1994 genocide, women made up the majority of Rwanda's population and headed more than two thirds of the country's households. The Government thus deliberately pushed for registration of women land rights by employing a mix of traditional and innovative communication strategies to educate its population on the need to have land in the joint names of spouses and equality in the inheritance of land.

Polavarapu is however quick to point out that despite this registration of women as land owners, the exclusions still persist in that in as much as women are in joint tenancies, their male counterparts continue to perpetuate dominion and chauvinistic tendencies in land administration. Indeed, most women are coerced to dispose of their properties by their husbands.[122]

Governments are encouraged to apply gender mainstreaming strategies in order to come up with programs that help reduce gender inequalities. Gender mainstreaming refers to the process of analysing how and why there are gender differences and

119 Supra n 8 (JC Luttrell 2020), p. 15

120 P Gillinham and F Buckle (2014) *Rwanda Land Tenure Regularisation Case Study*. (Evidence on Demand and DFID 2014), p. 6

121 Supra n 7 (UN & United Nations Entity For Gender Equality and the Empowerment of Women 2020), p. 70

122 A Polavarapu (2011) *Procuring Meaningful Land Rights for the Women of Rwanda*. Yale Human Rights and Development Journal, Vol 14, Article 3 Available at: http://digitalcommons.law.yale.edu/yhrdlj/vol14/iss1/3, p. 106

inequalities on a specific subject area. This assessment then identifies opportunities and areas of intervention so as to reduce the identified inequalities between men and women.[123] This assessment should take into account implications of policies, legislation and actions or programs with the ultimate goal being to achieve gender equality.

The gender mainstreaming strategy seeks to ensure that gender considerations are routinely included in the assessment of policy formulation, options and impacts, along with other considerations such as socio-economic dimensions. It also routinely seeks increased gender equality as one of the policy outcomes, along with growth, efficiency, poverty reduction, and sustainability. This requires the inclusion of gender perspectives at several points in the policy process.[124] It thus enables the governments and other organisations to focus on equality with constant monitoring and evaluation of policies, programs and implementation thereof.[125]

VII RECOMMENDATIONS

Governments should offer incentives to encourage registration of land in the joint names of spouses. For example, during the implementation of the big four agenda, cheap housing mortgages could be availed faster and at a slightly low interest to people whose lands are registered jointly in the names of both spouses.

Review succession, matrimonial property and other related laws to ensure that they conform to the principles of gender equity.

Review the Land registration Act or enact a new law that recognises, protects and registers the rights of peoples requiring special attention including women and girls land rights.

Carry out countrywide publicity and education on the advantages of joint spousal registration of property and property in land.

Establish appropriate legal measures to ensure that men and women reap the benefits of equal rights to matrimonial and other properties in land.

Increase the number of women in all leadership and managerial positions in the nation including in the land administration and land management authorities including the judiciary.

Establish *Nyakinyua*[126] Settlement Schemes. These are schemes that are women focused in line with affirmative action

Modernise land administration systems throughout the country. This will ensure simple, timely and transparent land registration which will not only be advantageous to women but to the whole country at large.

123 UN (2002) *Gender mainstreaming – An Overview* (NewYork, 2002), p. 2

124 ibid p. 13

125 Beijing Platform for Action from the United Nations Fourth World Conference on Women in Beijing in 1995: gender mainstreaming.

126 *Nyakinyua* is a term used in the Agīkūyū culture to denote an accomplished woman who has passed the age of bringing up her children and whose lastborn child is married. It is used to show respect.

VIII CONCLUSION

Kenya's legal provisions on women's land rights and registration thereof are not as affirmative as they ought to be. This study found out that there are progressive provisions pertaining women rights in land especially in the Constitution. For instance, Article 45 provides for equal spouses' rights at the time of marriage, during and at the dissolution of marriage. This thread is also true to some extent in some pieces of legislation, but it has not come out clearly that women's rights in land are human rights in most statutes. It is not mandatory to register or protect women's land rights, largely owing to Kenya's patriarchal history. For instance, in the Land Registration Act, there are no clear guidelines about how to register matrimonial properties, which is where the bulk of women's land rights ought to be recognised.

Further, some of the progressive provisions listed as overriding interests in the LRA were quickly rolled back by the Land Laws (Amendment) Act of 2016. The deletion of spousal interests (from the LRA) and the consequent non-requirement of the spousal consent when trading in land, contradicts section 12(5) Matrimonial Property Act which stipulates that written and informed consent of both spouses is required for any alienation of matrimonial property to be valid.[127]

Indeed, in many communities, women shy away from discussing land titles and land registration in their favour, choosing to leave this in the hands of their husbands, brothers or other male members in the family set-up. There ought not to be grey provisions in law. For instance, spousal rights in land are at some point protected under overriding interests then quickly withdrawn, or having women rights in land left under trust, where trustees are men.[128] Kenya could draw lessons from Rwanda where over 95 % of all land is registered out of which, 81 % is registered under joint names of husbands and wives.

There are numerous advantages of having women registered alongside men as landowners over and above the general advantages of registration of lands enumerated above. This would include the fact that both men and women especially in the family set-up are able to tap into mortgages from women funds and more. *Furthermore, land possession is a symbol of rural political power because it provides more security, which is a powerful stand for political participation*.[129]

127 Supra n 54 (M Oyuga & N Ikinu 2017), p. 6
128 Supra n 71 (Republic of Kenya 2012), sec 28
129 Supra n 6 (JK Moyo 2017), p. 45

CUSTOMARY LAW AND WOMEN'S RIGHTS IN KENYA

Winifred Kamau*

ABSTRACT

Kenya is a legally plural State where several different legal and normative systems operate alongside each other. The interaction of legal systems is complex and often engenders conflict and competition. This paper deals with the relationship between customary law and women's human rights in Kenya, and examines the ways in which conflicts between the different legal systems impact on the human rights of women in Kenya. The paper argues that there is a need to find ways of reconciling conflicts between customary law and women's human rights in order to enhance women's ability to actualise their rights.

1. INTRODUCTION: THE NEED TO RECONCILE CUSTOMARY LAW AND WOMEN'S RIGHTS

Kenya is a legally plural State where several different legal and normative systems operate alongside each other. The interaction of legal systems is complex and often engenders conflict and competition. This paper deals with the relationship between customary law and women's human rights in Kenya, and examines the ways in which conflicts between the different legal systems impact on the human rights of women in Kenya. The paper argues that there is a need to find ways of reconciling conflicts between customary law and women's human rights in order to enhance women's ability to actualise their rights. This is particularly in light of the principles of equality and non-discrimination espoused in the Constitution of Kenya, 2010. The paper also explores avenues that may be available to utilise customary law for the benefit of women.

Customary law plays a significant role in the lives of Kenyans. Customary norms and practices pervade people's relationships and dealings with one another. This is particularly so in the context of family relations. Debates about culture in Africa have largely focused on women in the context of the family and on the impact of custom on their enjoyment of rights. The family has been described as the site of struggle over symbols, entitlement to resources and decision-making.[1] It has aptly been observed that family law is: "the litmus test in any society with regard to legal norms and the status of women. It is also the area where law, ethnicity and ideology with regard to the rights of women merge to become a powerful ideological force."[2] Customary law plays a crucial role in the maintenance of cultural norms about the

* Associate Professor, Faculty of Law, University of Nairobi.

1 Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford: Hart Publishing House, 2005).

2 Radhika Coomaraswamy, "To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights", in Rebecca Cook, ed. *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Philadelphia Press, 1994) 39 at 48.

place of women in the family and society.

For Kenyan women, custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources. In addition, informal justice systems which constitute the most accessible forms of dispute resolution utilise localised norms derived from customary law.

Customary law may be defined as consisting of the unwritten norms and practices of small-scale communities dating back from pre-colonial times but has undergone transformations due to colonialism and capitalism. It is localised in nature and is as diverse as the communities involved, although there is a general consensus on certain fundamental principles.[3] It is unwritten and is characterised by dynamism and flexibility, as it develops and takes on different permutations in response to changing circumstances. The fluid nature of customary law, and the fact that it is unwritten, poses a challenge in determining its content in any particular case. In Kenya, customary law applies only in civil matters and hence is not applicable in criminal cases.[4]

It should be noted that customary, religious and statutory laws operate within the same social context and cover similar ground, particularly in the areas of personal law, which include marriage, divorce, inheritance, custody and guardianship of children and land tenure. However, there is a clear distinction between customary law and religious law. For example, while Islamic law (Sharia) may govern similar areas as customary law, such as marriage, divorce and inheritance, it is treated by the courts as a separate source of law and is dealt with by special Kadhis' courts.[5]

In Kenya, there is an intricate link between customary laws, customary practices and women's rights. Almost invariably, women occupy a disadvantaged position under customary law. This is because traditional African societies are governed on the basis of patriarchal structures where women's individual interests were subsumed under the interests of the group. Hence customary law contains aspects that often run counter to principles of gender equality and non-discrimination espoused in both domestic and international human rights instruments. The continued application of customary law in areas such as succession and marriage engenders conflict with

3 These principles include: the centrality of the family, supremacy of the group over the individual, and the importance of kinship ties. Some anthropologists have raised the question of whether the unwritten customs and practices of pre-industrial small-scale societies can be regarded as law: see for instance A.S. Diamond, *Primitive Law* (London: Watts, 1935) and A.R. Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses* (Glencoe, Ill.: Free Press, 1952). Others, such as Malinowski and Gluckman were much more prepared to accept that such customs and practice constitute law: See Max Gluckman, *Ideas and Procedures in African Customary Law* (London: Oxford University Press, 1969); Branislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge & Kegan Paul, 1926).

4 See section 3 (2), Judicature Act (Cap. 2).

5 Kadhis' courts are classified as subordinate courts and are provided for under Article 170 of the Constitution of 2010. The Kadhis' Courts Act (Cap. 11) sets out their jurisdiction. This jurisdiction of Kadhis' courts is restricted to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the courts.

statutory provisions. For example, the right of women to inherit equally with men granted in the Law of Succession Act[6] offends customary law practice that dictates against women inheriting immovable property, particularly land. However, the flexibility and dynamism inherent in custom, which is reflected in changing norms and practices, may also provide windows of opportunities available to utilise customary law for the benefit of women.

After a long and arduous struggle for comprehensive constitutional reform, Kenya promulgated a new Constitution on 27th August, 2010.[7] The Constitution of 2010 contains important gains for gender equality and equity and generally for the protection of human rights of all women and men in Kenya. A number of constitutional provisions have a direct bearing on customary law in relation to women's human rights, and in significant ways these provisions address some pertinent issues relating to women's position under customary law. Further, unlike the former Constitution, the Constitution of 2010 provides a platform for reconciling conflicts between customary law and statutory law.

II BRIEF BACKGROUND ON KENYA

A SOCIAL-CULTURAL BACKGROUND

Kenya is a multi-ethnic, multi-racial, multi-lingual and multi-religious society. There is a wide diversity of indigenous peoples, making up 43 ethno-linguistic groups, who together comprise the three major African linguistic groups: Bantu, Nilotic and Cushitic.[8] Africans are the overwhelming majority, comprising the 99% of the total population of 28.5 million.[9] Besides the African population, there is also a small but significant component of Arabs, Asians, and Europeans, who together make up 1% of the total population. This diversity is reflected in the different languages, history and cultural practices among the population. Among the African people groups, the majority are patrilineal and patrilocal.[10] Some common themes running across African social and economic systems and patterns of family life include the centrality of the family, supremacy of the group over the individual and importance of kinship ties.

6 Cap. 160.

7 The Proposed Constitution of Kenya was ratified in a referendum held on the 4th August, 2010 and was thereafter promulgated as the Constitution of Kenya, 2010 on 27th August, 2010.

8 Miraslova Prazak, "Kenyan Families", in Yaw Oheneba-Sakyi and Baffour K. Takyi, eds., *African Families at the Turn of the 21st Century* (Westport, Conn.: Praeger, 2006) 197 at 199.

9 This is the figure given in the 1999 census: Government of Kenya, Central Bureau of Statistics, Ministry of Finance and Planning, *1999 Population and Housing Census: Counting Our People for Development*, Vols. 1 and 2 (Nairobi: Government Printer, 2001). The most recent census was carried out in 2009 but the census report has not yet been made public.

10 In a patrilineal society, descent is traced through the paternal line (contrast matrilineal societies where descent is traced through the maternal line). Patrilocality refers to a social system where a married couple resides with or near the husband's parents (contrast matrilocality where residence is with the wife's family).

III THE APPLICATION OF CUSTOMARY LAW IN KENYA AS A POST-COLONIAL STATE

A PRE-COLONIAL PERIOD

Kenya was subject to British colonial rule from 1895 until 1963 when she gained political independence. The establishment of British colonial rule in Kenya was accompanied by the superimposition of English law over the indigenous people, who already had their own systems of governance. Under the indirect rule policy, the British introduced a racially stratified dual legal system, with one system of law for Africans and another system for non-Africans. Thus, Native Tribunals were established and run by ostensible traditional authorities, to apply "native law and custom" (or customary law) to Africans while English-type courts run by British magistrates and judges administered the received English law to govern non-Africans,[11] It should be noted that customary law was applied mostly in the area of personal relations, notably family law, land tenure and succession. The establishment of Native Tribunals meant that customary law was to be interpreted and applied by State courts. Other aspects of law, such as criminal law, contract and torts were governed by the received law consisting of English common law and statute law.

B POST-COLONIAL PERIOD

At independence, the overriding goal of the Kenyan government was to promote national unity in the face of ethnic, racial, religious and linguistic plurality. The multiplicity of indigenous justice systems engendered by customary law was perceived as a hindrance to social and economic development. A uniform legal system was therefore seen as desirable. The government therefore embarked on measures to integrate the dual structure of the legal system. In 1967 the native courts were dismantled and a unitary court system was established.[12]

The government also made concerted efforts to harmonise the customary laws of the various people groups with the received law. Two Commissions, one on Marriage and the other on Succession, were appointed in 1967, with the mandate of drafting uniform laws for marriage (and divorce) and succession respectively. The Marriage Commission in its 1968 Report annexed a Marriage Bill which was intended to constitute a unified system of marriage law. However, despite various attempts to enact it, this Bill was never passed.[13] The Report of the Commission on

11 Yash Ghai & J.P.W. McAuslan, *Public Law and Political Change in Kenya* (Nairobi, Oxford University Press, 1970).

12 These changes were effected through a number of statutes, namely the Judicature Act (Cap. 8), the Magistrate's Courts Act (Cap. 10) and the Kadhis' Courts Act (Cap. 11).

13 The Marriage Bill was presented before the Kenyan Parliament in 1968, 1979 and 1985 but was never passed. After presentation of several other bills, the Marriage Act, No. 4 of 2014 was eventually passed and came into force on 20th May 2014.

the Law of Succession experienced greater success culminating in the passing of the Law of Succession Act, which came into operation in 1981. Although the Act was intended to be the uniform law for all Kenyans irrespective of race or religion, this was not to be as exemptions were thereafter granted to certain categories of people, such as Muslims and some pastoralist communities.

Other reforms included the introduction of individualised land tenure under the Registered Land Act, 1963[14] (now repealed) whose result was to extinguish customary rights and interests in land that had been adjudicated and given individual tenure. However, it should be noted that legislation enacted after the Constitution of 2010 has granted more recognition of customary land rights. The Land Act, (No. 6 of 2012) (which repealed the Registered Land Act) defines these as rights conferred by or derived from Kenyan customary law whether formally recognised by legislation or not. Further, under the Land Registration Act, (No. 3 of 2012) customary trusts are recognised as overriding interests that do not require to be registered.

Hence, despite the attempt to harmonise the legal system the pluralistic base of the legal system remained. At present, the State legal system recognises the applicability of customary and religious laws to varying degrees, particularly in the areas of personal law, such as marriage, divorce, inheritance and land tenure. Indigenous norms still govern the lives of the people, particularly in rural areas where the majority reside. Further, a variety of informal justice forums persist despite the presence of the State judicial system, albeit not in their "pure" traditional form. Examples include village elders, chiefs and other community justice structures. These structures, which apply popular localised norms, often constitute the only accessible and relevant justice system for the majority, particularly in rural areas where the majority of women in Kenya live. These non-state justice systems have been recognised under Article 159 (2) of the 2010 Constitution and given further articulation in the Alternative Justice Systems Policy, 2017.

C IMPACT OF COLONISATION ON CUSTOMARY LAW

The emphasis in traditional African society was on family and larger kin groups characterised by strong extended family ties and community bonds. While it is apparent that children and women occupied an inferior position in traditional society, especially with regard to property, there were also protective mechanisms to ensure that their interests were taken care of. For instance, after a father's or husband's death the deceased's property would be entrusted to one of the male relatives of the deceased who was obliged to look after the welfare of the deceased's wife and children. Similarly, women's rights of occupation and cultivation of the family land were ensured.

14 Cap. 300.

Colonialism and capitalism had far-reaching effects on customary norms and practice. In general, the interaction between colonial state law and customary law worsened the position of women. Colonialism and capitalism brought in their wake a general breakdown in community institutions and the dismantling of safeguards for protection of weaker people in society, particularly women. For instance, the institution of the levirate, which was originally intended for the protection of the widow and her children, has been abused and has resulted in wives and their children being dispossessed by male relatives on the death of a husband. Similarly, the institution of bridewealth (also known as dowry) has been commercialised and women may be regarded as property which is seen as justifying practices like wife-beating. The individualisation of land title and commoditisation of land also jeopardised women's interests. For example, in Kenya, the processes of land adjudication and consolidation almost invariably led to vesting of legal title to land in men as the heads of households. Under the repealed Registered Land Act, 1963 legal title to land conferred absolute proprietorship with unfettered rights of possession, use and disposal to the exclusion of all other interests, including interests under customary law.[15] Hence, women were disadvantaged as their rights of use and occupation under customary law were thereby jeopardised. This has been redressed by the Land Registration Act, 2012 which recognises unregistered customary interests as overriding interests. Further, one of the guding principles under section 4 (f) of the Land Act, 2012 is the elimination of gender discrimination in law, customs and practices related to land and property in land;

IV NATURE OF CUSTOMARY LAW IN KENYA

A. CUSTOMARY LAW: STATIC OR EVOLUTIONARY?

Customary law is characterised by dynamism and flexibility, as it develops and takes on different permutations in response to changing social conditions. Some scholars are of the view that custom and customary law is actually an "invention" of colonial governments in collaboration with local leaders.[16] Customary law is unwritten and is passed on through the practices and oral traditions of the community concerned. In Kenya, there was an attempt at codifying customary law soon after independence in order to make it easier for judges to ascertain its content. The attempt at codification did not fully materialise but instead took the form of *Restatements* of the customary laws of marriage, divorce and succession which were published in 1968.[17]

15 Section 30, Registered Land Act (Cap. 300).

16 See Martin Chanock, Law, *Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985); Terence Ranger, "The Invention of Traditionalism in Colonial Africa", in Eric Hobsbawm & Terence Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

17 These were two volumes which were produced by Eugene Cotran and published under the general editorship of Anthony Allott, namely: Eugene Cotran, *The Law of Marriage and Divorce: Restatement of African Law, Kenya, vol. 1:* (London: Sweet & Maxwell, 1968) and Eugene Cotran, *The Law of Succession: Restatement of African Law, Kenya, vol. 2:* (London: Sweet & Maxwell, 1969) [*Restatements*].

Although the *Restatements* were not intended to be a code of customary law, they have acquired the status of a quasi-code, which judges have tended to treat as authoritative and binding.[18] Most judges who apply customary law rely on accounts of customary law that record such law as if it were static and do not take into consideration changes that have taken place in Kenyan society since the *Restatements* were written in 1968. It has been argued that the courts' continued reliance on customary law codes or quasi-codes, buttressed by the doctrine of precedent, has resulted in the ossification of customary law, thus stifling opportunities for development of customary law.[19] Thus there are divergences between "judges' law" consisting of judges' pronouncements and "living law" consisting of people's practices on the ground.

In Kenya it is often difficult to distinguish between customary law and customary practices. This is due to the ever-evolving nature of customary practices, which makes it difficult to ascertain the content of customary law at any given time. As already mentioned, customary law is treated as a question of fact which must be proved in evidence. Questions therefore arise as to whether a particular customary practice has achieved the status of customary law. The courts mostly rely on the evidence of witnesses who are usually elderly males. These witnesses may have warped or biased views, particularly in relation to gender relations. This has important implications for women's rights as women's perspectives of customary law are not taken into account in judicial considerations of what constitutes customary law in a given case.

However, there is some indication of changes in customary norms and practices over time to accommodate new realities. Factors influencing these changes include education, women's economic empowerment, civic education, awareness of rights among others. In *Karanja v. Karanja*[20] the court recognised that as a result of women being educated and earning salaries, it is quite possible for both married and unmarried women to acquire their own land. Local women's groups and NGOs have been instrumental in facilitating these processes. For example, through *chamas* (women's rotating savings groups) women have been able to raise capital to buy property, own businesses on their own. Hence the customary perception that women cannot own or manage property is being put to question. There is also some evidence that inheritance practices are gradually (though very slowly) changing to accommodate the rights of daughters to inherit their fathers' estates in

18 The *Restatements* have been relied upon in a large number of cases, e.g. *Mwathi v. Mwathi* [1995-1998] E.A. 229; *Re Estate of Naomi Wanjiku Mwangi* (deceased) (Nairobi High Court Succession Cause No. 1781 of 2001) and many others. However, in *Atemo v. Imujaro* [2003] K.L.R. 435 the Court of Appeal cautioned against treatment of the *Restatements* as binding on every issue of customary law in Kenya.

19 Anne Hellum, *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Avondale, Harare: Mond Books, 1999); Julie Stewart, "Why I Can't Teach Customary Law", in John Eekelaar & Thadabantu Nhlapo, eds., *The Changing Family: Family Forms and Family Law* (Oxford: Hart Publishing, 1998) 217;

20 [1975] KLR 307.

some instances particularly in situations where a daughter have been taking care of her father in his old age[21]. Some customary concepts, such as those relating to trusts, have in some cases operated to enable women to hold land on behalf of the family and to make decisions relating to apportionment and use of such land.[22]

Some cultural practices are also undergoing change. There is some indication that there is less than full observance of certain burial rites and practices, such as *tero buru* and widow inheritance practiced by some communities. This is attributable in large part to the influence of public health campaigns by government and NGOSs, particularly with the spectre of HIV/AIDS.[23] In some other regions, alternative rites of passage for women have been initiated minus the "cut" usually associated with female circumcision.

B CHOICE OF LAW DILEMMAS

The existence of multiple legal systems, where customary and statutory/common laws are recognised at the same time, gives rise to choice of law dilemmas. For example, the law of marriage in Kenya is governed by four systems of law, hence parties a have choice of what system of marriage to use. However, the legal consequences of marriage and the rights and obligations of parties under the different systems are not uniform. For instance, a woman is entitled to maintenance from her husband under the statutory system of marriage but not generally under the customary law system. However, these legal systems do not operate in separate compartments, but interact with one another in various ways. People often traverse the boundaries between the legal systems, and in many cases, these boundaries are blurred. For instance, it is common for a couple to go through a customary marriage ceremony and subsequently enter into a statutory marriage. It is then not clear what system of law should govern that couple's relationship, and hence, what rights and obligations obtain in that relationship.

More positively, multiple legal systems offer the opportunity of forum shopping, where parties have the advantage of choosing the legal system which offers more benefits for them. For example, a woman married under both customary law and statutory law may choose to file a suit in the formal State courts, rather than in informal traditional forums, as the former may afford her more rights such as maintenance and a share in matrimonial property. However, the woman's choice may be constrained by lack of access the formal courts due to the high costs,

21 Celestine Itumbi Nyamu, Gender, Culture and Property Relations in a Pluralistic Social Setting (J.S.D. Dissertation, Harvard University, 2000) [Property Relations] [unpublished].

22 Fiona McKenzie, "Gender and Land Rights in Murang'a District, Kenya" (1990) 17 Journal of Peasant Studies 609. Nyamu, Property Relations, supra note 21. McKenzie, supra note 22.

23 M.D. Okech-Owiti, "Some Socio-Legal Issues", in J.B. Ojwang & J.N.K. Mugambi, eds. *The S.M. Otieno Case: Death and Burial in Modern Kenya* (Nairobi: Nairobi University Press, 1989) 11.

geographical distance, complexity of procedure and such other factors. Such a woman may also be discouraged from filing suit in court by pressure from other family members and the threat of social disapprobation.

The Chief Justice Martha Koome in 2021 launched the Judiciary Social Transformation through Access to Justice Framework which adopts the Multi-Door Approach to Justice. This approach seeks to expand the doorways of justice through supporting multiple channels for addressing grievances through institutions such as small claims courts, tribunals, alternative justice systems, and alternative dispute resolution mechanisms. It is imperative that all these mechanisms align to the principles of gender equality and non-discrimination in order to be of benefit to women.

V RECOGNITION OF CUSTOMARY LAW BY THE STATE AND INCORPORATION INTO STATE'S LEGAL SYSTEM

A CUSTOMARY LAW AS A SOURCE OF LAW IN KENYA

The sources of law in Kenya are set out in Section 3 of the Judicature Act.[24] Subsection (1) lists these sources, in descending order of importance, as: the Constitution, all other written laws (including certain Acts of the U.K. Parliament), the substance of English common law, doctrines of equity and statutes of general application.[25] However, sub-section (1) contains a proviso which states that common law, equity and statutes of general application shall apply only in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. Section 3 sub-section (2) states as follows:

> "The courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law."

Thus, it is clear from the Judicature Act that customary law is a source of law in Kenya. However, the application of customary law under section 3 (2) is limited in a number of ways. Firstly, the application of customary law is restricted to civil cases only, where at least one of the parties is subject to customary law.[26] Under Section 77 (8) of the former Constitution, a person could not be convicted of a criminal offence unless that offence was defined, and the penalty for it prescribed, in a written law.[27] As customary law is unwritten law, this meant that criminal offences found in customary law could not apply in the Kenyan legal system. Customary criminal

24 Cap. 8.
25 These latter English sources apply as they subsisted as at 12th August 1897.
26 This would mean a Kenyan of African origin or anyone else who has subjected themselves to customary law.
27 The only exception to this rule was that a court may punish a person for contempt of law even where the act or omission constituting the contempt was not defined in a written law and the penalty for it was not so prescribed.

offences were therefore not considered part of Kenyan law.[28] While the Constitution of 2010 upholds the principle of legality as part of the right to a fair trial (see Article 50 (2) it does not have specific provisions similar to those of section 77 (8) of the former Constitution. Further, article 159 (2) (c) which mandates the promotion of traditional dispute resolution mechanisms does not make any distinction between criminal and civil cases. The only caveat (in article 159 (3)) is that such mechanisms should not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or result in outcomes that are repugnant to justice or morality, or is inconsistent with this Constitution or any written law. The provisions of Article 159 have opened the possibility of applying traditional dispute resolution mechanisms in criminal cases. In the ground breaking case of *Mohamed Abdow Mohamed* [2013] eKLR, the High Court discharged the accused on a murder charge on account of his family having paid "blood money" in the form of camels and goats as compensation for the offence. Similarly, in R v Lenaas Lenchura[29]the accused's sentence for murder was lifted as the court took into account the circumstances of the case, which involved a quarrel over scare water resources. Instead, the accused was required to pay compensation of one female camel as dictated by Samburu customs.

Secondly, customary law should not be inconsistent with written law. This suggests that where there is a conflict between customary law and a written law, such as a statute or constitutional provisions, then the latter should take precedence. However, this provision has been fraught with problems of interpretation which arose mainly from the proviso to section 82 (4) of the former Constitution. While section 82 (1) provided that no law should make discriminatory provisions either of itself or in its effect (sex being a prohibited ground of discrimination), the impact of that provision was watered down by subsection (4) (b) and (c) of section 82 which provided that the non-discrimination provisions of section 82 (1) would not apply to any law so far as that law made provision:

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

(c) for the application in the case of members of a particular race or tribe of

customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

Thus the "claw-back" provision[30] of sub-sections (4) (b) and (c) expressly excluded the

28 Under the auspices of the Restatement of Customary Law Project, the government embarked on the restatement and unification of customary criminal offences with a view to their incorporation into the criminal law of Kenya: see Eugene Cotran, *Report on Customary Criminal Offences in Kenya* (Nairobi: Government Printer, 1963) [*Criminal Offences*]. Pursuant to that undertaking, some customary criminal offences were incorporated into the Penal Code (Cap. 63).

29 Criminal Case No. 19 of 2011

30 This sub-section is referred to as a "clawback" clause as it takes away with one hand what it has given with another (i.e. gender equality).

non-discrimination provisions of the former Constitution in matters of personal law, and also allowed for customary law to be applied even where it was discriminatory. This provided grounds for judges to rule in favour of customary law over common or statutory law notwithstanding the provisions of the Judicature Act. Hence, in the *S.M. Otieno* case, customary law relating to burial was held to have precedence over common or statutory law. Similarly, in succession matters, although the Law of Succession Act[31] clearly stipulates that the Act is to be of universal application to all succession matter, judges have in many cases interpreted the Act in such as way as to leave room for the application of customary law, often giving priority to customary law over statutory law, for instance in excluding the rights of daughters to inherit their fathers' estates.

The ambivalence in the former Constitution was compounded by the uncertainty in the language of section 3 (2) of the Judicature Act. First, it is not clear whether customary law falls, in order of hierarchy, at the bottom of the ladder as a source of Kenyan law, or whether it should be treated as cross-cutting and outside the hierarchical order. Second, it is also not clear what the term "guided" really means. Does it mean that courts are not bound to apply customary law, or does it mean that courts must always have regard to customary law when making decisions?[32] The precise meaning of the term "guided" was the subject of much argument in the *S.M. Otieno* case, but regrettably the decision in that case did not make a definitive finding on that question, thus the uncertainty remains.

Happily, the Constitution of 2010 dealt quite decisively with this issue. Article 2(4) clearly provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency. This section clearly subordinates customary law to the Constitution and removes the ambivalence in the former Constitution with regard to customary and religious laws in the realm of personal law. Thus, customary law cannot be used to trump the provisions of the Bill of Rights in the Constitution.

Thirdly, the Judicature Act subjects the application of customary law to the "repugnancy test", that is, customary law must not be repugnant to justice and morality.[33] This means that a rule of customary law may not be applied where the court is of the opinion that it offends justice or morality. However, it should be noted that the application of this test is dependent on judicial discretion as to what constitutes justice and morality. In *Wambugi w/o Gatimu v. Stephen Nyaga Kimani*[34] it was held that customary law is applicable under section 3 (2) of the Judicature Act as long as the court is satisfied that the custom, if proved, is not repugnant to

31 Cap. 160.

32 The issue of the status of customary law was at the heart of the famous *S.M. Otieno case*.

33 The repugnancy clause was commonly used in former British colonies. The question has sometimes been raised as to whose standards of justice or morality are to be applied.

34 [1992] KAR 292 (Court of Appeal).

justice or morality. On the facts of the case, a custom that operated to bar women from inheritance (and hence discriminated against women) was found not to be repugnant to ordinary notions of justice. However, some judges have expressed disquiet about declaring customary law as repugnant to justice and morality. In *Kamete Ene Ateti Marine v. Mosupai ole Ateti*[35] the court was of the view that customs and traditions are time tested and based on wisdom and experience, hence they should not be brushed aside lightly, however tempting it might be to do so, unless there are sound reasons for it, which have to be judicially determined.

The 2010 Constitution restates the repugnancy clause in Article 159 (3) in relation to the use of traditional dispute resolution. It is arguable that the retention of this clause perpetuates the perception that customary law is inferior to other laws, and in a sense waters down the transformative constitutional provisions relative to customary law.

A PROOF OF CUSTOMARY LAW IN KENYAN COURTS

From colonial times to the present, customary law has always, by virtue of it being unwritten, been treated as a question of fact which must be proven in court as a matter of evidence. Thus, despite being a source of law, customary law is treated differently from legislation, common law and equity which do not have to be proved in this way.[36] This principle was laid down by the Privy Council in the Ghanaian case of *Angu v. Attah*[37] where it was stated as follows:

> "As is the case with all customary law, it must be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them."

The justification for this was the difficulty that colonial courts found in finding out and applying customary law to cases coming before them. The difficulty arose partly from the multiplicity of the different customary laws, partly from uncertainty regarding the limits of operation of customary law in competition or conflict with statutory or religious law, and partly from the fluid nature of customary law itself.[38]

Section 16 of the Magistrates Courts Act, 2015 provides that a magistrate's court may call for and hear evidence of the customary law applicable to any case before it. Under section 51 (1) of the Evidence Act,[39] persons who are likely to know of

35 Nbi. High Court Civil Appeal No. 224 of 1995, cited in William Musyoka, *Law of Succession* (Nairobi, LawAfrica, 2006) at 17.
36 Musyoka, *ibid.* at 286.
37 [1916] Gold Coast Privy Council Judgments (PC) 1874-1928.
38 A.N. Allott, "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 Modern Law Review 244.
39 Cap. 80.

its existence can adduce evidence concerning opinions relating to custom or right. In *Ernest Kinyanjui Kimani v. Muiru Gikanga & Another*[40] it was held that where customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it. The necessity to prove customary law as a matter of fact has onerous implications for women litigants. This is because even though under the rules of procedure a woman has the same capacity as a man to call evidence and rebut it, in practice the people recognised by society as custodians of custom tend to be men (usually elderly). Women are generally not viewed as being knowledgeable in customary law and have to call on male witnesses. Yet many women may not have the financial or social resources to do so. The inability of women to give their perspectives of what constitutes customary law often results in a distortion of the content of customary law, so that courts apply rigid or narrow conceptions of customary law without considering changes that have taken place on the ground or in disregard of the socio-economic context in which a particular customary practices is observed.[41] For example, the enforcement of the customary norm that women are not entitled to maintenance on divorce fails to recognise that the social structures that previously existed to support women upon divorce no longer exist in modern times.

Under section 87 (1) of the Civil Procedure Act,[42] a court may summon the assistance of competent assessors in any cause or matter pending before it in which questions may arise as to the laws or customs of any tribe, caste or community and such assessors shall attend and assist accordingly. Assessors differ from witnesses in that they are independent persons appointed by the court. These assessors are members of the local community that are deemed to be knowledgeable about relevant customary law. However, as already observed, knowledge or expertise in customary law is seen as vested primarily in men rather than women, hence such assessors will usually be men. This has detrimental effects on women's claims as the account of custom that the court receives comes from a predominantly male perspective.

The court may take judicial notice that a given customary practice has gained notoriety. Under section 60 of the Evidence Act,[43] the courts shall take judicial notice of both written and unwritten law, and where the court is called upon to take judicial notice of any fact, it may rely on books and documents produced before it.[44] It is in this context that the *Restatements of African Law* take on particular significance. The courts in Kenya have in numerous cases treated these volumes as authoritative statements of customary law. For example, in *Mwathi v. Mwathi*[45] the Court of Appeal

40 [1965] E.A. 735.
41 Hellum, *supra* note 19; Stewart, *supra* note 19.
42 Cap. 21.
43 Cap. 80.
44 See also section 41, Cap. 80 and Rule 64, Probate and Administrative Rules .
45 [1995-98] E.A. 229.

regarded statements contained in the Restatements on Kikuyu customs concerning the distribution of the estate of an intestate as binding or conclusive.[46] Similary, in *Gituamba v. Gituamba*,[47] the same court treated Jomo Kenyatta's *Facing Mount Kenya*,[48] an anthropological account of the tribal life of the Kikuyu, as conclusive on questions of land inheritance among the Kikuyu. As earlier mentioned, the codification or quasi-codification of customary law has been criticised as having contributed to the ossification of customary law. It is heartening to note that in at least one case, *Atemo v. Imujaro,*[49] the Court of Appeal sounded a cautionary note against treating the *Restatements* as binding on every issue of customary law and, in recognition of the dynamic nature of customary law, observed that the law in those volumes may not be the same today.

A COURTS' JURISDICTION IN CUSTOMARY LAW

Unlike some other African countries,[50] Kenya has no special customary courts. However, the various courts in Kenya have varying levels of jurisdiction in customary law. Under the Constitution, the High Court has original unlimited jurisdiction in all civil and criminal matters. Alhough not specifically stated, this jurisdiction includes customary law jurisdiction. This means that it may hear any civil matter based on customary law. The Court of Appeal hears appeals from the High Court on all matters, including customary law matters. As the High Court and Court of Appeal are not expected to be experts in customary law, they usually rely on the evidence of witnesses and also on independent assessors to enlighten them on the content of customary law. They also pay high regard to the *Restatements* relating to customary law of marriage, divorce and succession.

Magistrate's courts are subordinate to the High Court. Magistrate's courts have jurisdiction to hear customary law cases in civil cases, but this jurisdiction is restricted to claims related only to certain matters, namely: [51]

a) Land held under customary tenure
b) Marriage, divorce, maintenance or dowry
c) Seduction or pregnancy of an unmarried woman or girl
d) Enticement of or adultery with a married woman
e) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and
f) Intestate succession and administration of intestate estates, so far as not governed by any written law.

46 See other cases cited in Musyoka, supra note 34 at 288.
47 [1983] K.L.R. 575.
48 Jomo Kenyatta, *Facing Mount Kenya: The Traditional Life of the Gikuyu* (Nairobi: Kenway Publications, 1938).
49 [2003] K.L.R. 435.
50 For example Botswana, Ghana, Zimbabwe.
51 Section 7 (3), Magistrate's Courts Act, No. 26 of 2015. This reproduces the provisions of section 9 (a) of the repealed Magistrate's Courts Act (Cap. 10).

In 1991, special tribunals were created under the Land Dispute Tribunals Act[52] in order to deal with land disputes occurring in agricultural land within rural areas. These tribunals were constituted by panels of elders who were expected to apply customary law in the resolution of land disputes within their jurisdiction. However, the administration of these tribunals was fraught with difficulties such as corruption, bias and exceeding of jurisdiction. These tribunals were abolished by the Land Act, 2012 which repealed the Land Dispute Tribunals Act.

VI ANALYSIS OF KEY DOMESTIC CASE LAW THAT RECOGNISES CUSTOMARY LAW

There are numerous cases in Kenya that show recognition of customary law, either generally or in relation to specific issues. Recognition of customary law may be positive or negative for women, depending on the effects of such recognition. The following is a selection of cases where customary law has been recognised.

A GENERAL RECOGNITION OF CUSTOMARY LAW

At the heart of one of the most famous Kenyan cases, the *S.M. Otieno* case,[53] was the question of the place of customary law in Kenya. S.M. Otieno, a prominent trial lawyer from the Luo community, died intestate in 1986. The respondents, members of the deceased's Umira Kager clan, sued his widow, Wambui Otieno, seeking to have the deceased buried in his ancestral home in rural western Kenya in accordance with Luo customary law. On the other hand, the widow, who was of the Kikuyu community, wished to bury him in their suburban home in Nairobi in accordance with common law. Wambui's lawyers argued that Otieno had, through Christian urbanised life-style, and statutory marriage to a non-Luo woman, forsaken tribal custom for a modern life and that customary Luo burial law therefore did not apply in his case, but that rather, the applicable law was common law. Otieno's clan asserted that, on the contrary, Otieno's birth and upbringing as a Luo was paramount and that therefore customary law applied in the case. Unfortunately, it was not clear which of the two legal systems takes precedence in such a situation.

After long drawn-out proceedings, the Court of Appeal finally declared that customary law was the applicable law in the case and consequently ordered that

52 Cap. 18.

53 *Otieno v. Ougo & Siranga* [1987] eKLR. The case generated massive publicity and verbatim accounts were published in Kenyan newspapers daily. The *Daily Nation*, Kenya's leading newspaper, published a collection of print media articles and court proceedings of the case (Sean Egan, ed., *S.M. Otieno Case: Kenya's Unique Burial Saga* (Nairobi: Nation Newspapers Publications, 1988). The international press also took a keen interest in the saga; see for instance "African Tradition and Modern Values: Tribal Loyalties are Often at Odds with Nationalism", *International Herald Tribune*, February 13, 1987; "Kenyan Judge Awards Corpse of Modern Lawyer to Tribe", *The Washington Post*, February 14, 1987. Scholars from the University of Nairobi published a collection of essays on the case: see J.B. Ojwang & J.N.K. Mugambi, The S.M. Otieno Case: *Death and Burial in Modern Kenya* (Nairobi: Nairobi University Press, 1989). See also Winifred Kamau, "S.M. Otieno Revisited: A View through Legal Pluralist Lenses" (2009) 5 Law Society of Kenya Journal 59.

the deceased be buried in his ancestral home according to the customary practices of his clan. The court stated that customary law is the personal law of Kenyan Africans and there is no way an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal, irrespective of the person's choice of lifestyle. Personal law means the law that relates to a person's status or identity and includes the law of marriage, divorce, succession, custody, and burial among others.

The *S.M. Otieno* case exemplifies the conflict apparent between customary law on the one hand, and statutory and common law on the other hand. However, the court adopted versions of custom advanced by patriarchal community elders that were biased against women. The ruling in this case had negative implications for gender relations as a woman's right to bury her husband under common law was trumped by customary law. It should be noted that burial is one of the areas of personal where discrimination was allowed by the former Constitution, and the court in this case sanctioned such discrimination. Further repercussions are that the case can also be used as a precedent under the *stare decisis* rule to justify use of customary law to deny women's rights under common law or statutory law.[54] However, in the new constitutional dispensation, courts are obliged to subject customary norms to constitutional principles, as emphasised in *Re Burial of Musa Magodo Keya* [2021].

B RECOGNITION OF CUSTOMARY LAW IN SPECIFIC AREAS

. *i) Succession*

Although the Law of Succession Act is intended to be the universal law applicable in matters of succession, customary law is to some extent also applicable. As later discussed, some geographical regions of the country have been exempted from the application of the Act and in these regions, customary law is the applicable law relating to succession to agricultural land and livestock. Discretion has also been left to individuals to indicate in their wills any religious or customary law that they would wish to govern the administration of their estates. Customary law is also applicable to estates of the people who died before the commencement of the Act in April 1981.

Outside the above situations, controversy persists as to whether and to what extent customary law is also applicable in succession matters. While some courts have insisted on the exclusive applicability of the Law of Succession Act, other courts have maintained that customary law generally applicable in succession matters, even where there is no express provision for it in the Act. Under this approach, customary law has been applied to deny women the right to inherit their father's or husband's estate, as happened in *Mary Gichuru v. Esther Gachuhi,*[55] and in *Karanja*

54 See Patricia Stamp, "Burying Otieno: The Politics of Gender and Ethnicity in Kenya" (1991) 16 Signs 808.
55 Civil Appeal No. 76 of 1998

v. Githara. [56] In this regard, courts place much reliance on the assertions in Cotran's *Restatements* on the content of customary law.

Other courts have taken the view that customary law is applicable provided it is not repugnant to justice and morality vide section 3 (2) of the Judicature Act. This was the stance taken in *Wambugi w/o Gatimu v. Stephen Nyaga Kimani*[57] On the facts of the case, a discriminatory custom that operated to bar women from inheriting her father's land was found not to be repugnant to ordinary notions of justice**.** Indeed, the custom was held to be a salutary one as it ensured that the land remained in the family.[58]

By contrast, there is a growing body of jurisprudence which espouses the view that customary law should not apply where it offends the principles enshrined in international human rights instruments., such as the Additional Protocol to the African Charter on Human and Peoples Rights (Maputo Protocol). For instance, in *Mbinga v. Mbinga* (2006), Lady Justice Khaminwa appealed to the principles of non-discrimination enshrined in international treaties to which Kenya is a signatory, namely the Universal Declaration of Human Rights (UDHR) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to override a customary law that allowed discrimination against married daughters in inheritance matters. In a bold articulation of gender equality, the judge noted that the custom of disinheriting daughters (female children) went against the current jurisprudence in international law which was making a concerted effort to ensure that there was no discrimination on the ground of gender. Kenya was a signatory to general international treaties which clearly demanded that all customs and laws which discriminated against a person on the ground of gender must be discarded to ensure that the equality of female persons with that of males was guaranteed. Accordingly, the judge declared the discriminatory custom repugnant as mandated by the Judicature Act.

Similarly, Lady Justice Wendoh in *Re Estate of Musyoka* (deceased) (2005) noted that Kamba customary law, which was relied on by one of the parties in a bid to exclude a woman from inheritance, is discriminatory on the ground of sex and contrary to the Law of Succession Act. The Judge then proceeded to apply to apply the UDHR, CEDAW, and the Additional Protocol to the African Charter on Human and Peoples' rights notwithstanding the fact that these instruments had not expressly become part of the domestic law of Kenya. She stated that international law is applicable in Kenya as part of our law so long as it is not in conflict with the existing law even without specific legislation adopting them. It should be noted that most of the judges who subscribe to this approach have received gender training under

56 Civil Case No. 2039 of 1998
57 [1992] KAR 292 (Court of Appeal).
58 See generally Musyoka, supra note 34.

the Jurisprudence of Equality Program (JEP) which was spearheaded by the Kenya Women Judges Association in the early 2000s.

The Constitution of 2010 in Article 2 (5) and (6) expressly provides that the general rules of international law as well as all treaties or conventions ratified by Kenya shall form part of the law of Kenya. Thus, international instruments are now applicable even where they have not been domesticated by legislation.

. *ii Marriage*

By virtue of section 3 (2) of the Judicature Act, customary law was recognised as a system of marriage in Kenya, which is as valid as any of the other systems of marriage. Customary law was expected to regulate all aspects of the marriage, such as capacity to marry, age of marriage, requisites of marriage, rights and duties in marriage, etc. Some of these aspects have been modified by the Marriage Act, No. 4 of 2014, in conformity with constitutional principles.

In *Hortensiah Wanjiku Yawe v. Public Trustee*[59] it was held that the common law presumption of marriage (i.e. marriage by long cohabitation and repute) could apply irrespective of the form of marriage. Hence the presumption could apply even in a customary marriage which is potentially polygamous. The presumption was in this case applied where the parties had failed to establish evidence proving that they had been married under customary law. The effect of the decision was that the woman applicant was able to claim part of the deceased's estate in her capacity as the deceased's wife under customary law. The decision in this case was followed in a number of subsequent cases, such as *Esther Wanjiku Njau v. Mary Wahito,*[60] and is now firmly established as a principle.

The Marriage Act, 2014 expressly provides for customary marriage as one of the types of marriage in Kenya, the other types being Christian, Civil, Hindu and Islamic marriages. In recognition of the potentially polygamous nature of customary and Islamic marriages, the Act defines marriage as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act. The Act further provides 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. All marriages registered under the Act have the same legal status with the exception of Islamic marriages where parties shall only have the rights granted under Islamic law. The minimum age of marriage is prescribed as eighteen years of age. All marriages, including customary ones, are

59 Civil Appeal No. 13 of 1976 (unreported].
60 [2006] eKLR.

required to be registered. The above provisions reflect the constitutional principles of equality and non-discrimination and are favourable for women.

. *iii) Matrimonial Property*

In *Karanja v. Karanja*[61] it was held that the English Married Women's Property Act, 1882 (MWPA) was applicable to customary marriages. This ruling was advantageous to women as it meant that women married under customary law could apply to court for apportionment and distribution of matrimonial property. This was contrary to the argument by the respondent husband in that case that customary law did not give rise to the imputation of a trust in favour of the wife in respect of property jointly acquired property between the husband and wife.

The MWPA ceased to apply to Kenya upon enactment of the Matrimonial Property Act, No. 49 of 2013. This Act provides for the equal status of spouses, with a married woman having the same rights as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable, to enter into a contract, and to sue and be sued in her own name. The Act incorporates consideration of customary law principles during the division of matrimonial property between and among spouses. Section 11 provides that the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including: the customary law relating to divorce or dissolution of marriage, the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution, and the principles relating to access and utilization of ancestral land and the cultural home by wives or former wives. These provisions have emancipatory potential for women as they guarantee equal status and capacities for women and may be used to enforce benefits accruing to women under customary law, including user rights to land.

. *iv) Land tenure*

The Registered Land Act[62] was passed in 1963 to govern land that had been converted to individual land tenure from communal tenure. Registration under this Act conferred absolute proprietorship of the land which extinguished all non-registrable interests, including interests under customary law such as rights of occupation, cultivation and use.[63] This was disadvantageous to certain categories of people, such as women, children and younger males as title to land was not normally registered in their names. However, in *Gathiba v. Gathiba*[64] and other subsequent cases the concept of customary trust was recognised as a matter of judicial notice. A

61 [1975] K.L.R. 307.
62 Cap. 300.
63 See for instance *Esiroyo v. Esiroyo* [1973] E.A. 388;
64 [1991] K.L.R. (Env. & Land).

customary trust was imputed in order to protect customary interests of occupation, cultivation and use, notwithstanding the express provisions of the Registered Land Act. This recognition of customary law interests operated to the advantage of women and other categories of people who would otherwise be disenfranchised from the land.

The Land Registration Act, 2012, which repealed the Registered Land Act, expressly recognises customary trusts as overriding interests without their being noted on the register. Spousal interests in land also operate as overriding interests. The Act also provides for customary certificates of land ownership which did not hitherto exist. Where a spouse obtains land for the co-ownership and use of the spouse(s), there is a rebuttable presumption that the spouses hold the land as joint tenants. These provisions are favourable to women who in the past were disenfranchised from matrimonial property due to non-recognition of their interests owing to non-registration.

VII CHALLENGES OF PROTECTING THE EQUALITY RIGHTS OF WOMEN IN RELATION TO CUSTOMARY LAW IN KENYA.

There are a number of areas where customary law poses a challenge to the protection of equality rights of women. These relate mostly to personal law areas of marriage, divorce and inheritance (succession) as well as in property relations.

A CONFLICT OF MARRIAGE LAW SYSTEMS

Due to the pluralistic nature of Kenya's personal law regime, marriage and divorce are regulated under five different systems, namely customary,[65] Christian, Civil, [66] Islamic[67] and Hindu. [68] Prior to the enactment of the Marriage Act, 2014, each of these systems was governed by separate legislation. The 2014 Act repealed all that legislation and placed all the systems of marriage under its purview. However, the rules relating to each of the types of marriage remain separate, hence maintaining the plurality of systems of marriage. In addition, Kenyan law also recognises cohabitation relationships through the judicial application of the common law

65 Customary marriage is governed by the customary laws of the various ethnic communities in Kenya. Though customary norms of marriage are not uniform among all Kenyan communities, there are some basic similarities. For instance, all customary marriages involve the union of not only the individual parties but of their families. Such marriages are potentially polygamous and usually require payment of bridewealth.

66 Prior to the Marriage Act, 2014, civil marriages were governed by the Marriage Act (Cap 150), while Christian marriages were governed by the African Christian Marriage and Divorce Act (Cap. 151). Both these types of marriage are monogamous in nature. The Matrimonial Causes Act (Cap. 152) regulated divorce and matrimonial causes for persons in these systems of marriage.

67 Islamic marriages were celebrated under the Mohammedan Marriage, Divorce and Succession Act (Cap. 156) which applied the Islamic (sharia) law of marriage, divorce and succession to people of the Islamic faith. Islamic marriages are potentially polygamous up to a maximum of four wives at a time.

68 Marriages between people of the Hindu religion were governed by the Hindu Marriage and Divorce Act (Cap. 157). Such marriages are monogamous. Divorce and related matters were subject to the Matrimonial Causes Act.

presumption of marriage.[69]

The problem of multiplicity of legal regimes arises not from the mere fact of multiplicity but because of the differential rights and duties arising under each legal regime. Each system has its own rules about various aspects of marriage such as age of consent, whether the marriage is monogamous or polygamous, and the rights and obligations of the parties. This means that a person's rights and obligations with respect to marriage and divorce can only be ascertained with reference to the system under which the marriage was established, thereby making it almost impossible to apply a uniform standard. In general, women in customary marriages are disadvantaged in the event of breakdown of marriage or death of spouse. It should also be noted that one aspect of personal law may impact on another aspect; sincemarriage, succession and property relations are inextricably linked.

The multiplicity is compounded by the complex intersection between the systems, owing largely to the fact that people do not generally keep within one system of marriage but constantly traverse the boundaries. For instance, most Kenyan Africans who marry in church (under statute) at the same time go through some customary rites, such as negotiations for exchange of bride wealth. Hence the same parties contract a customary marriage and then follow it by a statutory marriage or vice versa. The question may then arise about which system of law governs the relationship, i.e., whether statutory law or customary law. This results in lack of clarity as to about the system of marriage governing their relationship, and hence what rights and obligations obtaining in the relationship.[70] Conflict also arises where a man marries a woman under customary law and then subsequently enters into a marriage with another woman under statute. Conversely, a man may marry a woman under statute and then go on to marry another woman (or women) under customary law. Both the repealed Marriage Act[71] and African Christian Marriage and Divorce Act covered these two situations and invalidated and criminalised such subsequent unions.[72] However, the penal sanctions were, and continue to be, breached with impunity and are hardly ever prosecuted.

Section 45 (4) of the Constitution of 2010 retains the recognition of multiple marriage and family law systems but only to the extent that such marriages or systems of law are consistent with the Constitution. This would include the Bill of Rights and all the equality and non-discrimination provisions. Section 45 (3) provides that parties to a marriage are entitled to equal rights at the time of, during and at the dissolution of the marriage. This is reflected in the provisions of the Marriage Act, 2014. Although

69 This is by virtue of section 3 (1) of the Judicature Act (Cap. 8) which provides for the application of the common law of England in force as at 12 August 1897.

70 E.g. in *Ayoob v. Ayoob* (Nbi Civil Appeal No. 34 of 1967 (unreported); *Mwangi & Others v. West* [1976] K.L.R. 203.

71 Cap. 150.

72 See sections 35 and 37, Marriage Act (Cap. 150). See also section 5, African Christian Marriage and Divorce Act (Cap. 151).

the Constitution and the Act does not explicitly address the question of how to resolve conflicts between different marriage systems, it at least points to itself as the standard. Any conflict would thus have to be resolved in light to constitutional principles, including equality and non-discrimination.

B AGE OF MARRIAGE

Early marriage is sanctioned by customary law which does not prescribe a minimum age of marriage of girls, provided they have reached puberty. It is common for girls, some as young as 12 years of age, to be married off, usually to much older men. This practice has a negative impact on young girls, as it adversely affects their health, education and general socio-economic position.

In the past, there was no uniform statutory age of marriage. However, Constitution of 2010 provides that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. The reference to "adult" means that only persons who have attained 18 years of age have the right to marry, effectively excluding marriage of minors. Such marriage is based on the free consent of the parties; this outlaws marriages where one of the parties is forced to marry, as happens in marriages involving young girls. Similarly, the Marriage Act, 2014 prescribes the minimum age of marriage under all systems of marriage, including customary law, as 18 years. [73]

Section 23 of the new Children Act, No. 29 of 2022 provides children protection from harmful cultural practices, which include child marriage, female genital mutilation; virginity testing; and girl child beading; or any other cultural or religious rite, custom or practice that is likely to negatively affect the child's life, health, social wellbeing and dignity. Section 2 defines "child marriage" as marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation. Under the same section "child" means an individual who has not attained the age of eighteen years. This effectively prohibits the marriage of persons under the age of 18 even where such a person is contracting a marriage under custom. This is bolstered by the Marriage Act which sets eighteen years as the minimum age for all marriages, including customary marriage. Thus, where there is a conflict between any customary norms or practices which permit child marriage and statutory law the statutory provisions would prevail. This is in line with section 3 (2) of the Judicature Act which provides that customary law is not applicable where it is inconsistent with written law.

73 The repealed Marriage Act and African Christian Marriage and Divorce Act generally stipulated the age of marriage to be 18 years for marriages conducted under those statutes. However, that both statutes nevertheless contemplated marriages of persons below 18 provided there was written consent form a parent or guardian, or in the alternative from a minister of religion, judge or registrar.

C MAINTENANCE

Under the repealed Subordinate Courts (Separation and Maintenance) Act[74] a woman was entitled to maintenance for herself and her children upon separation from her husband. However, the Act expressly stated that its provisions would apply only to persons who had contracted monogamous relationships under the prevailing marriage statutes.[75] Customary marriages were therefore outside the scope of the Act, which effectively barred women in customary marriages from applying for maintenance thus amounting to discrimination against such women. This would appear to be in line with customary norms generally, under which a woman is not entitled to maintenance from her husband upon separation or divorce, as she is expected to return to her natal family and obtain maintenance from there. Similarly, custody of children is under customary law expected to be exercised by the father; hence a women with actual custody of her children does not under customary law receive maintenance from the children's father.

By contrast, pursuant to 2010 Constitution, the Marriage Act, 2014 provides a right for either spouse to apply for maintenance from the other spouse irrespective of the type of marriage they had contracted. Thus, a spouse in a customary marriage may now claim maintenance from the other spouse in case of a marriage breakdown. The Act uses gender neutral language, which abrogates the traditional gender roles which assumed that a wife was entitled to maintenance from her husband. As was stated in *MEK vs GLM [2018 eKLR)* it is clear from article 45(3) of the Constitution and section 77(1) of the Marriage Act, 2014 that the obligation of spouses with regards to maintenance was equal and reciprocal. The primary and relevant consideration when either spouse sought maintenance from the other spouse was the financial affairs of the spouses.

D COHABITATION

Cohabitation refers to the practice where a man and a woman live together in a conjugal union without formalising the union under any of the four systems of marriage. Due to socio-economic changes, there is a growing informality in marital relationships and a rise in the number of cohabitation relationships. Often, parties engage in long periods of cohabitation and procreation before they have a wedding, if ever, and bride wealth is normally paid over a period of time. This is in keeping with the processual nature of African customary marriage, where marriage is not usually viewed as a single event but as consisting of different phases. Cohabitation is often the start of a process that may eventually culminate in a marriage proper, whether customary or statutory.

74 Cap. 153.
75 See section 15, Cap. 153.

Variously described as "living together", "come we stay", or "trial marriage", cohabitation relationships traverse and defy conventional categorizations of family law systems. Kenyan statute law is silent on the issue of cohabitation. However, Kenyan courts have the power to make a legal "presumption of marriage" whereby the relationship is treated for all intents and purposes as a marriage, with all the attendant legal consequences.[76] In *Yawe v. Public Trustee*,[77] the court held that the presumption of marriage may be applied to customary marriages.

In Kenya, there is an intricate connection between cohabitation, customary marriage and presumption of marriage. As customary marriages have hitherto not been registrable, it has usually usually a question of fact, proved by oral evidence, whether parties who are cohabiting are married under custom or not. The question of how a relationship is defined is important as it has distributive consequences. For instance, the issue of whether a woman is entitled to maintenance and custody of children will depend on whether or not she is deemed to be married. Hence the presumption of marriage is usually invoked in cases where one party asserts the existence of a customary marriage, while the other party denies it. Usually, the party denying the existence of a customary marriage argues that the requisite formalities or rituals were not performed, and that therefore the relationship has no legal status.[78]

In the past the courts' approach was to insist that all the requisite formalities for customary marriage must have been fulfilled before making a declaration of marriage. Courts often relied on Cotran's *Restatements of Marriage and Divorce*. A good example is *Case v. Ruguru*[79] where it was held that no marriage subsisted between the two people as *ngurario*, a ceremony involving the slaughtering of a ram under the applicable customary law, had not been performed in accordance with custom. The courts' stringent approach has been detrimental to women in cohabitation relationships as it has meant that such women could not avail themselves of the benefits of marriage, such as the right to inheritance of their husbands' estates, a share in the matrimonial property or maintenance from their husbands.

However, from 1976 in *Yawe v. Public Trustee*[80] the courts have been more willing to apply the presumption of marriage to cohabitation relationships even where the requirements for customary marriage have not been met. For instance, in *Adongo v. Adongo*[81], the court applied the presumption of marriage in order to hold that

76 The common law presumption of marriage has been applied by virtue of section 3 (1) of the Judicature Act which provides for the common law of England as a source of law in Kenya. See *Yawe v. Public Trustee* (Civil Appeal No. 13 of 1976).

77 Civil Appeal No. 13 of 1976 (unreported).

78 See for instance *Zepporah Wairimu v. Paul Muchemi* (Civil Case No. 1280 of 1970) [unreported]; reprinted in Eugene Cotran, *Casebook on Kenya Customary Law* (Nairobi: Professional Books Limited, 1987) 52 [*Casebook*].

79 [1970] E.A. 55.

80 Civil Appeal No. 13 of 1976 (unreported).

81 [2006] e KLR.

a woman in a cohabitation relationship was married to the deceased and as such was a wife for purposes of the Act, thereby enabling the woman to have a share of the deceased's estate. However, while the courts' change in attitude is laudable, the absence of clear legal provisions regarding the application of the presumption means that women still have to rely on judicial discretion, which is changeable and hence unreliable. There was a proposal in the Marriage Bill, 2007 that presumption of marriage would be applied after a period of two years. This would minimise the uncertainty as to whether a person is married or not. However, the Marriage Act, 2014 does not have any provisions on this and courts continue to apply the presumption as seen in *B C v J M G* [2018] eKLR.

The Marriage Act, 2014 now provides for registration for registration of customary marriages. This is governed by the Marriage (Customary Marriage) Rules, 2017, under which Gazette Notice Number 5345 was issued requiring that all customary marriages be registered as from the 1st of August 2017. For new marriages, parties who have completed the necessary rituals under the relevant customary law should apply to the Registrar of Marriages within six months of their marriage for a certificate of marriage. For existing customary marriages conducted before 1st August 2017 parties are issued with a marriage certificate upon payment of the prescribed fee and ascertainment that requisite conditions have been met. The introduction of registration of customary marriages is a welcome development but whose effectiveness depends on the level of compliance with the new rules.

E DIVORCE

Under customary law in most African communities, marriage was viewed as the union, not just of two individuals, but of two families and clans. The preservation of marriage was therefore of supreme importance, and divorce was discouraged and made difficult. Divorce was also not desirable as it meant that the wife's family had to return bridewealth to the husband's family. In customary law relating to divorce, women are disadvantaged relative to men. First, while there is a whole array of grounds upon which a man may divorce his wife, such as infidelity, insubordination, childlessness, or misbehaviour, a woman can only cite cruelty and failure to maintain as grounds for divorce. Upon divorce, the woman is not entitled to custody of the children, who remain with the father's family. The woman is also not entitled to maintenance from her husband, as it is expected that she will return to her natal family, who are supposed to provide her with maintenance.

However, such assumptions are untenable in light of modern-day realities as there is usually no land or resources available for the woman when she returns to her natal family. Divorced women are usually often left to fend for themselves. As separation and divorce usually occur in the context of domestic violence, where the woman and the children are often thrown out by an abusive husband, the woman usually has no choice but to take care of the children singlehandedly. While the

Marriage Act, 2014 provides for maintenance of spouses in all types of marriage, including customary marriages, women's ability to apply to court for maintenance is contingent on various factors, including their awareness of the legal provisions and financial capacity to access the courts.

F MATRIMONIAL PROPERTY

Until 2013, the Kenyan Parliament had not enacted legislation to deal with the division or allocation of property between spouses at the dissolution of marriage. Due to this lacuna, the Kenyan judiciary had resorted to the use of an old English statute, the Married Women's Property Act, 1882 (MWPA) which recognised a married woman's capacity to hold property in her own right and transact in it.[82] Section 17 of the MWPA provides that "in any question between husband and wife as to the title or possession of property, either of them may apply to the High court or a county court and the judge may make such order with respect to property in dispute … as he thinks fit". Kenyan Courts have innovatively interpreted this section of the MWPA to develop rich jurisprudence in the division of matrimonial property between husband and wife.

The case of *I v. I*[83] was the first to establish that the MWPA was applicable to marriages solemnised in Kenya. The respondent had sought a declaration under S 17 of the MWPA claiming a half share in the proceeds of the sale of a house that the parties held in joint registration. The applicant husband objected to the application of the Act in determining the parties' respective interests in the proceeds. He relied on the proviso in section 3 (1) in the Judicature Act (reception clause) which states that English law shall apply only in so far as the circumstances in Kenya permitted. The court observed that the circumstances of Kenya and its inhabitants do not generally require that a woman should not be able to own property.

In *Karanja v. Karanja*[84] the High Court confirmed that the MWPA was a statute of general application which could apply to a marriage solemnised under customary law. The court was therefore prepared to impute a trust in favour of the wife in respect of matrimonial property whose acquisition which she had contributed to indirectly through payments for household and other goods.

However, the continued use of the MWPA, was unsatisfactory for various reasons. Quite apart from its antiquity, the Act is inadequate as it contains no substantive provisions relating to matrimonial property. For instance, there is no definition of matrimonial property, neither are there any clear guidelines about the rules or principles to be used in apportioning matrimonial property. Matters were therefore

82 This changed the common law position where a married woman's legal identity was subsumed into her husband, and hence she had no capacity to hold property in her own right.

83 [1971] E.A. 278.

84 [1976] K.L.R. 307.

left entirely to the judge's discretion. The question of the wife's contribution, direct or indirect, monetary or non-monetary, has usually been in issue.

In Kenya, the courts' interpretation of these issues has been inconsistent. For instance, in *Karanja v. Karanja*, the wife's indirect contribution through purchase of household items with her salary was taken as giving rise to an imputation of a trust in her favour. As already mentioned, this case is also important as it applied the MWPA to a customary marriage. In *Kivuitu v. Kivuitu* [85] (decided in 1991) the court went even further to hold that a woman's indirect contribution, both monetary and non-monetary (through wifely duties) were sufficient to entitle her to a share of family property. The encouraging trend was continued in *Nderitu v. Nderitu*[86]where the Court awarded 50% share of the matrimonial property to the wife.

However, the gains made in these cases were reversed in *Kimani Vs. Kimani Njoroge*[87] which held that there must be strict proof of monetary contribution and that no presumption of a trust should be made. The reversal of gains continued in *Echarya v. Echarya* (2007) where the court disregarded unpaid contribution to a marital household, such as childbirth, childcare, cleaning, and agricultural labour, in dividing matrimonial property at divorce. The court's insistence on proof of monetary contribution is onerous for women, particularly those in rural areas who are not in salaried employment but whose work in tilling land and rearing livestock, although difficult to quantify in monetary terms, is nevertheless significant.

A further problem for women in customary marriages is that in order to bring themselves within the ambit of the MWPA, they had to prove that they are married. In the absence of a marriage certificate, as their marriages were not registered, this was a difficult task and unduly put them at a disadvantage in comparison with women married under statutory law. There was also the cultural assumption in customary law that women cannot own property, particularly land.

The Matrimonial Property Act was finally passed in 2013. It provides for the equal rights of a married woman to acquire, administer, hold, control, use and dispose of property whether movable or immovable, to enter into a contract, and to sue and be sued in her own name. Matrimonial property is defined to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes, or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

Ownership of matrimonial property vests in the spouses according to their contribution towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. Contribution is defined to mean

85 [1985] L.L.R. 1411 (Court of Appeal).
86 [1997] L.L.R. 606 (Court of Appeal).
87 1997] L.L.R. 553 (Court of Appeal). The Appeal Court remitted the case for fresh hearing by the High Court as the trial judge had exhibited manifest bias against women.

both monetary and non-monetary contribution which includes domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work. *AWM v JGK* [2021] eKLR confirmed that non-monetary contribution by a spouse includes companionship. The recognition of non-monetary contribution is beneficial for women as they are often unable to prove monetary contribution to the acquisition of matrimonial property, particularly where they work in the home or farm without a salary. Section 8 protects the first wife and subsequent wives' respective shares of matrimonial property in polygamous marriages.

It should be noted that there is no automatic assumption that spouses own equal shares in matrimonial property. The courts have held that division is to be on a case-by-case basis, and that each case must be determined based on its own peculiar circumstances, as was reiterated by the Court of Appeal in *TKM v SMW* [2020] e KLR. While the Act is useful in clearly defining married women's rights in matrimonial property, the determination of spouses' share in matrimonial property is still dependent on the courts' discretion.

G SUCCESSION

Kenya's law of succession is characterised by plurality. Currently, there are three regimes of succession law that apply in Kenya, namely statutory law, customary law, and Islamic law.[88] The main challenges relating to women's rights arise from the conflict of such laws and the divergent applications of customary law in succession matters. It should be noted that the law of succession is intricately connected to the law of marriage and divorce and property law in general. Hence, conflict in these areas are likely to affect the application of the law of succession.

In colonial times, there were separate regimes of succession depending on the race and religion of the individual concerned. Generally speaking, Africans were subject to customary law (even where they had converted to Christianity and married under statute), Europeans were subject to statutory law, while Muslims and Hindus were governed by their respective religious laws. Under customary law in Kenya, succession of property is patrilineal, that is through the male line.[89] The main features of customary law of inheritance include communal holding of land and property, supremacy of males (particularly the eldest son), and general exclusion of women from inheriting, particularly land. Customary law is characterised by patriarchal relations which, when interconnected with capitalism (for instance the

88 Islamic law of succession is applied by virtue of the Mohammed Marriage, Divorce and Inheritance Act (Cap. 156). Under this Act, the Kadhis' courts have jurisdiction to deal with any disputes between Muslims relating matters of inheritance, among other personal law matters. Islamic law of succession is beyond the scope of this paper.

89 Most of the ethnic communities of Kenya are patrilineal, with a few exceptions such as the Digo and Duruma. However, even these have shifted towards patrilineage as a result of contact with Islam.

individualization of title to land), has resulted in the general exclusion of women from inheritance, particularly land.

Traditionally men owned land and livestock while women could only own movable assets, such as cooking utensils and farming implements. The general rule is that a man's property is distributed equally among his sons. Daughters do not inherit any property from their father, as it is expected that they will get married and enjoy the property of their husband. Unmarried daughters may obtain cultivation rights over a portion of land, but on their marriage or death, such land would be taken over by their brothers. Where a man has only daughters and no sons, his property is divided up amongst his brothers. Widows have a right to be maintained and to use part of the deceased's land for their own needs during their lifetime, but they do not have absolute rights to the property and such rights cease upon their remarriage. There is also the idea that women are themselves property to be owned, rather than legal subjects who can own property in their own right.[90] In many Kenyan communities, there is the practice of levirate marriage where, upon a husband's death, the widow gets married to the deceased's brother. This is done in order to perpetuate the deceased's line and to provide for maintenance of the widow and the deceased's children.

However, there is some indication of changes in customary norms and practices over time to accommodate new realities. There are therefore examples of changes in customary practices that allow women to inherit land, for instance in Murang'a District in central Kenya.[91] Research also shows a growing acceptance that an unmarried woman may in some cases inherit from her father, particularly where a daughter has been taking care of her father in his old age[92].

In 1968, the Commission on the Law of Succession recommended that there should be a uniform law of succession. Pursuant to the Commission's recommendations, a Law of Succession Act[93] was passed in 1978 which came into operation in 1981. This law sought to unify the different systems of succession, and was intended to apply to all people in Kenya irrespective of race or religion. Another goal of the Act was to promote the equal status of women in Kenyan society.

The Act is based on English principles of succession and deals with both testate and intestate succession. It proceeds on the assumption of individual ownership of property, the right of a spouse to succeed to the deceased's estate, and equality of male and female children on succession irrespective of their marital status. Thus, the Act does not make a distinction between the rights of sons and daughters to inherit

90 Patricia Kameri-Mbote, "Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences", IELRC Working Paper 2001 <http://www.ielrc.org/content/w0101.pdf> (last accessed on 30th December 2010).
91 McKenzie, *supra* note 22..
92 Nyamu, Property Relations, *supra* note 21.
93 Cap. 160.

their parents' estates, whether comprising movable or immovable property. This goes counter to the assumption in customary law that women do not generally own or inherit land and that daughters (particularly married ones) do not inherit their father's estate. The Act therefore seeks to be gender-neutral in its application. [94]

Section 2 (1) of the Act categorically states that, except as otherwise expressly provided in the Act, the provisions of the Act shall have universal application to all cases of testate and intestate succession to the estates of persons dying after the commencement of the Act.[95] However, though the Act was intended to provide for a uniform system of succession, in reality this did not happen. In 1991 Muslims were exempted from the application of the Act[96] on the argument that the Act embodied secular principles which were contrary to Islamic teachings contained in the Koran and, further, that succession for Muslims was already adequately regulated under the Koran.[97] Further, certain geographical regions are exempted from the application of the Act in relation to intestate succession of agricultural land and livestock; customary law is the applicable law for those regions.[98] The Act also provides that a person when making a will is at liberty to indicate that his or her estate will be governed by customary or religious law. Thus, the Act reserves the application of customary law in certain situations. The Act also gives recognition to certain aspects of African culture, for instance by making provision for inheritance by members of the extended family with a much-expanded list of consanguinity relationships beyond the nuclear family.[99] Provision is also made for administration of estates of polygamous families which usually arise under customary marriages.

A number of problems have arisen in the operation and interpretation of the Law of Succession Act which have a bearing on customary law. As already mentioned, the Act by section 32 excludes certain gazetted geographical areas from the application of the Act and provides for application of customary law (i.e., the law or custom applicable to the deceased's community or tribe) in those areas. Under the former Constitution, the exemption of customary personal law in section 82 (4) from non-discrimination protections meant that a woman who felt unfairly treated in

94 However, there is differential treatment of widows and widowers in section 35 of the Act. While widows acquire only a life interest in the property of their deceased husbands, widowers acquire an absolute interest, which they can transfer and also pass on through inheritance. In addition, a widow loses her life interest in the property if she remarries. A widower continues to enjoy the inheritance regardless of his marital status.

95 The substantive provisions of the Act do not apply to persons who died before the coming into operation of Act.

96 *Vide* L.N. 21 of 1990.

97 This source of law is based on the teachings of the Quran. Under the Mohammedan Marriage, Divorce and Inheritance Act (Chapter 156), the Kadhi's courts have jurisdiction to deal with any disputes between Muslims relating matters of inheritance, among other personal law matters.

98 *Vide* s. 32. These areas include Wajir, West Pokot, Turkana, Tana River, Kajiado, Garissa, Marsabit, Isiolo, Mandera and Lamu. In general, the people living in these gazetted areas adhere to their traditional way of life to a large extent.

99 The list includes step-brothers and step-sisters, half-brothers and half-sisters, grandparents and step-grandparents, among others.

a succession matter where customary law was applied had no opportunity for constitutional redress the Constitution. Now under the Constitution of 2010 such a woman is able to rely on the recognition of equal rights in marriage (Article 45 (2) and the subordination of customary law to the Constitution (Article 2 (4) in order to apply for redress.

Another problem with the exemption in section 32 of the Law of Succession Act is that the Kenyan courts have interpreted this section in divergent ways. The section specifies that the exemption applies to geographical areas gazetted by the Minister. This means that only areas so gazetted are affected by section 32. However, some courts have taken it for granted that customary law is the applicable law in relation to agricultural law, without first finding out whether the land in question has been gazetted.

A further issue arises due to conflict of marriage laws owing to the interaction of different marriage systems. As previously discussed, people are constantly traversing the boundaries between the various marriage systems. In 1981, the Law of Succession Act was amended to allow a wife married under customary law but whose husband had contracted a previous monogamous marriage (contrary to marriage laws) to be considered a wife for purposes of the Act. This was done by section 3 (5), which provides as follows:

> "Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a subsequent or previous marriage to another woman, nevertheless a wife for the purpose of this Act… and her children are accordingly children within the meaning of this Act."[100]

The above provision is in direct contravention of both the Marriage Act and the African Christian Marriage and Divorce Act, which invalidate any customary marriage contracted subsequent to a statutory marriage. Section 3 (5) amounts to a sanctioning of a situation after the man's death that would have been unlawful during his lifetime. Although the provision may be seen as an attempt to recognise the reality on the ground, where many men marry their first wives under statute and then proceed to marry other women under customary law (or vice versa), it has proved to be unjust to the first wife, who is forced to share her husband's property with women who have come into the relationship subsequently, and whose existence is often not discovered until after the man's death. The subsection also assumes that all the family property belongs to the man for distribution to his wives and fails to give recognition to the contribution that the first wife may have made to the acquisition of the property.

100 This sub-section was inserted by Act No. 10 of 1981.

The courts have taken different approaches to the issue of applicability of customary law, with some judges taking the stance that the Law of Succession Ac is the exclusive law relating to succession matters.[101] Other judges have been of the view that customary law is generally applicable to succession matters, except where such customary law is repugnant to justice and morality.[102]

VIII OPPORTUNITIES FOR ADVANCING WOMEN'S RIGHTS IN RELATION TO CUSTOMARY LAW IN KENYA.

Until now, the discussion has focused on the challenges that customary law poses to the attainment of women's human rights in Kenya. This section now explores opportunities or possibilities that customary law may present for the advancement of women's human rights. One useful way of approaching customary law is to recognise the cultural roots of customary law and the traditional values imbued within it. One of the values emphasised in African traditional societies was the inherent dignity of the individual within the group. Such dignity called for respect in all dealings with the community. In this regard, women were held in special esteem because of their roles as mothers and nurturers of life. In some societies, some women were highly honoured as queen mothers and advisers who wielded great influence and whose opinions were highly regarded. These notions of dignity and respect for women can be drawn upon and applied in the modern context in the quest for gender equality and protection of women's rights. For instance, these values may be used to challenge practices that are oppressive to women.

Similarly, the traditional African philosophy of Ubuntu[103] emphasises the interdependence of everyone in society and the need for mutual respect and consideration. The Ubuntu philosophy offers us an understanding of human beings in relation to the world.[104] According to Ubuntu, there exists a common bond between us all and it is through this bond, through our interaction with our fellow human beings, that we discover our own human qualities. Ubuntu can be applied to women's rights in a positive way to reinforce the idea that women's well-being is for the good of society and that therefore women's interests should be advanced.

It should also be recognised that customary law in some cases gave more entitlements to women than contemporary formal law. For example, under customary law, a woman was entitled to user and occupation rights in the family property. Further, certain food crops growing on land, such as beans and potatoes, belonged to the woman. These traditional entitlements have been adversely affected with the

101 See e.g. *Rono v. Rono* [2005] E.A. 363.
102 See e.g. *Wambugi w/o Gatimu v. Stephen Nyaga Kimani* [1992] K.A.R. 292.
103 Ubuntu is a Zulu term that may be restated as "Umuntu Ngumuntu Ngabantu", which means that a person is a person through other persons.
104 The word 'Ubuntu' and its derivatives originate from the Bantu languages of Africa.

introduction of formal laws providing for individual land tenure as land titles are in the vast majority of cases vested in the man as the head of the household.

An attribute of customary law that presents opportunities for women's rights is the fact that it is dynamic and flexible and thus adaptable to changing circumstances. There is a need to empower women to leverage this dynamism and flexibility to their advantage, and to influence the development of customary law in a way that is more responsive to women. Women can utilise their particular roles or areas of authority to shape customary law. For instance, in some Kenyan communities, ailing men whose daughters have taken care of them have given those daughters a share in their property, despite the prevailing customary norm that daughters are not entitled to inherit their fathers' property.[105] In some parts of the country, widows have been able to use their customary law position as *muramati* (trustees) to make decisions regarding apportionment of their husbands' estates.[106]

IX THE CONSTITUTION AND CUSTOMARY LAW AND WOMEN'S RIGHTS

Before the adoption of Constitution of 2010, the position in Kenya with regard to customary law was inconsistent and there was no commitment to gender equality. The former Constitution contained a Bill of Rights (Chapter V) which provided protection for the fundamental rights of every person in Kenya irrespective of race, tribe, creed or sex, among other grounds. Sex was only added as a ground of discrimination in 1997. There was also a prohibition, contained in section 82 (1), against an law that was discriminatory either of itself or in its effect. However, these protections were watered down by the provisos to section 82 (4), which made the following exceptions as follows: (*inter alia*):

"Sub-section (1) [of section 82] shall not apply to any law in so far as that law makes provision:

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

Thus, sub-sections (4) (b) and (c) expressly excluded the non-discrimination provisions of the Constitution in matters of personal law and also allowed for exclusionary application of customary law even where it was discriminatory.

105 See Nyamu , Property Relations, *supra* note 21.
106 See McKenzie, *supra* note 22.

This provision had important implications for the human rights of women as the listed areas of personal law are the very areas where customary norms and values play a significant role and where women need protection from discriminatory cultural practices. The implication was that sex discrimination in these areas was permissible and that a law that discriminated on that basis would not be deemed unconstitutional. In *Mukindia Kimuru v. Margaret Kanario*[107] the Court of Appeal (the highest court in Kenya) affirmed that section 82 of the Constitution sanctions exclusion of daughters from inheritance of their fathers' estate.

By contrast, the Constitution of 2010 represents major victories for women's human rights. This is seen both in its general orientation and in its specific provisions. To start with, the national values and principles of governance under the Constitution include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Secondly, the Constitution explicitly provides for gender equality and non-discrimination. Under Article 27 (1), every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.[108] Article 27 (3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Under Article 27 (4) and (5), neither the State nor any person is allowed to discriminate, whether directly or indirectly against any person on any ground, including sex, pregnancy, marital status or dress, among others.[109] For the first time, anti-discrimination provisions target not just the State but also non-State persons. This enables women to obtain redress from individuals, groups and corporate bodies in relation to discriminatory action.

The Constitution also recognises the principle of affirmative action. In order to give full effect to the realisation of the rights guaranteed under Article 27, the State is obliged to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.[110] It should be noted that women have been recognised as a category of vulnerable or marginalised groups and an obligation is imposed on all State organs and public officers to address the needs of such vulnerable groups.[111]

107 Nyeri Court of Appeal Civil Appeal No. 19 of 1999 (unreported).
108 Article 27 (2).
109 The other grounds are race, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth.
110 Article 27 (6).
111 Article 21 (3) as read together with Article 260 which defines "marginalised group" to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4). Some of the grounds of discrimination in that clause relevant to women include sex, pregnancy, marital status and dress.

Another important provision is the principle articulated in Article 27 (8) that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. The State is enjoined to take legislative and other measures to implement this principle. This principle is significant for women as it ensures that they are guaranteed at least one-third representation in elective or appointive bodies in the public sector. This would result in enhanced opportunities for participation and decision-making in a manner that ensures that women's interests are articulated and taken into account.

Article 2 (1) of the Constitution declares the supremacy of the Constitution and states that the Constitution is binding on all persons and all State organs at both levels of government. Under Article 2 (4) any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. This provision clearly subordinates customary law to the Constitution and enables any conflicts between customary law and the Constitution to be resolved in favour of the Constitution, including the Bill of Rights and the principles of non-discrimination and equality. This is a welcome departure from the previous position where such conflicts could not easily be resolved through the Constitution. However, the Constitution of 2010 is silent on the question of conflict between customary law and other laws. In such cases, in my view it would seem that Section 3 (2) of the Judicature Act (which subordinates customary law to written law) would continue to apply, with the added safeguard that all such law mustbe interpreted through the prism of constitutional principles of non-discrimination, equality and others.

For the first time there is constitutional recognition of alternative forms of dispute resolution. Article 159 (3) of the 2010 Constitution provides for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Traditional dispute resolution mechanisms usually utilise localised norms drawn from customary law and customary practices. The recognition of these mechanisms is significant as they are usually the most accessible form of dispute resolution for most women, particularly in rural areas. This is because the formal courts are for the most part outside the reach of the majority due to the high financial costs, geographical distance, complex procedures, unfamiliar language, among other hurdles. This recognition provides a basis for formulation and implementation of policy and legislation to regulate the operations of these forums. The Alternative Justice Systems Policy, 2017 and the Small Claims Courts Act, No. 2 of 2022 are important steps towards this.

It should be noted that the use of traditional dispute resolution mechanisms is subject to some important limitations. Article 159 (3) provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the

Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality, or is inconsistent with the Constitution or any written law.[112] These limitations on the use of traditional dispute resolution mechanisms are important for women, as women often face discrimination and marginalisation in these forums. Subjecting the operations of these mechanisms to the Bill of Rights is especially important as it means that these mechanisms cannot be used in a discriminatory manner or in a manner that offends the principles of gender equality and equity.

AJS Policy: 3 Models

Judiciary Social Transformation – embrace of AJS; Multi door approach to justice.

The 2010 Constitution attempts to strike a balance between the protection of individual rights and freedoms and recognition of group rights, including the right to culture. In Article 11 (1) there is a stated recognition of culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation. The State shall promote all forms of national and cultural expression through literature, the arts, and traditional celebrations, among others.[113] Article 44 (1) protects the exercise of language and culture. Hence every person has the right to use the language, and to participate in the cultural life of their choice. Further, a person belonging to a cultural or linguistic community has the right, with other members of that community to enjoy the person's culture and use their language, to form, join and maintain cultural and linguistic associations and other organs of civil society.[114] However, no person shall compel another person to perform, observe or undergo any cultural practice or rite.[115] This is an important limitation for women as it means that women can now more easily challenge practices that are forced upon them in the name of culture, such as widow inheritance, widow cleansing and female genital surgeries.

The 2010 Constitution retains the pluralistic base of family law by providing for enactment by Parliament of legislation that recognises marriages concluded under any tradition, or system of religious, personal or family law, as well as any system of personal and family law under any tradition, or adhered to by persons professing a particular religion. This is a recognition of the validity of customary and religious systems of customary law. However, such recognition is only to the extent that any such marriages or systems of law are consistent with the Constitution.[116]

112 Article 159 (3) replicates the wording in Article 3 (2) of the Judicature Act relating to limitations in the application of customary law.
113 Article 11 (2) (a).
114 Article 44 (2).
115 Article 44 (3).
116 Article 45 (4).

The above constitutional provisions have provided an ample foundation for reform of law and policy on women's rights in relation to customary law. This has been demonstrated in the areas of marriage and divorce, succession and property rights as highlighted in this paper.

IX CHALLENGES OF CULTURAL RELATIVISM AND LEGAL PLURALISM RELATING TO WOMEN'S RIGHTS

One of the key challenges facing efforts to realise women's human rights is cultural relativism. While human rights, including women's rights, are usually justified on the basis that they are universal, inherent and predate all legal systems, there is the counter-argument by cultural relativists to the effect that ethical and social standards reflect the cultural context from which they are derived and that each group should look to their own culture to devise and implement their own notion of rights. Cultural relativists claim that notions of universality are an attempt by Western societies to impose their own cultural standards and values on non-Western societies. Hence, cultural relativists have justified some cultural practices that are generally considered harmful to women and girls, such as FGM, child marriages and widow cleansing, through an appeal to cultural sentiments.

In Kenya cultural relativist ideas have been demonstrated during Parliamentary debates on the Marriage Bill where members of Parliament have on various occasions rejected the Bill on the claims that the legislation is un-African and an imposition of western values etc.[117] Similarly, during debates prior to the passing of the Sexual Offences Act, 2006, provisions proposing the criminalisation of marital rape were rejected on the basis that they went against African culture.

Attempts to criminalise practices that offend human rights standards often result in backlash against the very people sought to be protected or merely drives the practice underground. Therefore, although it is important to penalise such practices in order to convey a normative message, there is need to be careful not to take an abolitionist stance without appropriate sensitisation and awareness raising. The challenges posed by cultural relativism mean that efforts at reform of formal law must take into consideration the specific cultural context and should avoid approaches that result in polarization between rights activists and traditionalists. There is a need for consensus building before attempting to change law. This involves recognition by reformers of the value of customary norms in women's lives and the realisation that custom is a source of identity for most people and can be a source of entitlement.[118] However, it should at the same time be remembered that culture is not a fixed entity but is constantly evolving and is subject to negotiation and compromise. Some

117 Phoebe Asiyo, "Gender Issues and the Legislative Process in Kenya" in Mary Adhiambo Mbeo, & Oki Ooko-Ombaka, eds. *Women and Law in Kenya* (Nairobi: Public Law Institute, 1989) 41.

118 Winifred Kamau, "Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom" (2009) 23 International Journal of Law, Policy and the Family 133..

important questions include: who has power to define culture; whose voices are being heard in a culture; who benefits from definitions of culture?

A related challenge for the advancement of women's human rights is that posed by legal pluralism. In a legally plural context, there is co-existence and interaction between multiple legal orders. This means that there are multiple and often overlapping bases for claims. This fosters what Meinzen-Dick and Pradhan call "knowledge uncertainty", meaning that no one in a given situation knows all the applicable legal frameworks and their provisions, thus resulting in partial and fragmented knowledge.[119] Thus a woman in a matrimonial dispute may only be aware of customary law as being of relevance, while the lawyer and the court may instead only be cognisant of statutory law. Parties are also often uncertain of which legal framework is applicable in a given situation. Another form of knowledge uncertainty arising from multiple and overlapping legal frameworks is the inability to know or predict how other people or institutions will act.[120] This is exacerbated by the fact that customary law itself is constantly evolving, thus making it difficult to ascertain its content at any moment, and making such content the subject of contestation and negotiation. Thus, the legal terrain is constantly shifting. A major implication for advocates of women's rights is that one cannot reliably depend on formal law (e.g., statutes) and formal institutions (e.g., courts) to secure women's entitlements and must always take into account the other competing and overlapping legal frameworks.

Despite its challenges, legal pluralism, with its inherent flexibility and dynamism, provides women with some valuable opportunities. Where rules and laws are subject to negotiation and re-interpretation and change, there is room for the law to be adaptive in response to changing circumstances. For example, the fluidity of customary law can allow for accounts of customary law that differ from the dominant version. Legal pluralism also offers the possibility of "forum shopping", in which disputants use different normative repertoires in different contexts or forums depending on which law or interpretation of law they believe is most likely to support their claims.[121] The ambiguity and plurality allows for choice and human agency.

Nyamu advocates an approach which she terms 'critical pragmatism' that focuses on context and consequences, and enables women to utilise and develop the opportunities presented by plural normative orders while challenging oppressive ones. This entails taking advantage of positive aspects of both statutory and customary law, while resisting those aspects which are unfair or repressive to

119 Ruth S. Meinzein-Dick & Rajendra Pradhan, "Legal Pluralism and Dynamic Property Rights", CAPRi Working Paper, No. 22 (2002) at 13.

120 Ibid. at 14.

121 Ibid at 5; Keebit von Benda-Beckman, *The Broken Staircase to Consensus: Village Justice and State Courts in Manangkabau* (Dordrecht, The Netherlands: Foris, 1984).

women.[122] However, it should be realised that women are not always in a position to make effective or strategic choices. The process of negotiating the plural legal terrain is hinged on existing power relations, and women are usually disadvantaged as they often lack the knowledge, resources and bargaining power needed to actualise their rights. There is need for establishing effective platforms for negotiation as well as providing external intervention to level the playing field for women.[123]

A multi-pronged approach is required in efforts to realise women's rights in the context of legal pluralism as no one approach will work on its own. Nhlapo suggests three main strategies that can be used in this struggle, namely conscious law reform, judicial intervention and internal adjustment and.[124] Conscious law reform entails taking steps to deliberately change laws to eliminate discriminatory practices in cultural practices, while being sensitive to the complexities of culture and customary norms.[125] Women's rights groups, civil society NGOs and community based organisations have a crucial role to play in the processes of lobbying for law reform, raising public awareness of issues, and dissemination and public education of the laws once passed.

Judicial intervention involves the formal courts playing a key role in spearheading changes. Judges and magistrates can use a wide range of interpretive tools to do so. For instance, they can appeal to constitutional principles, particularly where a country's constitution has incorporated principles of gender equality, non-discrimination and affirmative action.[126] Reference may also be made to international human rights standards, such as those in CEDAW or the African Women's Rights Protocol. The repugnancy clause may be used to declare customary laws or practices repugnant to justice or morality, while positive values in customary law, such as dignity and respect for women (as daughters and mothers) may be applied. Even in the absence of enabling constitutional or legislative provisions judges can still be creative and innovative. For example, they could choose to rely on empirical evidence of changing customary practices that reflect the living law, rather than on written accounts of customary law which portray a static customary law. In order to enable judicial officers to play this role effectively, there is need for focused training of judicial officers. Some laudable efforts have already been made in Kenya through the Jurisprudence of Equality Programme (JEP) spearheaded by the Kenya Women Judges Association (KWJA), where a number of Kenyan judges and magistrates have received gender training. It should be noted that under the Constitution of 2010, the Judicial Service Commission is mandated to, among others, prepare and implement programmes for the continuing education and

122 Celestine I. Nyamu, "How Should Human Rights & Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?"(2000) 41 Harvard International Law Journal 381 ["Human Rights"].

123 Meinzen-Dick & Pradhan, supra note 121 at 19.

124 "Culture, Custom and Women's Human Rights" <http://hrlibrary.ngo.ru/iwraw/culture_custom_womensHR1999.html >(last accessed on 30th December 2010).

125 *Ibid.*

126 See for example Article 27, Constitution of Kenya 2010.

training of judges and judicial officers. One of the principles to guide the Commission in the performance of its functions is the promotion of gender equality. [127] These provisions provide ample scope for courts to be equipped with knowledge on gender issues, which can potentially be used to make decisions which are more in line with women's human rights. Researchers on gender issues can provide support to courts by undertaking research on living customary law to provide credible empirical evidence of changing customary practices. Once such research is published it may then be deployed as evidence in court, for instance by lawyers and women's rights groups engaging in strategic litigation, including test cases and constitutional challenges of customary practices.

The third strategy, internal adjustment, entails the modification of customs and practices within a particular community.[128] In this regard, existing cultural structures may be used to effect change in customary law in order to modify discriminatory cultural practice. While this may be a slow process, it is more sustainable in the long run as the change will come from the people themselves. The scope for internal adjustment arises from the dynamic and flexible nature of custom. For example, in Kenya some communities have, with the assistance of local NGOs, adopted an alternative rite of passage for women that incorporates all the valuable cultural teachings and practices but excludes the "cut" characteristic in FGM.[129] There is therefore need for critical engagement with customary institutions and practices which act as gatekeepers of tradition, such as councils of elders, on issues that impinge on women's rights, such as child marriages, widow inheritance and widow cleansing. In this regard, creation of public awareness on gender issues is critical, using local teachings and interpretations.

It is also important to engage with traditional justice structures operatingalongside the formal justice system. These forums, though not officially sanctioned, are involved in the resolution of disputes at the local level, particularly in rural areas, and take up the bulk of cases in the country. Due to difficulties that women face in accessing the formal justice system, which include cost, geographical distance, lack of legal representation and technicalities of procedure, these informal justice structures are often the only accessible and relevant justice system for the majority of women. The advantages of these forums are that they are cheap, geographically accessible, flexible, use non-technical language and procedure, and apply familiar local norms. However, they also suffer from some major shortcomings such as biased and negative attitudes towards women, exclusion of women from decision-making positions and processes, use of inhumane punishments and ignorance of human rights principles. It therefore becomes necessary for women to be able to address the content of customary law in that context, for instance by drawing on customary principles that are supportive of women and giving alternative accounts of custom. Addressing the content of customary law would at the same time feed into the interpretation of customary law in the formal judicial system.

127 See Article 172 (1) (d) and Article (2) (b) of the Constitution.
128 Supra, note 126.
129 See postings at http://fgmnetwork.org/gonews <last accessed on January 13, 2011.

There is also a need to democratise informal justice systems by increasing women's representation in these forums. Dispute resolution agents also need gender sensitisation and education on human rights principles. In the Turkana region in Kenya, some inroads have been made by women who, after receiving paralegal training from a local NGO,[130] have gained credibility in their communities and succeeded in sitting on local councils convened by administrative chiefs. The input of these women is sought during resolution of disputes involving other women, which has resulted in some gains for women's rights.

X CONCLUSION

In a context of legal pluralism, customary law continues to be a significant aspect of legal and social regulation in Kenya. The interaction of customary law with state law often engenders conflict and competition, which has important implications for the realization of women's human rights. Due to the importance of customary law in the lives of women, efforts to realise women's rights in Kenya cannot be effective unless such efforts take into account customary law and its related institutions. There is need to find ways of resolving conflicts between customary law and statutory law. This requires a multi-pronged approach as no one approach will work on its own. Despite the numerous challenges that legal pluralism poses, it at the same time offers opportunities for women's agency, such as forum shopping, that can be utilised towards realization of women's rights. In this regard, the dynamic and flexible nature of customary law allows room for the development of a customary law that is sensitive to the needs and entitlements of women. The content of such customary law needs to be shaped by the perspectives and interventions of women, drawing from positive African cultural values and informed by socio-economic changes in the modern Kenyan context. Kenya is fortunate to have a progressive Constitution which unequivocally espouses the principles of gender equality, non-discrimination and affirmative action. These principles have acted as a springboard from which legal reforms affecting women have been spearheaded. The judiciary has a special role in the interpretation of laws (customary and statutory) through the prism of gender equity principles. Other State and non-State actors, including women, can play a key role in shaping perceptions of gender relations and ensuring women's equitable representation in decision-making, dispute resolution and norm-formulating forums.

130 The NGO is called the Turkana Women Conference Centre. See http://www.awid.org/eng/Issues-and-Analysis/Library/When-culture-overrides-the-law-Does-rights-talk-always-get-results2 (last accessed on 30th December 2010).

THE WIFE OF LAW: EQUALITY AND ITS DISCONTENTS

Roseline K. Njogu*, Patricia Kameri-Mbote** and Nkatha Kabira***

ABSTRACT

While the laws of Kenya claim to create an equality framework, equality in marriage remains elusive. The Constitution of Kenya declares that parties to a marriage shall have equal rights at the beginning, during the term and at the termination of a marriage.[1] This article makes two arguments. Firstly, it argues that despite these legal declarations and years of extensive law reform, wifehood remains subjugated to husbandhood because the law reproduces and entrenches patriarchal order by casting the legal subject in terms that render wives marginal and invisible in the eyes of the law, and because formal law is insufficient to dismantle the hegemonies of patriarchy especially in post-colonial settings where marriage is governed by a competing plurality of norms. Over 100 statutes mention wives - and whenever wives are found in the law, they are cast in terms that are in tension with each other; agency and dependency. The wife of law is also always cast in juxtaposition to the man of law- to assuage his vulnerabilities; in care, in incapacitation or in death. Secondly, it argues that this subjugation produces three forms of inequality: explicit inequality (inequality on the face of the law), tacit inequality (inequality by application of seemingly equal laws), and structural inequality (inequality due to systemic bias in spite of or outside the law). Using a doctrinal analysis of the law, and taking examples from family, citizenship, burial, succession, tax and business laws, this article reveals that the law fails to deliver on its promise of equality throughout the lifecycle of a marriage.

I INTRODUCTION

Who is the Wife of Law? What is the place of the Wife in Law? This paper critically interrogates the place of the wife in law and the extent to which constitutional provisions on equality in marriage are upheld throughout the law and the lived realities of wives. While the laws of Kenya claim to create an equality framework, equality in marriage remains elusive. The Constitution of Kenya declares that parties to a marriage shall have equal rights at the beginning, during the term and at the termination of a marriage.[2] Over 100 statutes mention wives - and whenever wives are found in the law, they are cast in terms that are in tension with each other; agency and dependency. The wife of law is also always cast in juxtaposition to the man of law- to assuage his vulnerabilities; in care, in incapacitation or in death. The paper relies on the Naffine Ngaire's Man of Law[3]("Man of Law") to demonstrate

* PhD Candidate, Univeristy of Nairobi, Faculty of Law.
** Professor of Law, Univeristy of Nairobi, Faculty of Law.
*** Senior Lecturer, Univeristy of Nairobi, Faculty of Law.

1 See Article 45(3) of the Constitution and its reproduction in Section 3(2) of the Marriage Act of 2014

2 See Article 45(3) of the Constitution and its reproduction in Section 3(2) of the Marriage Act of 2014

3 Naffine Ngaire, 'The Man of Law', in Law and the Sexes: Explorations in Feminist Jurisprudence, Sydney; London: Allen & Unwin (1990) pp100-123 at 100

that wifehood remains subjugated to husbandhood because the law reproduces and entrenches patriarchal order by casting the legal subject in terms that render wives marginal and invisible in the eyes of the law. It also uses Patricia Kameri-Mbote's Fallacies of Equality and Inequality[4] ("Fallacies") to argue that despite these legal declarations and years of extensive law reform, wifehood remains subjugated to husbandhood because formal law is insufficient to dismantle the hegemonies of patriarchy especially in post-colonial settings where marriage is governed by a competing plurality of norms. It further argues that this subjugation produces three forms of inequality: explicit inequality (inequality in the face of the law such as the provision for polygamy but not polygny), tacit inequality (inequality by application of seemingly equal laws such as spousal rape exemptions), and structural inequality (inequality due to systemic bias in spite of or outside the law such as burial rights and rites that privilege male relatives over wives). Using a doctrinal analysis of national, regional and international statutes, conventions, treaties and case law, and taking examples from family, citizenship, burial, succession, tax and business laws, this article reveals that the law's promise fails explicitly, tacitly and structurally. In other words, the wife of law is caught in an inequality paradigm of formal, substantive, and structural inequality. Finally, it suggests that true equality for wives might be found outside of the law. The paper is divided into five parts. Part One explores the nature of the wife of law. Part Two relies on Man of Law and Fallacies to create a framework of analysis for equality, and introduces three forms of inequality namely explicit inequality, tacit inequality and structural inequality. Part Three interrogates the equality paradigm created by the general law of equality. Part Four uses the framework created in Part Two to evaluate the extent to which international, regional and domestic law treats husbands and wives equally throughout the lifecycle of a marriage. Part Five concludes with some reflections.

II THE NATURE OF THE WIFE OF LAW

Wifehood is a contested category. While colloquially understood as the state of having a husband, or a woman being married, wifehood (sometimes called wifedom)[5] in pluralistic postcolonial settings such as Kenya, is layered and complicated by custom, colonialism, religion and law.

In much of classical legal thought[6] (CLT), a wife is a female married partner, usually in an exclusive relationship.[7] In this geometry, wifehood begins at the

4 Fallacies of Equality and Inequality Multiple Exclusions In Law And Legal Discourses, (University of Nairobi 2013)

5 Poulter, Sebastian. "The Definition of Marriage in English Law." The Modern Law Review, vol. 42, no. 4, 1979, pp. 409–29. JSTOR, http://www.jstor.org/stable/1094962. Accessed 5 Oct. 2022.

6 See Kennedy D. "Three Globalizations of Law and Legal Thought: 1850-2000" The New Law and Economic Development: A Critical Appraisal. Eds. D. M. Trubek and A. Santos. Cambridge MA: Cambridge University Press. 2006. 25-27 on ideas of individualism, free will and exclusivity animating classical legal thought, and Sylvia Kang'ara, Beyond Bed and Bread applying these ideas to marriage in colonial Kenya. See also supra at note XX

7 See J E. Halley, What is Family Law?: Genealogy Part I, 23 Yale J.L. & Human. 1 (2011).

point of contracting, and ends at death, annulment of the marriage, or divorce. The relationship is often determined and coloured by one vector – her husband.

In post-colonial contexts such as in Kenya,[8] ideas of wifehood bleed outside of those neat boundaries, and often must be understood relative to other relationships outside of the spousal relationship. Often, wifehood, or elements of wifehood begin at betrothal with rights and obligations arising before the "contracting" phase. In some cases, although strictly outside the statute's provisions, betrothal begins in childhood, when a girl has no capacity to consent to a marriage. In some communities, divorce is non-existent, and a woman once married could never exit wifehood. Wifehood in that case becomes a fixed status such as race or ethnicity.

During the marriage, depending on the form of marriage contracted, a wife might at once be in various relationships critical to defining her wifehood: a co-wife (if a polygamous relationship exists), or a community wife (where communal marriages exist). Further, a woman may be the wife of another woman, not in a same-sex marriage as understood in classical legal thought, but as a wife of a woman considered a ritual male.[9]

In ALT, marriage is coterminous with the life of the wife. The death of a husband does not release a wife from marriage, as in CLT, for example.[10] The death of a husband sometimes means that the marriage remains intact, with the wifehood and widowhood merging in interesting ways. In communities that practice(d) wife inheritance, wifehood would be reconfigured and re-instated by transferring husbandhood to a surrogate husband, usually the deceased man's brother. Even among communities that do not practice wife inheritance, the hegemony expects that the widow remains faithfully married to her deceased husband, and that she continues to discharge the duties of a wife, often comingled with motherhood/daughter-in-law-hood/sister-in-law-hood until her death. Only then would she be free from wifehood.[11]

8 For a thorough treatment of post-coloniality and the construction of wifehood (family law) alongside the construction of the state see Friedrich Engels, *The Origin of the Family, Private Property and the State*

9 Case law is now showing a return of interest in these customary woman-to-woman marriages. See for example *Monica Jesang Katam v Jackson Chepkwony & another* where Justice JB Ojwang' uses Article 11 of the Constitution of Kenya as an umbrella to protect the inheritance rights of a "wife" in a woman-to-woman marriage. In granting the petitioner the grant of letters of administration of the deceased's estate, this case distinguishes itself from *Maria Gisese w/o Angoi v Marcella Nyomenda* by redeeming this custom, using a liberating theory of Constitutional interpretation.

10 In *Hyde v Hyde* for example, one of the main markers of Christian marriages as highlighted by the court is the idea of a voluntary union for life. In this case, "life" means the life if the wife.

11 This idea explains the provisions stipulating the rights of widows to marry or choose not to remarry in Section 15 of the Marriage Act.

In this article wifehood is a web of relationships a woman has stemming from marriage, or a relationship analogous to a marriage. Wifehood is also a state of being. This article understands wifehood as a site of encounter of law, religion and imperialism.[12]

The African wife has been the target of much law reform and 'saving' work.[13] Going as far back as the colonial enterprise, the civilising mission was animated in large part by the 'need' to free the African wife from the vagaries of polygamy.[14] In Decolonising Sex[15] Roseline Njogu observes

"…beyond [systemic polygamy and eternal marriage] that treated women as inputs in the production of bio-power, other practices tangential to marriage and sexual relationships, such as wife-chastisement and compulsory female circumcision, further subjugated women. Since personal status and property systems were inextricably linked to marriage, the subjugation of women, by marriage, was complete. The regulation of the female body and sexual conduct happened against this patriarchal background. The tools of this regulation had over time been fashioned for and by men. The African woman's body needed a saviour. He arrived, in fairy tale fashion, waving the Union Jack. He offered English monogamy as salvation to the body so encumbered…"[16]

She argues that English monogamy was in fact a 'false messiah' and failed to liberate wives or lead them to substantive equality.

Over the next 100 years, various interventions were mounted to bring about the equality of husbands and wives. Reforms used a two prolonged approach: increasing wives' agency on the one hand, and increasing legal protections through the recognition of dependency. The first prong saw legislative changes and judicial actions targeted at incentivising monogamy,[17] recognition of wives

12 This article is part of a broader study titled "Wifehood and Power: The Triple Bind of Law, Religion and Empire", a doctoral thesis being undertaken by the first author under the supervision of the second and third authors at the University of Nairobi.

13 See for example Makau Mutua, Limitations on Religious Rights: Problematizing Religious Freedom in the African Context (5 Buffalo Human Rights Law Review 75 1999), generally, as well as Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights." Harvard International Law Journal 42(1): 201-245 2001

14 See broadly Sylvia Kangara, "Beyond Bed and Bread: Making the African State Through Marriage Law Reform," Hastings Race & Poverty L.J. 9: 353-395 (2012) and Roseline K. Njogu, (2016) "Decolonising Sex: Fifty Shades of Rape," Southern African Journal of Policy and Development: Vol. 3 : No. 1 , Article 6. Available at: https://scholarship.law.cornell.edu/sajpd/vol3/iss1/6 (2016)

15 ibid

16 Ibid at 18

17 In *Cole v Cole* 898 1 NLR 15 for example, early in the colonial state, a widow was able to secure her inheritance against her husband's relatives by pleading English monogamy therefore enjoying protection against patriarchal customary rules of inheritance.

land ownership rights,[18] protection of matrimonial property,[19] and expansion of rights of wives to seek divorce[20] among others. The dependency prong included the recognition of wives' rights to pledge their husbands names for credit,[21] recognition of wives as dependants as of right in succession,[22] recognition of illegal wives in succession,[23]among others.

While the difference in western classical legal thought informing family law[24] and its corollary, African legal thought[25] (ALT) have led to tensions and absurdities in wifehood law reform, perhaps the bulk of the failure to achieve equality can be chalked up to the inherent blindness of formal law, and masculinity legal subject.

III WIFEHOOD, INEQUALITIES AND THE MAN OF LAW

This part connects wifehood's subjugation to husbandhood using Naffine Ngaire's Man of Law. We further argue that the inequalities that arise can be best explicated by Mbote's Fallacies. In Man of Law, the author posits that the law is shot through with contradictions although it professes to be internally coherent and certain. Its institutions, principles and general orientation may all be seen to reflect and reinforce the priorities of those who interpret and administer the law. Because of this, the law still plays an important role in reproducing the existing patriarchal order.[26]

18 See generally P. Kameri-Mbote. The Land Has its Owners! Gender Issues in Land Tenure Under Customary Law, UNDP-International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action (https://s3.amazonaws.com/ landesa_production/resource/2557/Kameri-Mbote_The-Land-Has-its-Owners- Gender-Issues-in-Land-Tenure-Under-Customary-Law_2005

19 The Reception Clause and Section 3 of the Judicature Act applied the Married Women's Property Act of 1882 (MWPA) as a Statute of General Application to the Protectorate and later Colony of Kenya, which found expression in judicial action through vide *Muinde v Muinde* and *I v I*

20 Common law gave jurisdiction based on domicile, while the Divorce Ordinance (1904) based jurisdiction on residence. In *Magean v Magean* for example, a wife seeking divorce on the grounds of desertion was denied, with the court holding quite preposterously, that by leaving the jurisdiction and relocating to Tanganyika, the deserting husband had moved the petitioner's domicile, therefore robbing the court of jurisdiction. This position would eventually be remedied by a 1952 amendment to the Matrimonial Causes Ordinance, enabling a deserted wife to petition for divorce based on her residency in Kenya. Eventually, the Law of Domicile Act (1970) provided that a married woman could acquire her own independent domicile.

21 See for example *Patterson v Nanyuki General Stores* 15 EACR28 upholding the common law right of a wife to pledge her husband's credit, even where the husband and wife were not cohabiting together as in *Ramji Dass Co. v McDonald*

22 See sections 2 and 29 of the Law of Succession Act that recognized wives, including former wives, as dependents as of right for purposes of succession. The Act was amended in 2021 to recognize husbands as dependents as of right to their wives, removing the requirement to prove actual dependence prior to the deceased's death.

23 Section 3(5) of the Law of Succession Act recognizes otherwise 'illegal' wives, including women entering into a bigamous relationship with a man as wives for the purposes of succession. See generally Patricia Kameri-Mbote in The Law of Succession in Kenya: Gender Perspectives in Property Management and Control

24 As described by Sylvia Kang'ara in Beyond Bed and Bread: Making the African State Through Marriage Law Reform," Hastings Race & Poverty L.J. 9: 353-395 (2012) at p4-13 classical legal thought foregrounded individualism, free will and exclusivity in marriage.

25 See for example Ifeanyi A . Menkiti, Person and Community in African Traditional Thought where personhood and indeed marriage is understood in the context of co-production within the community. In this geometry, marriage is often polygamous, includes 'bride price', and communal- with ties to the past and future generations as observed by John S Mbiti in Introduction to African Religion. Heinemann (1991).

26 Man of Law (2001) 2, 3.

The 'Man of Law' is an idea of humanity imbued with certain social and physical characteristics, and moral qualities that are considered ideal by those that interpret and administer the law. This ideal is used as the central justifying character of the Gesellschaft concept of justice.[27] The Man of Law has five distinctive characteristics (a) He is a male who is educated, affluent and over 21 who often acts on his own behalf and on behalf of a family; (b) He functions in the public sphere without reference to the demands of a family; (c) He is entirely self-interested; (d) He is not seen to benefit from the emotional and physical services of a caring wife; and (e)He is fully severed from the life of the heart.[28]

Man of Law makes seven important arguments that are instructive: Firstly, that the law's characterisation of the person often serves to render women (and many men) marginal in the eyes of the law.[29] Secondly, that the man is deemed to be the natural inhabitant of the public sphere; the woman is accorded a more constraining domestic role.[30]Thirdly, that the omission of the experience of women from our Gesellschaft type of justice is neither an innocent oversight nor a conscious male conspiracy against women. Rather it seems to be a function of a positive and genuine commitment on the part of law and its agents to a traditional view of the sexes.[31]Fourthly, that there is a clear relation between law and class and the legal idea of neutrality itself displays a class bias-in favour of the status quo- in that it sanctions wilful blindness to existing inequalities between people.[32]Fifthly, because of uneven distribution in the society, the real effect of the legal ideals of freedom and equality implicit in the commodity form is to preserve the existing rights of people who do own property to quiet possession of that property, and to engage in profitable transactions while conferring a quite meaningless right to negotiate in the market and to freedom from interference with their property on those who have little with which to interfere.[33] Sixthly, the law embodies a middle-class style of masculinity.[34]Seventhly that the Gesellschaft law envisages a person who is largely a fiction but it is vital for the legal scheme of things that he is seen to be typical.[35]

The law imbues in men the characteristics required for 'success' in the public space (or perhaps more accurately it casts "success in the public space") in the language and fashion more likely to be achieved by men. In women, the law sees characteristics society associates with the reproductive-nurture needs of the private space. The law and its infrastructure have subjected women to men – to be the private, quiet and

27 ibid 1, 23.
28 ibid 25.
29 ibid 13.
30 ibid 11.
31 ibid 13.
32 ibid.
33 ibid 16.
34 ibid 18.
35 ibid 25, 26.

unseen enablers of the successful public men. It has resisted attempts to re-order this hierarchy or attempts of women to enter the public space. Wifehood is the site of the acquisition, organisation, and privatisation of that help. This 'help' therefore is, as a matter of course, imbued with inequalities against its recipient of help.

In Fallacies, Mbote argues that despite the international and local laws stipulating that all men are equal, discrepancies always exist, and inequalities inevitably creep in fuelled by power relations, thus the normative provisions of local and international legal instruments are not enough to ensure equality among men and women.[36] She argues that gender-neutral laws have failed to promote gender equality in a real environment that is skewed against women especially in contexts where patriarchal norms have historically excluded women.[37] In such cases, she argues that affirmative action (substantive equality) is justifiable as a means of levelling the playing field[38], given that formal inequality does not address historical injustices and structural distinctions. When equality is achieved, the measures put in place to achieve substantive equality should be stopped to ensure that the perceived advantaged group does not become disadvantaged. Finally, attributes enduring inequalities to the plurality of laws makes the application of the concepts of non-discrimination and equality complex and ambiguous,[39] information asymmetry, intersections of inequalities leading to multiple exclusions,[40] and the unavailability of resources. Importantly, she argues that law can be used as a tool to reinforce inequalities.

A EXPLICIT, TACIT AND STRUCTURAL INEQUALITY

The law indeed creates an equality paradigm within which marriage operates. However, as this article shows, there exist several crevices within which spousal inequality thrives. While decades of law reform efforts have significantly closed the gap of entitlements between husbands and wives, the pre-existing legal structures, bureaucracies, and hegemonies, retain wifehood in a state of subjugation to husbandhood. These crevices produce three kinds of inequality: explicit, tacit, and structural inequality.

Explicit inequality is a form of inequality that is apparent on the face of the law. Here, the law clearly and outrightly makes provision for express differential treatment between husbands and wives, such as providing for the right of husbands to marry more than one wife, but not the right of wives to marry plural husbands.[41] Explicit inequality can also be called express inequality, formal inequality or *de*

36 See Fallacies at p 7. For
37 Ibid at 9
38 Ibid at 10
39 Fallacies at p.4. See also SF Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul,1978)
40 Fallacies at p. 11-12
41 Section 3(1) of the Marriage Act defines marriage as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act

jure inequality. Such provisions of the law have been the target of law reform, but some endure, such as the provision of polygamy, (including the forced polygamy upon the death of a bigamous man)[42], in punishing a pregnant bride while ignoring women impregnated by the groom, among others. Explicit inequality is easily cured by law reform.

Tacit inequality is a form of inequality that occurs when there is differential impact between men and women upon the application of seemingly equal legal provisions. Here, while the letter of the law appears to apply equally to the subjects of law there is a disparate impact between husbands and wives. Gender-neutral provisions tend to produce this inequality as their ostensible equality obscures the disparate effect in their application. Some examples of tacit inequality indicate "gender-neutral" spousal rape exemptions[43] that exclude the application of rape provisions from spouses. The gender neutral of this provision obscures that traditionally, more wives have been victims of rape than husbands. Law reform without impact analysis has been ineffective impact on inequality. Tacit inequality can also be called implicit inequality, substantive inequality, or defector inequality.

Structural inequality is a form of inequality that occurs in spite of the law, outside the law or because of the structure/infrastructure of the law. It is due to systemic bias that disadvantages wives and privileges husbands, in spite of the law, or where the law is absent or in competition with other norms and bargains are made based on alternative patriarchal social norms. It is inequality by exclusion, or extra-legal inequality. Structural inequality is not easily cured by law reform as it requires a dismantling of hegemonies as can sometimes be done through constitutional reviews that entail large scale reordering of society. Alternatively, structural inequalities are best addressed through a power analysis and in conversation with law alongside other hegemonies.

42 See section 3(5) of the Law of Succession Act that provides for a wife in death for the purposes of succession, as previously discussed.

43 The import of section 43(5) of the Sexual Offences Act is to exclude the application of rape provisions from spouses

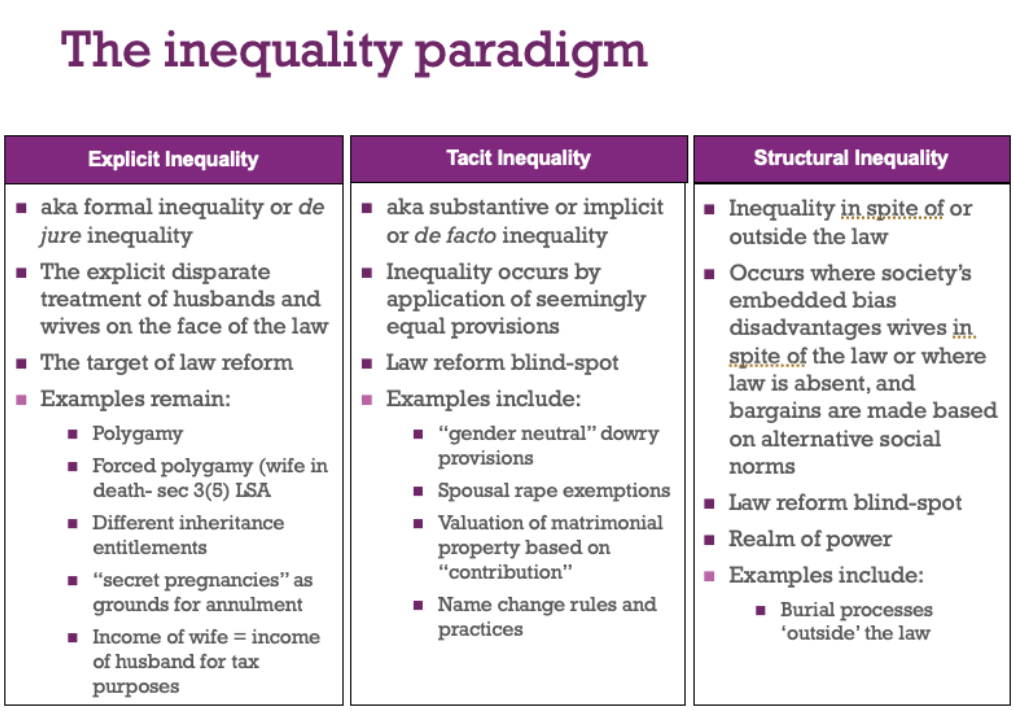

Fig 1.1 The Inequality Paradigm

IV THE GENERAL LAW OF SPOUSAL EQUALITY

A NATIONAL LAW

Decades of law reform efforts have led to an almost evening out of entitlements and obligations between women and men. The promulgation of the Constitution of Kenya 2010 heralded the latest era of law reform efforts by creating a fairly robust equality framework.

The Constitution expands on the Bill of Rights, including guaranteeing extensive protections for economic, social and cultural rights. For family law, the gains are unprecedented. From the preamble to the last schedule and everywhere in between, the Constitution is aggressive about creating an equality framework.

The preamble to provides for governance through equality by recognising the aspirations of Kenyans to be governed on the basis of the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.[44] The National Values of the Constitution, i.e., the governing ethos and principles that bind all State organs, officers and all persons whenever they enact, interpret

44 See Preamble, Constitution of Kenya

or apply any law, or make and implement public policy decisions, including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.[45] Further, in propounding its interpretive framework, Article 20 on the Bill of Rights requires courts, tribunals or other authorities, while interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.[46]

Article 27 on equal protection of the law is especially important in private law jurisprudence. It reads:

> "...(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law… (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status… ethnic or social origin, colour… religion, conscience, belief, culture, dress, language or birth. (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified... (6) To give full effect…of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action…to redress …past discrimination…"

Not only does this article provide for equal benefit and protection under the law, but it also extends its protections to spheres previously outside the scope of law.[47] It then proscribes direct or indirect discrimination by the State or *any person,* thereby extending this equality framework to private and other actors. And finally, this provision reaches into the past by requiring the State to take measures to redress past discrimination.

Article 45(3) provides the very important spousal equality provision. It provides: "…(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage…" Here the Constitution breaks ranks with the repealed Constitution that sanctioned and condoned sex discrimination in adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.[48] Section 3(2) of the Marriage Act reproduces the Constitutional "equality in marriage" provision, almost verbatim. It provides:

> "…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…"

45 See Article 10, Constitution of Kenya on national values
46 Article 20, Constitution of Kenya
47 The effectiveness of this is unclear – see Foucault and the horrors of public executions.
48 See Section 82(4)(b) of the repealed Constitution of Kenya

The Marriage Act extends the Constitution's provision by providing for equality of both rights and obligations.

This equality framework is found elsewhere in marriage law including in the specific clarifications in the Matrimonial Property Act on the rights of married women. Section 4 provides that a married woman "…has the same rights as a married man—(a) to acquire, administer, hold, control, use and dispose of property whether movable or immovable; (b) to enter into a contract; and (c) to sue and be sued in her own name…". Borrowing from its predecessor the Married Women's Property Act of 1882 and breaking with coverture, this provision buttresses wives' right and capacity to own and deal with matrimonial and other property, to contract and handle suits in their own legal capacity.

B REGIONAL LAW

The Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa requires all States Parties to combat all forms of discrimination against women through legislative, institutional and other measures[49]; to modify the social and cultural patterns of conduct of people to eradicate harmful practices based on ideas of gender superiority and inferiority and stereotyped gender roles[50]; provides for various women's human rights[51]; prohibits various harmful practices[52]; and provides for access to justice[53].

On marriage, Article 6 of the Protocol provides that State Parties ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. It requires States Parties to guarantee this equality by enacting laws to ensure that marriage is between adults, based on consent, and registered. While requiring that monogamy be encouraged and preferred by State Parties, the Protocol also maintains that the rights of women in polygamous marital relationships be promoted and protected.

The Protocol also provides for the right of both parties to choose, by mutual agreement, their matrimonial regime.[54] It protects a number of a wife's identity markers: the right to retain her maiden name and use it as she pleases; the right together with her husband to choose her residence; and the right to retain her nationality or to acquire the nationality of her husband[55]. Further, it provides that

49 Article 2(1) of the Protocol requires states to combat discrimination through measures such as ensuring that the principle of equality is captured in national constitutions and laws, inculcating gender perspectives and lenses in government decision making processes, and using corrective and positive action where discrimination still exists.

50 See Article 2(2) of the Protocol.

51 See for example the right to dignity (article 3); and the right to life, integrity and security of the person (article 4).

52 See Article 5 of the Protocol.

53 Article 8 of the Protocol

54 African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, available at: https://www.refworld.org/docid/3f4b139d4.html [accessed 30 June 2022]

55 See Article 6 of the Protocol

a woman and a man shall have equal rights, with respect to the nationality of their children; jointly contribute to safeguarding the interests of the family, protecting and educating their children; and wife shall have the right to acquire her property and to administer and manage it freely.

Article 7 of the Protocol requires States Parties to enact legislation to ensure that husbands and wives enjoy the same rights in case of separation, divorce or marriage annulment.Article 8 declares that women and men are equal before the law and shall have the right to equal protection and benefit of the law.

The African (Banjul) Charter on Human and Peoples' Rights provides that every individual is entitled to the enjoyments of the rights and freedoms recognised in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.[56] It also provides for equality before the law, and equal protection of the law.[57]

The African Youth Charter (AYC) [58] requires State Parties to promote culturally appropriate, age-specific sexuality and responsible parenthood education[59]; and to ensure that girls and young women who become pregnant or married before completing their education shall have the opportunity to continue their education[60]. This provision increases wives/women's agency by incentivising education and economic empowerment, early motherhood or wifehood notwithstanding.

The African Charter on the Rights and Welfare of the Child (CWC) provides for marriage equality for children's welfare. Article 18(2) requires State Parties to ensure the equality of rights and responsibilities of spouses with regard to children during marriage and at dissolution. Article 21(2) proscribes underage marriage and requires States to enact legislation specifying the minimum age of marriage as eighteen (18) years, and requiring registration of marriages.

C INTERNATIONAL LAW

Various conventions unite at the International Law level to create an equality framework. The Universal Declaration of Human Rights provides for the right to legal personhood[61]; and equality before the law, equal protection of the law without discrimination[62]. Article 16(1) provides that spouses are "…entitled to equal rights as to marriage, during marriage and at its dissolution…" Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires States Parties

56 See article 2 of the Charter.
57 Article 3 of the Banjul Charter
58 See Article 8(2) of the African Youth Charter
59 Article 13(4)(n) of the AYC
60 Article 13(4) of the African Youth Charter
61 See Article 6 of the UDHR
62 Article 7 UDHR

to ensure the equal right of men and women to enjoy all economic, social and cultural rights set forth in the Covenant.

Article 23(4) of the International Covenant on Civil and Political Rights (ICCPR) requires States Parties to ensure equality of rights and responsibilities of spouses to marriage, during marriage and at dissolution of the marriage.

The Convention on the Nationality of Married Women protects the wife's nationality from automatically changing upon marriage, dissolution of marriage or change in the nationality of her husband,[63] and provides for the right of a wife to acquire her husband's nationality[64]. The Workers with Family Responsibilities Convention is premised on the idea that "…a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women…" and the "need to create effective equality of opportunity and treatment as between men and women workers with family responsibilities and between such workers and other workers…"[65] and therefore, applies to both men and women with responsibilities for dependent children, whose responsibilities for care-work impact their capacities at public production.

The Preamble to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages provides that spouses are entitled to equal rights to marriage, during the marriage and at its dissolution.[66] The preamble to the CEDAW declares its rationale and the spirit. CEDAW has a plethora of provisions that provide for the restructuring of power dynamics between men and women, on the basis of equality. Tasking State Parties with the responsibility to eliminate all forms of discrimination against women, CEDAW restructures power dynamics between men and women by guaranteeing women's rights, giving social support to women and enhancing social and cultural change.[67]

To the extent that every wife is a woman, and that inequality between men and women in public spaces always leads to inequality in private (marriage) spaces, this study will review all the relevant provisions.[68]

63 See Article 1 and 2 of the Convention
64 See Article 3 of the Convention
65 See Preamble to the Convention
66 UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962, available at: https://www.refworld.org/docid/456d89064.html [accessed 30 June 2022]
67 RHoltmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' 29."plainCitation":"Rikki Holtmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' 29.","noteIndex":20},"citationItems":[{"id":245,"uris":["http://zotero.org/groups/2361683/items/MQIEMM8F"],"uri":["http://zotero.org/groups/2361683/items/MQIEMM8F"],"itemData":{"id":245,"type":"article-journal","language":"en","page":"29","source":"Zotero","title":"The CEDAW: a holistic approach to women's equality and freedom","author":[{"family":"Holtmaat","given":"Rikki"}]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}
68 See for example H Z Lopata, 'The Interweave of Public and Private: Women's Challenge to American Society' (1993) 55 Journal of Marriage and Family < https://www.jstor.org/stable/352967?seq=1 > accessed 10 May 2021; and Ulla Wischermann and Ilze Klavina Mueller, 'Feminist Theories on the Separation of the Private and the Public: Looking Back, Looking Forward' (2004) 20 Women in German Yearbook < https://www.jstor.org/stable/20688978?seq=1 > accessed 10 May 2021

Article 2 requires State Parties to set up the Constitutional, legislative, institutional and policy frameworks and processes to eradicate discrimination, including embodying and ensuring equality between men and women in national constitutions[69], creating legislation that prohibits discrimination against women[70], protecting the rights of women through national tribunals and public institutions[71], refraining and ensuring that public institutions[72], organisations, enterprises or any person[73] refrain from discriminating against women and modifying or abolishing existing laws[74] (including penal provisions[75]), regulations, customs and practices which constitute discrimination against women.

Article 3 requires State Parties to take measures in all fields, especially in political, social, economic and cultural fields, to ensure the full development and advancement of women and to guarantee the exercise and enjoyment of human rights and fundamental freedoms.

Article 4 provides for affirmative action temporarily to ensure that special measures are taken to accelerate substantive equality between men and women[76], and for maternity provisions.[77] Article 5 obligates states to shape culture and societies' views on men and women, by working to modify the social and cultural patterns of conduct for men and women to eliminate prejudices and stereotypes. This provision keeps states from playing the "culture card". This element of Article 5 has been described as "Transformative Equality".[78] It places the burden on states to champion change and do away with gender stereotypes. Article 5 (b) foregrounds the work of reproduction, framing it in the language of social functions. Further, it recalibrates the discourse on childcare and parental responsibility by framing it in the language of the child's best interests and requiring states to recognise the role of both men and women in raising their children. Article 9 is especially important for wives. It provides:

"…States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband…"

69 Article 2(a) CEDAW
70 Article 2(b) CEDAW
71 Article 2(c) CEDAW
72 Article 2(d) CEDAW
73 Article 2(e)CEDAW
74 Article 2(f) CEDAW
75 Article 2(g) CEDAW
76 Article 4(1) CEDAW
77 Article 4(2)
78 Groenman et al ., Het vrouwenverdrag in Nederland anno 1997 ; Holtmaat, Towards Different Law and Public Policy ; Holtmaat and Tobler, 'CEDAW and the European Union's policy'; and Cook and Cusack, Gender Stereotyping

Historically, in many Common Law jurisdictions, a wife's nationality and domicile were, by law, that of her husband.[79] Issuing from coverture and the doctrine of the unity of husband and wife, it followed that if a wife's legal personality was suspended in law, then her nationality collapsed under that of her husband. Supported by the family law doctrine of consortium and the right/obligation of spouses to cohabit, this configuration of nationality and domicile had many terrible repercussions, including the loss of her citizenship by birth, or the inability to bring a suit for divorce before the court, if her husband deserted her.[80]Therefore, a wife was dependent pn her husband for her very citizenship- her social contract required a mediator in the form of a husband.

Article 9(2) seeks to place motherhood and fatherhood on equal footing as far as their children's nationality is concerned by providing that "...States Parties shall grant women equal rights with men with respect to the nationality of their children…"Until this provision, many states provided for automatic/as of right citizenship to children based on the father's citizenship but did not extend the same right or power to mothers.[81] Article 10 takes seriously the role of education in perpetuating or intervening in gender stereotypes by requiring the elimination of any stereotyped concepts of gender roles in all forms of education, including by encouraging coeducation, revising teaching materials, programmes and pedagogies that entrench gender stereotypes[82].

Article 11(2) is especially important for this study. It deals specifically with protections at the workplace for women based on marriage and maternity. It requires State Parties to prohibit dismissal from work on the grounds of pregnancy or of maternity leave or marital status[83]; it requires maternity, leaves with pay or with comparable social benefits without loss of former employment, seniority or social allowances[84]; encourages the setting up of supporting structures to sustain parenthood alongside employment including the set-up of childcare facilities[85], and giving special protection to pregnant women in potentially harmful work[86].

Part IV of the Convention deals with the subjectivity of women and their standing before the law. Since the subjectivity of wives is a central part of this article, it bears reproducing the text of Articles 15 and 16 here.

79 Vogel U, 'Is Citizenship Gender-Specific?', The frontiers of citizenship (Springer 1991)

80 In *Magean v Magean*, for example a wife seeking divorce on the grounds of desertion was denied, with the court holding quite preposterously, that by leaving the jurisdiction and relocating to Tanganyika, the deserting husband had moved the petitioner's domicile, therefore robbing the court of jurisdiction.

81 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: https://www.refworld.org/docid/3ae6b3970.html [accessed 30 June 2022]

82 Article 10(c) CEDAW

83 Article 11(2)(a) CEDAW

84 Article 11(2)(b) CEDAW

85 Article 11(2)(c) CEDAW

86 Article 11(2)(d) CEDAW

> "…States Parties shall accord to women equality with men before the law. (2) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. (3) States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void. (4) States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile…"

Article 15 is especially important in requiring states to shed the vestiges of coverture, and increasing women's agency. It clarifies that women are legal subjects on an equal basis with men and that they can conduct whatever business with such capacity, be treated the same as men in courts where they often have to exercise or defend the challenge to such capacity. It also obviates private arrangements that intend to diminish women's capacity. Dovetailing with Article 9 it provides for women's freedom to choose their residence and domicile, as earlier discussed. It also provides for the freedom of movement at a time when many immigration laws provided that wives had to have their husbands' permission to leave the country.

Article 16 (1) contains specific provisions on equality in marriage. It provides:

> "…States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: a)The same right to enter into marriage; b)The same right freely to choose a spouse and to enter into marriage only with their free and full consent; c)The same rights and responsibilities during marriage and at its dissolution; d)The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children…g)The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; h)The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration…"

Equality at the beginning of the marriage (including the right to enter a marriage and the right to do so based on free and full consent),[87] equality during the tenancy of the marriage including the equal rights to family planning decisions, equal personal rights including the equal right to choose a family name, a profession and occupation. Again, under common law, the wife had the "right" to acquire and use

87 Article 16(1) (a) and (b)

her husband's name[88] based on the idea of coverture and consortium. Over time, it became a de facto requirement or expectation in many cultures for a married woman to change her last name to her husband's name.[89]

Sub-article 2 provides for the nullity of the betrothal and marriage of children, and requires states to prescribe in statute, the minimum age for marriage and to make the registration of marriages in an official registry compulsory. Indeed, years of law reform have created a fairly robust spousal equality framework at the national, regional and international level. However, this article will show that while equality is the general framework, many exceptions exist that create crevices for inequality at every stage of the marriage life-cycle.

V THE INEQUALITY FRAMEWORK

A THE BEGINNING OF A MARRIAGE

While the general law governing husbandhood and wifehood relations is one of equality, in this section, by tracing the law's work throughout the lifecycle of a marriage, this article will show the many exceptions within the law that convert this equality framework into an inequality framework. At the point of contract, that is to say, at the beginning of the marriage, the law provides, by and large, for equal obligations and entitlement of spouses. To the extent that, as one would say in contract law, that this point is the "material time", then the work of the law in structuring this relationship is very important.

The contract that one enters into including the rights, obligations, governing law, exit clauses and dispute resolution mechanisms, is frozen. Put another way, what the law cannot confer at the point of contracting, it cannot later guarantee. Thus, parties should ideally seek the best possible bargain at this point. A wife, for example, who contracts a polygamous or potentially polygamous marriage, cannot later be heard to say that the law ought to grant her monogamy. Similarly, a husband who contracts a traditional marriage cannot later object to his impotence being used as grounds for divorce.[90] In this way, entitlements and bargains are frozen at this point of contracting. While declaring equality of spouses at the beginning of a marriage, various provisions of the law provide for unequal entitlement and rights between husbands and wives.

Section 43(2) of the Marriage Act provides that where the payment of dowry is required as proof of marriage, the payment of a token amount shall be sufficient.

88 DJ Anthony, 'A Spouse by Any Other Name' (2010) 17 Wm. & Mary J. Women & L. 187; ME Spencer, "A Woman's Right to her Name" [1973] UCLA 665

89 O Abalaka , '"Once You Get Out, You Lose Everything": Women and Matrimonial Property Rights in Kenya' (Human Rights Watch 2020) <https://www.hrw.org/report/2020/06/25/once-you-get-out-you-lose-everything/women-and-matrimonial-property-rights-kenya> accessed 30 June 2022

90 The impotence of a husband is grounds for divorce in customary marriages. See Report of the Commission on the Law of Marriage and Divorce

While, this section has the veneer of gender neutrality, in virtually all indigenous communities in Kenya, dowry is paid by a man, or his family, to the bride's family. In recent years, as dowry negotiations have taken an aggressively commercial tangent, and as further complicated by the shift to a cash economy, the procuring of a family's consent to marry a woman by the payment of dowry takes a very ominous light. A purchaser has rights to purchased goods, - many men have argued, before raping or battering their wives.[91] As women do not pay dowry to have the opportunity to marry men, this vestige of dowry in law, well intended as it might have been, continues to structure power dynamics in the language of purchaser/acquisition. It begs the question: what services is the wife being acquired for? Traditionally, dowry compensated the bride's family for the loss of her love and labour as she became a part of her husband's clan and gave her in-laws her lifelong love and labour. While modernity has ruptured some of those geometries, arrangements and rationalisations, vestiges of the skewed power structures and expectations remain. These enduring dowry provisions are a site of tacit inequality.

Section 2 of the Marriage Act defines polygamy as the "state or practice of a man having more than one wife simultaneously." Section 3(1) then defines marriage as a heterosexual voluntary union, either in a monogamous or polygamous union. The Act does not countenance polyandry- it maintains the right of men to marry many wives but does not confer a reciprocal right to women. To this extent, women and men do not have equal rights to contract or at the beginning of a marriage.

This element is exacerbated by the import of section 3(5) of the Law of Succession Act, which posthumously converts an otherwise monogamous marriage, into a polygamous one, upon an adulterous husband's death. Conflicting with other provisions of law, including sections 6(2) and section 9 of the Marriage Act, the section confers the status of wifehood to a woman illegally and bigamously married by the deceased. The threat of this section seems to place an obligation on wives to defend their monogamous marriage and ward off all would-be wives in the event of their husband's death. Husbands know no such obligation. These two polygamy provisions are a site of explicit inequality.

Section 73 (1) (f) of the Marriage Act provides that where a woman is pregnant at the time of the marriage, without the knowledge of her husband, and where the husband is not the father of the child, this "secret pregnancy" consists grounds for the annulment of the marriage. A reciprocal provision constituting the secret impregnation of another woman by the husband, at the time of the marriage, grounds for annulment, does not exist. The law creates an explicit inequality of obligations: women must remain chaste (or at least, they must not conceive with other men) or suffer grave consequences. In contrast, no such obligation exists for men.

91 Timothy Njoya, *Selfhood: Divinity of the Clitoris* (1st edn 2020)

Section 2 of the Marriage Act defines "cohabit" as to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles marriage. Marriage by cohabitation, or common law marriage, which is recognised by the courts[92] is a crutch that developed and is relied upon, almost exclusively by women. In a survey[93] of "cohabitation cases", this study found that only women approached the court to be declared wives in every case reviewed. Seemingly, men do not need husbandhood conferred to them, in the same way wives need wifehood conferred. Men seem to have more power to contract marriages – women seem to require the machinery of the state to augment their capacity to contract.[94] This power asymmetry that imbues in men the agency to become husbands of their own motion, but that absent in women, who must move the courts to bestow wifehood on them, is an exemplification of structural inequality.

The foregoing provisions demonstrate that at the point of contracting, spouses have varied entitlements; and this variation structures the marital power dynamics. The provision for dowry, polygamy, unequal grounds for annulment based on pregnancy, and unorthodox means of contracting marriage *viz* wives in death and wives by court order, reveal inequalities in the spousal relationship.

B DURING THE TERM OF THE MARRIAGE

Spousal entitlements during the term of the marriage issue from the form of marriage already contracted. At this point, the bargains are frozen in place, and the work of the law here is fairly passive. It is a last resort, the far-out threat that is only triggered when the contract is fundamentally breached. Other social norms arising from culture, religion and governance systems are more active in this phase. However, the passivity of the law here is manufactured.

The Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994 captures the spirit behind that passivity very elegantly, *viz.* "… Violations of human rights in the private sphere, including the family - the site of much of women's experience of violations - are usually perceived to be outside the reach of the human rights. The …State …often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimate the

92 Grace Wanjiku Kimani & 2 others v Peter Kimanga Kimani & another [2017] eKLR; NWK v JKW [2018] eKLR; In re Estate of Kamuyu Njiri [2019] eKLR; B C C v J M G [2018] eKLR; P O M v M N K [2019] eKLR; In re Estate of Morris Kilonzo Musyimi (Deceased) [2018] eKLR

93 This is based on a survey of twenty cases where one of the issues for determination was whether a woman was a wife by cohabitation and repute. See for example *NLS v BRP* [2016] eKLR, *Joyce Atemo v Mary Ipali Imujaro* [2003] eKLR, *Grace Wanjiku Kimani & 2 others v Peter Kimanga Kimani & another* [2017] eKLR, *NWK v JKW* [2018] eKLR, *James Odhiambo Nyawade v Philip Otieno & another* [2017] eKLR, In *re Estate of Kamuyu Njiri* [2019] eKLR, *In the Matter of The Estate of James Simu Nthiwa* [2005] eKLR, *BCC v JMG* [2018] eKLR, *POM v MNK* [2019] eKLR, *PMK v PRM* [2017] eKLR, *SWG v HMK* [2015] eKLR, *In re Estate of Morris Kilonzo Musyimi* (Deceased) [2018] eKLR, *MMN v WIN* [2018] eKLR, *RLA v FO & another* [2015] eKLR, *Eva Naima Kaaka & another v Tabitha Waithera Mararo* [2018] eKLR, *AWM v RM* [2005] eKLR, *Hortensiah Wanjiku Yawe V Public Trustees* EACA C.A. No. 13 of 1976 (UR), and *In re Estate of DMM (Deceased)* [2018] eKLR.

94 *Joyce Atemo v Mary Imujaro* [2003] KLR 435

authority of male members over the lives of female members of the family and… often fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently…".[95]

In this phase, rights and obligations are not really being contested by the spouses, as much as being negotiated in the shadow of the law.[96] When there is conflict, sometimes despite the conflict, the law is absent, rationalised against the fiction of the private public divide. For example, courts choose not to divide matrimonial property while the marriage is not yet dissolved. Section 17 of the Matrimonial Property Act represents a turning point in that courts now may make declarations and determinations on spouses' entitlement to matrimonial property during the term of the marriage. Division, however, only happens at the dissolution of the marriage.

Another turning point may be found in the recently enacted Protection Against Domestic Violence Act, which criminalises gender-based violence and protects people from violence in intimate spaces. While the language of this Act is gender neutral, the bulk of domestic violence victims have historically been women, and so proper implementation of this law would have a greater impact on the lives and rights of women and girls.[97]

Section 43(5) of the Sexual Offences Act is the instantisation of State absence in marital spaces. The import of the section is to create the spousal rape exemption. It constructs spouses as being incapable being raped by/raping each other. Here, the use of the gender-neutral language obscures the fact that most of rape cases are perpetrated by men (husbands in this case) against women. Put differently, wives do not have the right to say no to sex with their husbands. And even if they do, it is not rape. The use of gender neutral language here signals tacit inequality as wives have historically been more victims of rape than husbands.[98]

The Hale Doctrine, one expression of Coverture, has been used to explain the refusal of governments to protect married women from spousal rape[99]. It provides "…but the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself

95 The Victoria Falls Declaration of Principles for the Promotion of the Human Rights

96 K Bumiller, 'Victims in the Shadow of the Law: A Critique of the Model of Legal Protection' (1987) 12 Signs: Journal of Women in Culture and Society 421

97 JK Agostino, 'Influence of Gender Based Violence on the Implementation of Community Development Projects: A Case of Gikui Mweru Water Project in Igoji East Ward, Meru County, Kenya' (PhD Thesis, University of Nairobi 2015)

98 See Kamau, W., P. Nyaundi and J. Serwanga. (2013). "The Legal Impunity for Marital Rape in Kenya: A Women's Equality Issue." http://theequalityeffect.org/wp- content/uploads/2013/04/Marital-Rape-Paper-Winnie-Kamau-Final-edited-July-18.pdf and Engle, K. (2005). "International Human Rights and Feminisms: When Discourses Keep Meeting." In: D. Buss and A. Manji (Eds.), International Law: Modern Feminist Approaches. Hart: 47, 52–4.

99 See generally '"Decolonising Sex: Fifty Shades of Rape" by Roseline K. Njogu' <https://scholarship.law.cornell.edu/sajpd/vol3/iss1/6/> accessed 3 January 2020.

in this kind unto her husband, which she cannot retract…"[100] and has been used in many jurisdictions that refuse to criminalise marital rape.

Many of the rights and obligations of spouses that evolved within common-law are undergirded by coverture: a husband as a legal subject, and a wife with no legal personhood, who draws her personality from her husband. Though substantively amended these marital rights and obligations retain these legacies of coverture, and stop short of dismantling the patriarchal hegemonies in marriage. As such, many of these rights and obligations retain elements of one or all three forms of inequality.

i) *Consortium*

In Common Law, consortium is a bundle of rights that includes one spouse's right to the company, affection and society. It finds expression in the right to cohabit together, the right to sexual intercourse, the right of the wife to use her husband's name and so on. Consortium supported the conceptual merge of two individuals into one "person" or household, as Lord Denning would later observe that in a marriage two become one- the one is the husband.[101] In old common law, the husband had a right to consortium and a wife had the obligation to offer it. Until the 19th century, a husband could use extrajudicial means of enforcing consortium, including restricting his wife's movement from her home.

Modern-day expressions of consortium are found in rules on cohabitation; the choice of a matrimonial home/residence (which includes the right to choose a domicile and or personal status law) nationality and citizenship; conjugal rights, matrimonial confidence; companionship and name rights. Over time many of these rights and obligations were codified and are now found in provisions of various international, regional and domestic law statutes and instruments.

ii) *Right and Duty to Cohabit*

Section 2 of the Marriage Act defines 'cohabit' as living together in an arrangement that resembles a marriage. Cohabitation sometimes leads to the formation/recognition of a marriage, although more women than men rely on this form of marriage, as already discussed. Spouses have the right and obligation to live with each other, and where a party refuses to cohabit with the other this constitutes desertion, a ground for divorce.[102] Cohabitation is so central to marital rights that where one spouse makes it difficult/ impossible for the other live with them, the alternative ground of 'constructive desertion' arise.

100 1 Hale, *Pleas of the Crown* at p 629

101 Turner Memorial Lecture "Law and Life in our Time" delivered by Lord Denning <http://www.austlii.edu.au/au/journals/UTasLawRw/1967/1.pdf> accessed 09 May 2021

102 Marriage Act 2014 s. 65(c), 66(2)(c), 69(1)(c), s. 70(b)

iii) *Residence, Nationality and Citizenship*

The right to choose where a matrimonial home will be is an old one in common law and is related to the right to cohabitation.[103]Modern instruments allow both parties to determine where they will live,[104] including the protection of the right to joint residency in times of crises.[105] In the past, the law provided that a wife would automatically assume the residence, domicile and acquire her husband›s citizenship. In *Magean v Magean*[106], for example, a wife could not have standing before a court of law for a divorce on the grounds of desertion as the court held that her husband's relocation (desertion) to Tanganyika had caused her domicile to move to Tanganyika. She therefore had no standing to prosecute her divorce in a Kenyan court. The absurdity of this decision and the injustice of it eventually led to law reform such as the enactment of the Law of Domicile Act that provided that married women could have a domicile of their own. Eventually, the requirement for domicile in establishing the court's jurisdiction, for purposes of divorce proceedings.

Similarly, until the promulgation of the 2010 Constitution, husbands could confer citizenship to their foreign wives and to their children as of right. Wives, on the other hand, could not. The position now provides for equal rights of husbands and wives to confer citizenship to each other, their children, and the right to retain their Kenyan citizenship.[107] This last element is important as previously, Kenyan women who married foreigners and acquired their citizenship, lost their Kenyan citizenship.[108] Similar provisions exist in international and regional law.[109]

iv) *Right to Companionship*

Companionship is difficult to legislate outside of the cohabitation requirement already discussed. However, some provisions of the law are instructive. Section 13(c) of the Marriage Act provides the right of a spouse to sue a third party in tort, through whose action the spouse has lost the companionship of the other. This provision codifies a long-standing provision in tort law.[110] Companionship takes on distributive elements as section 2 of the MPA recognises it as a mode of contribution through which a spouse acquires interest in matrimonial property.

103 CS Bruch, 'Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial-Legislative Interaction' (1981) 29 The American Journal of Comparative Law 217

104 See for example Article 15(4) CEDAW and Article 6 of The Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa

105 Article 26 & 82 Geneva Convention Relative to the Protection of Civilian Person in Time of War of 12 August 1949 (Geneva Convention IV); Geneva Convention IV:Additional Protocol I; Geneva Convention IV:Additional Protocol II

106 (1919-1921) 28 KLR 154

107 The Constitution of Kenya, 2010

108 VW Mucai-Kattambo, J Kabeberi-Macharia and P Kameri-Mbote, 'Law and the Status of Women in Kenya'

109 Ibid

110 Matrimonial Property Act, 2013

v) *Name Rights*

Wives now have the right to retain and use their birth names upon marriage[111] or adopt their husbands' names.[112] Further, in contract law, a wife has the right to pledge her husbands' name for necessaries, and no such right is available to men – a clear formal inequality.[113] Subsidiary legislation evolved to facilitate the changing of last names by wives.[114] However, while spousal equality provisions now abound in law, there does not exist a reciprocal process for husbands' opting to use their wives last name. In fact, if a wife chooses to change her last name back to her birth name, the process is fairly convoluted and will often require that she shows evidence of a divorce or permanent separation.

Further, changing a wife's last name to her husband's name is often akin to uprooting a woman, and completely severing her ties with her heritage. Depending on the politics of the official at the Registrar of names carrying out this process, sometimes the change of name comes with a change of "home of origin" details in the population register to match those of her husband's ancestors. With a simple process not only does a wife change her name, but her past is erased and hijacked, being falsely and forcefully grafted into that of her husband. Here, coverture reaches where even laws cannot reach - into the past, and produces both formal and structural inequalities.

Coverture follows professional wives to the upmarket; whatever their name choices . Section 23(2) of the Business Names Act (1951) requires that married women include "wife of so and so" after their names in all trade circulars and business letters sent by their firms. This provision in the Business Names Act of 1951 is an insidious extension of coverture that seems to say: "I have my husband's permission to work".

Although these provisions seem to have fallen out of practice - it is still the (misogynistic) law and an element of formal inequality. The wives' names laws are a good example of the enduring legacies of patriarchy and the fundamental unequal structuring of spousal relations in law.

vi) *Wife's Income and Tax*

The Income Tax Act retains the idea that whatever property a married woman has or income she makes, ultimately belongs to her husband- a clear exemplification of formal inequality. Section 45(1) provides that:

111 DJ Anthony, 'To Have, to Hold, and to Vanquish: Property and Inheritance in the History of Marriage and Surnames' (2016) 5 British Journal of American Legal Studies 217

112 Ibid

113 See Patterson v Nanyuki General Stores

114 AE Yamin, N Datta and X Andión, 'Behind the Drama: The Roles of Transnational Actors in Legal Mobilization over Sexual and Reproductive Rights' (2017) 19 Geo. J. Gender & L. 533

> "…The income of a married woman living with her husband shall be deemed to be the income of the husband for the purpose of ascertaining his total income, and shall be assessed on, and the tax thereon charged on, the husband… [unless] such married woman opts to file a separate return from that of her husband[115]…"

Not only is this clause remarkably coverture-esque with hints of Head and Master Laws it does distributive work. Taking the age-old breadwinner/homemaker distinction very seriously it assumes that whatever income a wife makes even in her professional capacity is her husband's income. Beyond the distributive effects of this provision, tax law here infantilise women. It seems to say that a wife requires a guardian - an intermediary - to visualise her before the State.[116] The Income Tax Act makes it clear that its subject is almost always a man. So committed is it to this 'man of law' that even when the man is obviously female, it refuses to deal with her, preferring to deal with her 'guardian' - the husband.[117] Per section 45 (2)(3) of the Income Tax Act, the wife has to prove that she did not cohabit with her husband, to force tax law to see her in her own right.[118]

During the term of the marriage, much of the inequality is tacit and is largely based on patriarchal doctrines that cast husbands as heads of households, and wives as subordinate parties. Rights are negotiated in the shadow of the law, but in the full glare of patriarchal family orderings. Other social norms outside of the law are more active in this phase of the marriage, with the law as a reluctant arbiter. The role of the government officials in ensuring, protecting and enforcing the rights and obligations during the tenancy of the marriage cannot be gainsaid. The politics and convictions of those officials, have almost as much a bearing on the entitlements of the spouse as the provisions of the law, showing that both the law and the machinery/bureaucracy of the law conspire to structure power dynamics often in a patriarchal fashion.

vii) *The Termination of a Marriage*

It is in the third stage of the marriage cycle (termination) that spousal equality is revealed as truly formal and not substantive equality. While the law, in many respects, still provides for equal rights between husbands and wives at divorce, annulment of marriage, or death of spouses, husbands, and wives experience termination differently. Those varied gender-specific experiences follow the explicit, tacit and structural inequality divisions.

115 See s. 15(4) Income Tax Act
116 See generally Wendy Brown's arguments in Finding the Man in the State
117 See generally Man of Law
118 Income Tax Act Cap. 470

viii) *Inheritance*

To the extent that Succession falls within "personal status" law, it has been fraught with a plethora of (gender) discrimination elements, especially where legal pluralism exists. In Kenya, the combination of the colonial enterprise with British patriarchy firmly in place, individualistic property regimes, unity of marriage, Christian ideals and the patriarchy and rights of primogeniture in African customs unite ominously to exclude women from inheritance[119]. Further, inheritance is still, by large, within and subject to Sally Folk Moore's "semi-autonomous social fields".[120]

Years of law reform have yielded almost equal inheritance rights for men and women in international, regional and domestic law, and specific protections for women, such as widows' inheritance rights, and the right to retain the matrimonial home[121], rights of daughters to inherit[122], protection of matrimonial property and in particular the matrimonial home[123], wives' capacity to make wills[124], protection of dependants by rules the automatic revocation of wills upon marriage[125], the privileged right to act as ranking administrator of a spouse's estate[126], and the prohibition of a widow's right to remarry by invalidating any such conditions to gifts in a will.[127] However, various laws retain provisions that explicitly, tacitly, or structurally disenfranchise wives.

Article 21(2) of the Protocol to the ACHPR provides for the right of daughters to inherit from their parents in equitable shares as against their brothers. The problem with equity is that it has been used to justify the derogation of women's human rights.[128] The explicit inequality of Section 3(5) of the Law of Succession Act is one of the most glaring. It provides "…Notwithstanding the provisions of any other

119 See Mbote on the impact of colonialism of land tenure systems and women's access to property.

120 SF Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul, 1978). CN Musembi and P Kameri-Mbote, 'Mobility, Marginality and Tenure Transformation in Kenya: Explorations of Community Property Rights in Law and Practice' (2013) 17 Nomadic Peoples 5

121 See for example Article 21(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

122 Article 21(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

123 See Article 68 of the Constitution of Kenya requiring Parliament to enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage; and… protect the dependents of deceased persons…[such as] interests of spouses in actual occupation of land…"

124 Section 5 of the Law of Succession Act

125 B Kaawe, 'A Brief On The Making Wills And Last Testaments In Kenya' (Tharuma Trevisan Advocates, 2022) <https://tta.co.ke/a-brief-on-the-making-wills-and-last-testaments-in-kenya/> accessed 30 June 2022

126 Section 66 of the Law of Succession Act

127 Section 44 of Schedule I to the Law of Succession Act protects widows from undue control by the deceased by invalidating any condition to a gift that totally restrains a widow from remarrying, without providing for any gift over or in default of that condition.

128 African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, available at: https://www.refworld.org/docid/3f4b139d4.html [accessed 30 June 2022]

written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act…". This particular provision is one of the most problematic in Succession law. Not only is it in conflict with marriage laws, in that it seeks to cure an illegality (even the crime of bigamy) at the point of the husband's death, it also robs the first (legal) wife of the protections of monogamy upon which she contracted her marriage.

Over the years, the courts have upheld the application of this section, thereby disenfranchising the "legal" wife through no fault of her own. In *Re Estate of Isaack Chege Kamau (Deceased)*[129] the court applied section 3(5) of the LSA and recognised a woman married under Kikuyu customary law during the subsistence of a statutory (monogamous) marriage under the African Christian Marriage and Divorce Act[130] as a wife for the purposes of section. It held "…The provision kicks in really after the man's death, for before then he would lack capacity and the purported marriage would be a nullity. The woman purportedly married under customary law would not be a wife before the man's death. However, once the man dies, the otherwise non-wife becomes a wife for succession purposes, entitled to be treated at par with the wife married under statute…"

The court has held similarly in other cases.[131] However, in *Re Estate of Johnson Githaiga Joshua Ng'ang'a (Deceased)*[132], the court sided with the first "legal" wife, ignoring section3(5) of the LSA and holding, in part "…The entire proceedings were a nullity. The deceased had no legal capacity to marry another wife under Gikuyu customary law. He had contracted a statutory and monogamous marriage with his first wife…under the African Christian Marriage and Divorce Act … The marriage persisted until his demise. I thus readily find that the purported marriage between the deceased and the protestor was unlawful and void for all purposes…".

Until the LSA review of 2021, per section 29, a wife or former wife is a dependant as of right, as far as her husband's estate was concerned. A husband on the other hand, had to prove "dependency" showing that he was maintained by his wife immediately before her death. The amendment now frames both spouses as dependents as of right.

Section 32 of the LSA exempts certain areas within Kenya from the application of the Law of Succession Act intestacy rules, thereby applying Customary Law.[133] In

129 [2015] eKLR
130 Repealed by the Marriage Act of 2014
131 See for example *Re Estate of T O O (Deceased)* 2017] eKLR and *Re Estate of Reuben Nzioka Mutua (Deceased)* [2014] eKLR
132 [2014] eKLR
133 Legal Notice No. 94 of 1981

many communities, the customary law of inheritance discriminates against women, and in particular, disinherits wives and married daughters.

The provisions of section 39 privilege fathers over mothers, by giving them the right to inherit a deceased child's estate, and thereby extinguishing the rights of mothers to do so.[134]

Sections 35 and 36 discriminate against widows in that they lose the life interest in the estate of their deceased husbands upon marriage. Widowers however enjoy the life interest for the length of their lives, subsequent marriages notwithstanding.

Sections 35 and 40, read together deal with the estate of a polygamous man. Where such a man dies intestate, his property will be divided among the houses[135] based on the number of 'units' in each house, determined by counting the number of children and each surviving wife. This mode of distribution is problematic for a few reasons. Firstly, it disadvantages a wife (or house) that has fewer children, the length of marriage to the husband notwithstanding. That is to say, that a wife of forty years who only bears two children will be gravely disadvantaged against a wife of ten years who bears five children. Secondly, under this mode, a wife must share the deceased's estate with all her co-wives and step children, while in the case of the death of a wife in a polygamous family, the husband inherits the "spouse's" portion of the property, with no share going to the cowives. This is further complicated by the difficulty of excising the matrimonial property out of the estate before devolution. The husband, should he survive all his wives, would ideally inherit all of their property, especially considering that he would have a life-long life interest. The law does not envision a woman being married to several men, and is of course explicitly unequal.

ix) *Matrimonial Property*

The Matrimonial Property Act of 2013 attempted to bridge the Married Women's Property Act of 1886 (MWPA) with over 130 years of case law and jurisprudence. Until 2013, the MWPA applied as a statute of general application as stated in *I. v I.*[136] Over the years a number of the MWPA elements remained - such as affirming the capacity of the married women to own property as well as the entitlement to matrimonial property through contribution. The jurisprudence evolved over the years from entitlement based on proof of direct contribution, to include indirect contribution, and non-monetary contribution.[137] *Kivuitu v Kivuitu*[138], *Tabitha Wangeci Nderitu v Simon Nderitu*[139], and other cases buttressed that once contribution was

134 Law of Succession Act Cap 160

135 Section 3 of the Law of Succession Act defines house as " means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife;

136 [1971] EALR 278

137 See *Karanja v Karanja* [1976] KLR 307

138 Mary Ann Kivuitu vs Samuel Mutua Kivuitu Civil Appeal No 26 of 1985

139 Tabitha Wangechi Nderitu V Simon Nderitu Kariuki [1998] Eklr

proved, courts divided the property equally. *Peter Mburu Echaria* v *Priscilla Njeri Echaria*[140] reversed much of the gains the feminist movement had made by reopening the conversation on contribution and dividing the property based on what it considered the actual contribution of each party to be.

This clawback intensified the push for new legislation. Immediately after the promulgation of the Constitution of Kenya 2010 courts began to divide matrimonial property equally, doing away with the need to prove contribution. Citing Article 45(3) of the Constitution, courts gave equal division orders in *Agnes Nanjala William v. Jacob Petrus Nicolas Vander Goes*)[141]. However, the enactment of the MPA 2013 reintroduced the concept of contribution as captured by s 2 of the Act as "… contribution" means monetary and non-monetary contribution and includes— (a) domestic work and management of the matrimonial home; (b) child care; (c) companionship; (d) management of family business or property; and (e) farm work;…" and provided that entitlement to matrimonial property depends upon each spouse's contribution to its acquisition.[142]

The Parliamentary debate that led to the retention of contribution was a candid if somewhat sad commentary on patriarchy's unwillingness to cede power to wives - especially estranged wives. The overwhelmingly male creators of this law ensured that divorced wives would be punished by having to prove their work and worth.

So, while the Act now expressly recognised indirect and non-monetary contribution, it gave no guidance on how that contribution was to be measured. The compromise seems to have been to capture 'women's work' as a valid contribution and perhaps then the courts could actively expand the meaning of contribution and lead to equal/ equitable distributions. Unfortunately, the actions of the courts have not validated this position. In *U M M v I M M*[143], for example, the court held that equality did not mean dividing the matrimonial property in equal shares. The court said:

> "…I take the view that at the dissolution for the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary of non-monetary. The bigger the contribution, the bigger the entitlement…"

On the face of it, contribution appears meritorious, fair even. However, by and large, the courts undervalue non-monetary contribution, and overwhelmingly under-provide for the spouse depending on it, who is often the wife.[144] Non-monetary contribution has a gendered dynamic- with wives performing most of

140 [2007] eKLR
141 CA No. 127 of 2011 (UR
142 Section 7 of the Matrimonial Property Act
143 [2014] eKLR
144 See for example Joke Swiebel, Unpaid Work and Policy-Making Towards a Broader Perspective of Work and Employment available at https://www.un.org/esa/esa99dp4.pdf accessed 7th May 2021

the unpaid care work in families and husbands remaining in the paid economy as their care-work and family responsibilities are shouldered by wives. These structural conditions eventually impoverish women who must rely on their unpaid work in the home to show their entitlement to matrimonial property. Further, even when they can prove that unpaid work, the courts have discretion on how to value that labour and therefore attach a share to their matrimonial property. Reliance of contribution for entitlement in matrimonial property under these circumstances is therefore both tacitly and structurally unequal.

x) *Burial Rights*

The end of a marriage through death presents perhaps the sharpest spousal inequalities. Put differently, of all the stages in the marriage life cycle, widowhood is markedly subjugated over widowerhood, especially as far as burial rights are concerned. The reasons widowers appear preferred over widows in the right to bury their spouses fall in three main categories: the application of customary law; the dependence of widows on courts; and the changing standards and rules applied by the courts to burial disputes.

C APPLICATION OF CUSTOMARY LAW

Burial law in Kenya is uncodified and has remained the province of customary law throughout the colonial and post-colonial epochs, despite calls by the courts[145] as well as scholars[146] for Parliament to codify it.

While in some other areas of life, customary law has offered protections to wives where statute does not (such as in section 3(5) Law of Succession Act protecting "illegal" wives that are otherwise recognised by custom), burial rites in most communities do not. Not only are burial customs steeped in patriarchy and primogeniture, customary law is also an extremely difficult body of law to rely on. Its set up in the Judicature Act provides various qualifications which the it must meet[147]. The qualifications include its customary law's reduced authority to guide (not to bind), its restriction to civil cases,[148] where at least one party must be subject to or affected by the custom, its applicability, its non-repugnance to justice and morality, and its consistency with written law. Further, as customary law is unwritten, it must be proved by evidence before it can be relied upon.[149]

145 See for example the court in the *SM Otieno Case* stating "…It does appear to us that in the course of time Parliament, may have to consider legislating separately for burial matters covering a deceased's wishes and the position of his widow and so enabling courts to deal with cases related to burials expeditiously…"

146 See generally Ojwang J. B, Mugambi J. N. K & Aduwo G.O, 1989, pp 116 *'The S.M Otieno Case: Death and Burial in Modern Kenya,'* Nairobi University Press, and Abdullahi A.M, 1999, pp 171 *'Burial Disputes in Modern Kenya; Customary Law in a Judicial Conundrum,'* Faculty of Law, University of Nairobi.

147 Section 3(2) of the Judicature Act

148 As further limited by section 2 of the Magistrates Courts Act.

149 *Ernest Kinyanjui Kimani v Muiru Gikanga & Another* [1965] EA 735 and Nyariba Nyankomba vs. Mary Bonareri Munge [2010] eKLR

Due to these barriers inherent in Customary Law widows' access to justice, through the courts can be inordinately curtailed.

D WIDOWS DEPENDENCY ON THE COURT

A quick review of 40 burial disputes revealed that in 90per cent of these cases, the body being contended over is that of a man. Most cases pitted a widow against her adult children, her co-wife/wives, her husband's family, her husband's clan, and so on. Cases, where a husband has to deploy state machinery through a judicial process to bury his wife, are rare.

The rarity of these cases is perhaps undergirded by the cultural understanding that upon marriage, a wife joins her husband's clan and he has the ranking right to bury her, as was observed in *Virginia Edith Wambui Otieno Vs Joash Ochieng Ougo & Another*[150] as well as in *Josinda Katumba Kamau v Annah Ngendo.* Here, the courts observed:

. *"…the deceased was born and bred a Luo and as such under Luo customary law, his wife on marriage became part and parcel of her husband's household as well as a member of her husband's clan. Their children are also Luo as well as members of their deceased father's clan… Under the Luo custom…she has no right to bury her husband and she does not become the head of the family upon the death of her husband. As with other African communities a man cannot change his tribal origin…"*

This need to bring wives under their husbands' clan and control, even allows would-be husbands who have not met all requirements to cure them after death, and to unlock the right to bury. In *Joyce Atemo v Mary Imujaro*[151] the Court of Appeal upheld a Teso custom that allows for a marriage to be formalised where the husband's clan pays the dowry after his death but before his burial.

One can say therefore that the right of a husband to bury his wife is largely unchallenged. However, the right of a wife to bury her husband is open to various challengers, against whom she has to wield a perilous judicial process, that often cements her disenfranchisement.

E THE CHANGING STANDARDS AND RULES APPLIED BY COURTS

Even after mounting litigation to defend her right to bury her husband, the widow has to contend with divergent court decisions on who has the right to bury the deceased, and the checklist by which the court arrives at that decision.

150 [1987] eKLR
151 [2003] KLR 435

In *SAN v GW*[152] the Court of Appeal restated the rules that courts must apply in burial disputes as follows:

a) That the wishes of the deceased, as far as possible be given effect, so long as those wishes are not contrary to custom or to the general law or policy;[153]

b) That the law only recognises the persons who are closest to the deceased to have the right to bury the deceased, in the following order of priority - spouse, children, parents and siblings; and

c) That a person claiming the right to bury the deceased must demonstrate closeness to the deceased during their lifetime.[154]

While in some communities, a spouse is the unchallenged next-of-kin with the highest rank of grief, therefore the most say in burial decisions, in many African communities, this is not a foregone conclusion.[155] In Kenya, often the decisions of the larger family, the clan, male relatives or adult children will veto burial decisions made by a widow.

Over the years, the courts have privileged clans, parents and siblings of deceased men over wives in burial rights litigation. Before the 2010 Constitution especially, the trajectory of the courts was to strictly apply customary law, which often disenfranchised wives, even if it called for disregarding the deceased's wishes.

In *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR (famously known as the SM Otieno Case) the court held that according to Luo customary law, the clan takes charge of his burial and thereby ranked the clan's claim over the deceased's body for burial over his wishes to be buried in Upper Matasia, and over his wife's claim. Similar decisions were reached in *Patrick Odera Alila & Another v Rose Nyaseme & Another*[156] where the court found in favour of the deceased's brother and son over the widow, citing Luo customary law, and in *Josinda Katumba Kamau v Annah Ngendo*[157] where the court found in favour of the clan and ordered the deceased to be buried according to Kikuyu customary law.

Justice JB Ojwang' set aside this idea of binding custom in burial law and propounded a different approach in *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another*[158] where he preferred the first "official" wife of statute in his burial decision,

152 [2020] eKLR
153 See *Apeli vs. Buluku* [1980] eKLR and *Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira* [2014] eKLR
154 See *Samuel Onindo Wambi vs. COO & Another* Kisumu Civil App. No. 13 of 2011 (2015) eKLR where the court held that a person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased.
155 See generally Nwabueze, Remigius Nnamdi (2005) The concept of sepulchral rights in Canada and the USA in the age of genomics: hints from Iceland. *Rutgers Computer & Technology Law Journal*, 31 (2), 217-284.
156 [2012] eKLR
157 [1998]eKLR
158 [2014] eKLR

over the second common law wife despite her cohabitation with the deceased before his death, and the deceased wishes to be buried at her home. In ranking the second "illegal" wife lower than the first, he observed "…in the social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant...'

This idea of the nexus-of-grief theory has animated the courts' reasoning in subsequent cases such as *Martha Wanjiru Kimata & another v Dorcas Wanjiru & another*[159] where the court sided with the wife. Similarly, in *John Omondi Oleng and another vs. Sueflan Radal*[160] Justice Mabeya stated:

> "…When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in..."

The nexus-of-grief approach in burial disputes attempts to mitigate against the harsh outcome of customary law that often disenfranchises widows. However, courts by and large seem to swing between that and the strict adherence to custom approach.

Burial law, perhaps more than any other law, exemplifies the structural inequalities between husbands and wives. The application of customary law, the disproportionate dependency of widows on courts and the varying court standards and rules mean that widowers are preferred over widows in burial rights.

vi CONCLUSION

This article critically interrogated the place of the wife in law and the extent to which constitutional provisions on equality in marriage are upheld throughout the law and the lived realities of wives. While the laws of Kenya claim to create an equality framework, equality in marriage remains elusive. The Constitution of Kenya declares that parties to a marriage shall have equal rights at the beginning, during the term and at the termination of a marriage.[161] Over 100 statutes mention wives - and whenever wives are found in the law, they are cast in terms that are in tension with each other; agency and dependency. The wife of law is also always cast in juxtaposition to the man of law- to assuage his vulnerabilities; in care, in incapacitation or in death. The

159 [2015] eKLR
160 (2012) eKLR
161 See Article 45(3) of the Constitution and its reproduction in Section 3(2) of the Marriage Act of 2014

paper relied on the Naffine Ngaire's Man of Law[162]("Man of Law") to demonstrate that wifehood remains subjugated to husbandhood because the law reproduces and entrenches patriarchal order by casting the legal subject in terms that render wives marginal and invisible in the eyes of the law. It also relied on Mbote's Fallacies to argue that despite these legal declarations and years of extensive law reform, wifehood remains subjugated to husbandhood because formal law is insufficient to dismantle the hegemonies of patriarchy especially in post-colonial settings where marriage is governed by a competing plurality of norms. It further argued that this subjugation produces three forms of inequality: explicit inequality, tacit inequality, and structural inequality. Using a doctrinal analysis of national, regional and international statutes, conventions, treaties and case law, and taking examples from family, citizenship, burial, succession, tax and business laws, this article revealed that the law's promise of equality fails. This article shows that inequality exists in the law, explicitly and tacitly, and often it exists outside the bounds of the law. It provides for explicit inequality (formal inequality/*de jure* inequality) in the institution of polygamy (including the forced polygamy upon the death of a bigamous man), in punishing a pregnant bride while ignoring women impregnated by the groom, in privileging a dead husband's clan's claim to burial rights over the wife's claim and in disparate inheritance rights for widows and widowers.

It provides for tacit inequality or inequality by application (substantive inequality/ *de-facto* inequality) in the provisions for dowry, the bureaucracies that prefer and *incentivise* a wife's loss of her identity markers, and in the devaluation of non-monetary contribution in the division of matrimonial property.

It provides for structural inequality (inequality by exclusion/extra-legal inequality) by its absence or impotence in the face of alternative social norms in extra-legal spaces where power is negotiated in pluralistic contexts such as in burial rights and rites.

162 Naffine Ngaire, 'The Man of Law', in Law and the Sexes: Explorations in Feminist Jurisprudence, Sydney; London: Allen & Unwin (1990) pp100-123 at 100

THE CARING WIFE AND MATRIMONIAL PROPERTY LAW AND PRACTICE IN KENYA (2010 – 2022).

Rosemary Mbaluto – Mutuku*, Nkatha Kabira**, and Nancy Baraza***[1]

ABSTRACT

Despite the fact that the Constitution of Kenya provides for equality at the dissolution of a marriage and that legislation further provides that spouses can contribute non-monetarily, nevertheless, the case law on matrimonial property jurisprudence indicates that when a spouse contributes non-monetarily the weight of her contribution is not equal to the weight of the spouse who contributes monetarily. As a result, this discrepancy between the valuation of monetary contribution and non-monetary contribution brings about inequality between men and women. This paper makes four main arguments. The first argument is that matrimonial property law continues to be premised on neo-liberal conceptions of work which privilege public work done for financial gain over private work which is done at home and is unpaid. The second argument is that by privileging public work done by men over private work done by women, matrimonial property law as practiced by Kenyan courts fails to reflect the spirit and letter of the Constitution. The third argument that this paper makes is that there are discrepancies in the case law on division of matrimonial property and the reason for these discrepancies is that non-financial contribution as authorised by Section 2 of the Matrimonial Property Act, 2013 has not been interpreted nor quantified. The fourth argument is that as a result of these discrepancies three schools of thought have emerged from the jurisprudence. These schools have been named; The Equality Jurisprudence, The Contribution Jurisprudence and the Oppressive Jurisprudence.

I INTRODUCTION

The Matrimonial Property Act 2013 (MPA) states five ways in which a spouse can contribute monetarily to matrimonial property. These are; child-care, domestic work, companionship, management of a family business and farm work. The shortcoming of this section is that there is are no guidelines as to how an adjudicator who is faced with awarding a share of property to a spouse who has contributed non-monetarily shall make the award. Judges are left to use their discretion in

* PhD Candidate, University of Nairobi and Lecturer, Strathmore University.
**S enior Lecturer, School of Law, University of Nairobi, Iso Lomso Fellow, Stellenbosch Institute of Advanced Studies, Stellenbosch, South Africa
*** Senior Lecturer, School of Law, University of Nairobi.

weighing non-financial contribution and in some cases judges have even said that the have had to estimate the weight of this contribution.[1] The Constitution of Kenya commands equality between spouses at the time of divorce.[2] The objective of this paper is to investigate whether the jurisprudence on division of matrimonial property emerging from the courts reflects the equality between spouses that is endorsed by the Constitution.

The discourse on division of matrimonial property has attracted many opinions. Halima Sheikh[3] affirms that the 2010 Constitution aligned Kenyan law with international human rights standards and spoke to the lack of rights for the women of Kenya. Fryeda Owino,[4] espouses that we need to re-evaluate the purpose of dividing matrimonial property and focus more on the needs of the spouses and less on their contribution. In reviewing case law on the issue, J. Daniel[5] declares that judges have no guidance on accessing important issues such as contributions, needs and resources of separating spouses. For this reason, the current law is applied incongruously. Lucy Mairo[6] states that Article 45(3) introduces the principle of equity in the division of matrimonial property and yet in demanding contribution, the MPA ignores this principle.

Professor Patricia Kameri - Mbote and Muriuki Muriungu, in their paper 'Much Ado About Nothing: A Critical Analysis of The Matrimonial Property In Kenya'[7], opine that the promises made by the 2010 Constitution for equality between men and women and particularly Article 45(3) were 'much ado about nothing'. This is mainly because of several clauses in the MPA whose effect is to take us back to the pre-2010 asymmetry that existed in the area of division of matrimonial property. This article builds on this argument and on existing scholarship on matrimonial property law and practice by focusing on the practice relating to the quantification of non-monetary contribution.

1 *MAA vs AR* [2018]eKLR.
2 The Constitution of Kenya, 2010. Article 45 (3)
3 Halima Shiekh, 'Women's Rights in Kenya' <https://independent.academia.edu/HalimaSheikh> accessed 16 September 2018.
4 FK Owino, 'The Division of Matrimonial Property in Kenya: A Feminist Approach' <https://su-plus.strathmore.edu/handle/11071/5226> accessed 30 June 2022)
5 JO Daniel, 'THE LEGAL FRAMEWORK GOVERNING DIVISION OF MATRIMONIAL PROPERTY IN KENYA.' <https://www.academia.edu/11935870/THE_LEGAL_FRAMEWORK_GOVERNING_DIVISION_OF_MATRIMONIAL_PROPERTY_IN_KENYA> accessed 12 October 2022.
6 L Mairo, 'A Critical Analysis of the Legal Framework of the Matrimonial Property Regime in Kenya', <https://www.academia.edu/28421856/A_CRITICAL_ANALYSIS_OF_THE_LEGAL_FRAMEWORK_OF_THE_MATRIMONIAL_PROPERTY_REGIME_IN_KENYA_doc> accessed 30 June 2022
7 PK Mbote & M Muriungu, 'Much Ado About Nothing: A Critical Analysis of The Matrimonial Property In Kenya,' International Environmental Law Research Centre, 6 Zanzibar Yearbook of Law, p. 71 -102

Feminist economic theory is the theoretical basis for the arguments in this paper. Feminist economists argue that orthodox economics makes a fundamental error when it ignores the economic contribution made by unpaid care-workers who perform very important economic services to society. Feminist economic theory postulates that unpaid – care work should be quantified and governments should implement policies that reward care-workers.[8] This paper makes four main arguments. Firstly, it argues that matrimonial property law continues to be premised on neo-liberal conceptions of law which privilege productive work done by men over reproductive work done by women. Secondly, by privileging public work, matrimonial property law as practiced by Kenyan courts, fails to reflect the spirit and letter of the Constitution because it places the private work done by women in an unequal footing with the public work done by men. Thirdly, case law on division of matrimonial property is fragmented because non-monetary contribution is not quantified or interpreted. The fourth argument is that as a result of this fragmentation, three schools of thought have emerged from the jurisprudence. These schools have been named; The Equality Jurisprudence, The Contribution Jurisprudence and the On-The-Fence Jurisprudence.

This paper is divided into five main parts. The first part is the introduction. The second part is the legal and constitutional foundations of equality in matrimonial property law in Kenya. The third part is a feminist economic analysis of key concepts on matrimonial property law. This part provides the conceptual and theoretical basis for equality in non-monetary contribution considerations. The fourth part is a gender analysis of the case law from 2010 to 2022. The fifth part is the conclusion.

II LEGAL AND CONSTITUTIONAL FOUNDATIONS OF EQUALITY IN MATRIMONIAL PROPERTY LAW IN KENYA

The 2010 Constitution, which has been hailed as 'the second republic'[9], recognises women's rights as human rights and establishes the principle of equality as a core value of leadership.[10] The 2010 Constitution has many articles that endeavour to bridge the wide gap between men's and women's social, political and economic

8 MS Floro & J Willoughby, 'Feminist Economics and the Analysis of the Global Economy': (2016) Vol 40, Issue 2, The Fletcher School of Law and Diplomacy, p. 15 -27.

9 Belfer Center for Science and International Affairs, 'Kenya's New Constitution: The Birth of the Second Republic' <https://www.belfercenter.org/event/kenyas-new-constitution-birth-second-republic>.

10 W Lichuma, 'Gender Equality Challenges in Kenya and Africa', Keynote Address by Commissioner Winfred Lichuma, During the event:- Gender Equality: International Challenges and Strategies for Success or*ganized by Australian Federal Police at the Australian High Commission in London Offices on 20th June 2017.*

lives.[11] Of particular concern for this paper is Article 45 (3) of the Constitution which 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 marriage.'***

Article 68 (c) of the Constitution directs Parliament to enact legislation which shall regulate the recognition and protection of matrimonial property and, in particular, the matrimonial home during and on the termination of the marriage. Parliament obeyed this directive by passing the MPA in 2013.[12]

Section 2 of the Act states that;

> 'contribution means monetary and non-monetary contribution and includes—
>
> (a) domestic work and management of the matrimonial home;
>
> (b) child care;
>
> (c) companionship;
>
> (d) management of family business or property; and
>
> (e) farm work;

Section 7 of the Act declares that;

> '……. 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.'

The other Act that has a bearing on division of matrimonial property is the Law of Succession Act of Kenya[13]. Section 35 (1) and (2) of this Act reads as follows;

……where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

11 These articles are, inter alia; Article 27 (1) which states that *'every person is equal before the law and has the right to equal protection and equal benefit of the law'* ; Article 27 (4), '*the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status…….'*; Article 60*(1)(f)* which declares that *'Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with…….(the)elimination of gender discrimination in law, customs and practices related to land and property in land*'.

12 Matrimonial Property Act, 2013, (No. 49 if 2013), Kenya Gazette Supplement No. 183; Date of Assent: 24th December 2013. Date of Commencement: 16th January 2014. The passing of this Act was very controversial because very many sections which were beneficial to women were amended and some removed to the detriment of women. The days before the passing of the Act saw a. concentrated campaign by women lawyers who wanted to Bill to be passed in its original form; Tim Hanstad, 'A Dark Day for Kenyan Women: Why Kenya Must Not Pass Its Revised Marriage Property Bill' [2014] *Huffington Post* <http://www.huffingtonpost.com/tim-hanstad/a-dark-day-forkenyan-wom_b_4435910.html> accessed 15 September 2018; Katy Migiro, 'Kenyan Women to Fight Bill Denying Them Property Rights in Divorce - AllAfrica.Com' <https://allafrica.com/stories/201311141193.html> accessed 15 September 2018.

13 Chapter 160 of the Laws of Kenya.

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.This section basically bequests the estate of a spouse who has died intestate to the surviving spouse. However, it has a disparate impact on men versus women. If the surviving spouse is a woman, she will loss the property she has acquired under this section if she remarries. However, this is not the case if the surviving spouse is a man. He will be able to keep the property he has acquired if he remarries.

The Matrimonial Property Rules 2022[14] give a wide range of directions that a judge may follow while applying his discretionary powers in the division of matrimonial property. Rule 30 states that a judge can order for the sale of matrimonial property, vest property to the spouses in common in a share that the court considers to be just and equitable, order for the partition of property and even vest the property in one of the spouses where the property is owned jointly, among other orders. These rules widen and affirm the wide discretionary powers of judges.

The MPA upholds the principle of equality among spouses as outlined in Art 45(3) of the Constitution. This is illustrated by the statutory endorsement of non-monetary contribution in section 2 of the Act. By recognizing non-financial contribution as contribution, the Act recognizes the important reproductive work done by women. However, the fact that there is no guide in the Act as to how the five ways of non-monetary contribution highlighted in section 2 are to be weighed, leaves the matter to be settled by the discretion of judges. Unfortunately, most of these judges are men who may not understand the value of care-work. There is therefore a high likelihood that those who are called upon to quantify sec 2 of the MPA are not equipped to do so because they do not understand the value of non-monetary contribution. This article investigates whether the jurisprudence emerging from the courts, between the promulgation of the 2010 Constitution to 2022, reflects the law as stated in Article 45 (3) of the 2010 Constitution.

III A FEMINIST ECONOMIC ANALYSIS OF KEY CONCEPTS IN MATRIMONIAL PROPERTY LAW.

A FEMINIST ECONOMICS

Feminist economics seeks to propose economic policies that recognise and seek to reduce gender inequality. One of the main arguments of proponents of feminist economics is that the economic value of reproductive work should be recognis ed and included in the GDP of nations. This is because this work which is mainly

14 The Matrimonial Property Rules 2022 .Legal Notice No. 137 of 2022.

carried out by women, is essential for sustaining the activities carried in public paid work. A study done in 2015 showed that unpaid care work is worth as much as $10 trillion a year to the global economy.[15] By concentrating only on the paid economy, orthodox economists ignore the important economic contribution of the work done by women at home.[16]

Research done by feminist economists demonstrate that traditional economic models and methods pay exclusive attention to paid work dominated by men. Traditional economics focuses on public markets from which most women of the world are absent because they are mostly at home working to ensure that public markets function smoothly. The theory of rational choice, which says people will act in a way which maximizes the gains to themselves, does not recognize that people often choose to act in ways to support their families rather themselves as individuals, and that gender norms mean women are more likely to do this than men.

B UNPAID CARE-WORK

Unpaid care-work is work that is done at home to take care of family members. It consists of tasks such as cooking, cleaning, child-care, washing dishes, doing laundry and generally any task that takes care of the welfare of the family. It also includes taking care of the sick and elderly. In rural areas it includes collecting firewood and water. If the worker is the wife or mother, this work is not compensated monetarily.

The historical reality of women doing home related chores is still the reality in modern times. Women are responsible for the majority (76.2 per cent) of unpaid care work, spending an average of 201 days on unpaid work during a year, compared to 63 days spent on unpaid work by men[17]. Research done by the International Labour Organization in 2020 revealed that of the 136 million workers in the health and social care sectors, 70 per cent are women and roughly 80 per cent of the world's domestic workers are women.[18] The amount of time women spend on unpaid – care work reduces or completely eliminates the amount of time they can spend on other activities such as paid work, recreation and education.

15 McKinsey & Company, 'The Power of Parity: How Advancing Women's Equality Can Add $12 Trillion to Global Growth' (*McKinsey Global Institute*, September 2015) <https://www.mckinsey.com/~/media/mckinsey/industries/public%20and%20social%20sector/our%20insights/how%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/mgi%20power%20of%20parity_full%20report_september%202015.pdf> accessed 26 September 2022."plainCitation":"McKinsey & Company, 'The Power of Parity: How Advancing Women's Equality Can Add $12 Trillion to Global Growth' (McKinsey Global Institute, September 2015

16 Green Duncan, *From Poverty to Power, 2nd Edition: How Active Citizens and Effective States Can Change the World* (2nd edn, Oxfam International, Practical Action Publishing 2012). p 138.

17 L Addati, U Cattaneo, V Esquivel & I. Valarino, 'Care Work and Care Jobs for the Future of Decent Work' (International Labour Organization 2018) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf> accessed 3 October 2022.

18 International Labour Organization, 'ILO Monitor: COVID-19 and the World of Work. Sixth Edition: Updated Estimates and Analysis' (2020) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_755910.pdf> accessed 3 October 2022.

The care-work done at home by women makes it possible for other members of the family to effectively carry out their activities outside the home without the worry or interruption of having to do house chores. Despite the obvious contribution made to society by this work, unpaid-care work is commonly left out of policy agendas due to the misconception that it is difficult to measure and less relevant for policies unlike paid public work. The effects of leaving unpaid care out of policy considerations, are that; wrong conclusions are reached about changes and levels of the wellbeing of individuals in the society, gender inequalities are seen in empowerment areas such as employment and policies in a range of socio – economic areas are not effective.[19]

Riane Eisler argues that the important work of caring for people and caring for nature should be made visible in the economic system. She goes on to claim that if neoclassical economic indicators are changed to include the household economy, a more accurate reflection of economic reality will emerge. Eisler points out that when people ae cared for, they are more creative and productive. As such, the household economy increases the quality of human capital. This positive economic externality will not be accounted for in economic reports if unpaid care-work continues to be ignored.[20]

Most nations of the world have embraced a gendered system of values. Anything that is associated with femininity is marginalised and devalued. Women have been referred to as the weaker sex. We need to move towards a different world that does not devalue caring. This will allow us to shift from the domination of masculine values to partnership. Economic practices and policies must be seen to support care-work.[21]

C SOCIAL EQUALITY

Social equality is found in the absence of class, gender or caste boundaries. It occurs when citizens of a country, both men and women, have equal freedoms, rights and status. Some of these rights include freedom of expression, equal access to social services and public goods, civil rights and freedom of autonomy.[22] Social equality requires a social policy that is based on justice, fairness and impartiality. If social equality is at play, individuals in a society have the same prospects and outcomes.[23]

19 G Ferrant, LM Pesando & K Nowawacka, 'Unpaid Care Work: The Missing Link in the Analysis of Gender Gaps in Labour Outcomes' (OECD Developmet Centre 2014) <https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf> accessed 7 October 2022. p. 3.

20 R. Eisler, *The Real Wealth of Nations: Creating a Caring Economics,* (Berrett-Koehler Publishers 2007). p.56.

21 Ibid. p. 57.

22 R Blackford, 'Genetic Enhancement and the Point of Social Equality'. Institute for Ethics and Emerging Technologies

23 United Way of the National Capital Area, 'What Is Social Equity? Definition & Examples' (*United Way NCA*) <https://unitedwaynca.org/blog/what-is-social-equity/> accessed 7 October 2022."plainCitation":"United Way of the National Capital Area, 'What Is Social Equity? Definition & Examples' (United Way NCA

Of great importance to feminist economics is the struggle to reduce or eliminate gender inequity.[24] As opposed to mainstream economists, feminist economists strive for equality of outcomes in occupations, incomes, assets, resources and generally in economic activities. A number of feminist economists argue that equality of outcomes and equality of opportunities are closely related because unequal power is a result of inequality in outcomes and in its turn unequal power leads to unequal opportunities. [25]

The inequalities found in the job market are fostered by the roles assigned to men and women and traditional assumptions made about men and women. Men in the job market are often paid more than women due to the assumption that women are dependent on men. Men are traditionally assumed to be the bread-winners, therefore, it is more likely to find a man being hired in a position that attracts promotions. Since women are assumed to be the secondary earners, they find themselves being assigned insecure jobs that attract low wages. In addition to this, women are disadvantaged by the lack of policies to address unpaid care-work and the caring responsibilities that women invariably shoulder. The time women spend on care activities does not allow them to compete in the job market at an equal footing

24 G Berik, S Seguino & Y Rodgers, 'Feminist Economics of Inequality, Development, and Growth' (2009) 15 Feminist Economics 1.considering various channels through which gender, growth, and development interact. It upholds the salience not only of equality in opportunities but also equality in outcomes. The contribution argues that inequalities based on gender, race, ethnicity, and class undermine the ability to provision and expand capabilities, and it examines the macroeconomic policies that are likely to promote broadly shared development. It explores how the macroeconomy acts as a structure of constraint in achieving gender equality and in turn how gender relations in areas like education and wage gaps can have macro-level impacts. Further, it underscores that the interaction of the macroeconomy and gender relations depends on the structure of the economy, the nature of job segregation, the particular measure of gender inequality, and a country's international relations. Finally, it outlines policies for promoting gender equality as both an intrinsic goal and a step toward improving well-being.","container-title":"Feminist Economics","DOI":"10.1080/13545700903093524","ISSN":"1354-5701","issue":"3","note":"publisher: Routledge\n_eprint: https://doi.org/10.1080/13545700903093524","page":"1-33","source":"Taylor and Francis+NEJM","title":"Feminist Economics of Inequality, Development, and Growth","volume":"15","author":[{"family":"G Berik, S Seguino & Y Rodgers","given":""}],"issued":{"date-parts":[["2009",7,1]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} p 5.

25 Ibid.considering various channels through which gender, growth, and development interact. It upholds the salience not only of equality in opportunities but also equality in outcomes. The contribution argues that inequalities based on gender, race, ethnicity, and class undermine the ability to provision and expand capabilities, and it examines the macroeconomic policies that are likely to promote broadly shared development. It explores how the macroeconomy acts as a structure of constraint in achieving gender equality and in turn how gender relations in areas like education and wage gaps can have macro-level impacts. Further, it underscores that the interaction of the macroeconomy and gender relations depends on the structure of the economy, the nature of job segregation, the particular measure of gender inequality, and a country's international relations. Finally, it outlines policies for promoting gender equality as both an intrinsic goal and a step toward improving well-being.","container-title":"Feminist Economics","DOI":"10.1080/13545700903093524","ISSN":"1354-5701","issue":"3","note":"publisher: Routledge\n_eprint: https://doi.org/10.1080/13545700903093524","page":"1-33","source":"Taylor and Francis+NEJM","title":"Feminist Economics of Inequality, Development, and Growth","volume":"15","author":[{"family":"G Berik, S Seguino & Y Rodgers","given":""}],"issued":{"date-parts":[["2009",7,1]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} p 5

with men. For this reason, encouraging market processes such as competition will not solve the problem of inequality in the job market.[26]

Gender wage gaps are seen in almost all occupations including the entertainment and sports industry where movie stars and famous professional sports women are expected to have a fighting chance due to their fame and popularity.[27] In 2020, women earned 84 per cent of what men earned. Based on this figure, it would take an extra 42 days of work for women to earn what men did in 2020.[28] If equality is to be achieved in the job market, policies must be put in place that will ensure that both men and women are given the same opportunities, equitable distribution of unpaid care-work responsibilities, the ability to combine paid and unpaid care-work and both genders are paid the same decent wages.[29]

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26 Ibid.considering various channels through which gender, growth, and development interact. It upholds the salience not only of equality in opportunities but also equality in outcomes. The contribution argues that inequalities based on gender, race, ethnicity, and class undermine the ability to provision and expand capabilities, and it examines the macroeconomic policies that are likely to promote broadly shared development. It explores how the macroeconomy acts as a structure of constraint in achieving gender equality and in turn how gender relations in areas like education and wage gaps can have macro-level impacts. Further, it underscores that the interaction of the macroeconomy and gender relations depends on the structure of the economy, the nature of job segregation, the particular measure of gender inequality, and a country's international relations. Finally, it outlines policies for promoting gender equality as both an intrinsic goal and a step toward improving well-being.","container-title":"Feminist Economics","DOI":"10.1080/13545700903093524","ISSN":"1354-5701","issue":"3","note":"publisher: Routledge\n_eprint: https://doi.org/10.1080/13545700903093524","page":"1-33","source":"Taylor and Francis+NEJM","title":"Feminist Economics of Inequality, Development, and Growth","volume":"15","author":[{"family":"G Berik, S Seguino & Y Rodgers","given":""}],"issued":{"date-parts":[["2009",7,1]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} p. 6

27 A Bailey, 'Venus Williams: The Pay Gap Is a Real Problem and We Have to Close It' <https://www.usatoday.com/story/sports/tennis/2022/03/17/venus-williams-pay-gap-real-problem-in-america/7050860001/> accessed 7 October 2022; M Smith, 'Jennifer Lawrence Slams Hollywood's Gender Pay Gap: "It Doesn't Matter How Much I Do"' (*CNBC*) <https://www.cnbc.com/2022/09/07/jennifer-lawrence-slams-hollywood-gender-pay-gap-in-vogue-interview.html> accessed 14 October 2022. According to Smith, On average, women earn about $1.1 million less than their male co-stars, according to 2017 research from three professors: Sofia Izquierdo Sanchez of the University of Huddersfield, Maria Navarro Paniagua of Lancaster University, and John S Heywood of the University of Wisconsin-Milwaukee. For actors over 50, that gap is even wider: Older actresses earned almost $4 million less than male actors. Other studies have noted that women of color are significantly underpaid compared to white women.

28 A Barroso & A Brown, 'Gender Pay Gap in U.S. Held Steady in 2020' (*Pew Research Center*) <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/>.

29 G Berik, S Seguino & Y Rodgers (n 25).considering various channels through which gender, growth, and development interact. It upholds the salience not only of equality in opportunities but also equality in outcomes. The contribution argues that inequalities based on gender, race, ethnicity, and class undermine the ability to provision and expand capabilities, and it examines the macroeconomic policies that are likely to promote broadly shared development. It explores how the macroeconomy acts as a structure of constraint in achieving gender equality and in turn how gender relations in areas like education and wage gaps can have macro-level impacts. Further, it underscores that the interaction of the macroeconomy and gender relations depends on the structure of the economy, the nature of job segregation, the particular measure of gender inequality, and a country's international relations. Finally, it outlines policies for promoting gender equality as both an intrinsic goal and a step toward improving well-being.","container-title":"Feminist Economics","DOI":"10.1080/13545700903093524","ISSN":"1354-5701","issue":"3","note":"publisher: Routledge\n_eprint: https://doi.org/10.1080/13545700903093524","page":"1-33","source":"Taylor and Francis+NEJM","title":"Feminist Economics of Inequality, Development, and Growth","volume":"15","author":[{"family":"G Berik, S Seguino & Y Rodgers","given":""}],"issued":{"date-parts":[["2009",7,1]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} p. 6.

Feminist economists opine that it is important for implementers of economic policies to integrate policies that stabilise the economy with policies that bring about gender equality.[30] The percentage of time spent on unpaid care-work by location, age and sex is one of the measures being monitored in the SDG Agenda (Indicator 5.4.1). It is obvious that the more time women spend on unpaid housework, the less time they will have to be engaged in paid work and therefore the less likely they will be able to improve their economic situation. This shows that research on gender related issues in economics is important. Traditional economic rationales that privilege male roles, traits and experiences over those that are stereotypically women's need to be dismantled. The work and economic activities that take place in the home can no longer be ignored. This work must be imbedded in theories of macroeconomics that are used to inform policy.[31]

D MATRIMONIAL PROPERTY

The MPA 2013 defines matrimonial property as the matrimonial home, household goods and effects in the matrimonial home and any movable or immovable property jointly owned and acquired during the marriage.[32] Due to the unpaid care work that women do, they are more vulnerable to economic hardships in the event of divorce.[33] Kenyan law on division of matrimonial property has traditionally favoured men because they are the ones who contribute monetarily. Although new gender-neutral family laws were passed in 2010[34] and 2013[35] women who contribute by way of unpaid care-work still find themselves disadvantaged mainly because section 2 of the MPA has not been quantified or interpreted.

Freyda Owino suggests that the substantive equality approach should be used in order to enable a woman who contributes non-monetarily to be given a fair share of matrimonial property.[36] The substantive equality approach argues that in a bid to enable the weaker party access justice, common standards of equality should be

30 MS Floro & J Willoughby (n 7). p 22.

31 Ibid. p 22

32 Matrimonial Property Act, 2013 (No. 49 if 2013), Kenya Gazette Supplement No. 183. Section 1.4. This section also indicates that Trust property, including property held in trust under customary law does not form part of matrimonial property.

33 MF Brinig & J Carbone, 'Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform' (1991) 65 Tulane Law Review <https://scholarship.law.nd.edu/law_faculty_scholarship/467>.p. 998.

34 The Constitution of Kenya, 2010.

35 Matrimonial Property Act, 2013, (No. 49 if 2013), Kenya Gazette Supplement No. 183.

36 F Owino, 'The Division of Matrimonial Property in Kenya: A Feminist Approach' <https://su-plus.strathmore.edu/handle/11071/5226> accessed 4 October 222AD."plainCitation":"F Owino, 'The Division of Matrimonial Property in Kenya: A Feminist Approach' <https://su-plus.strathmore.edu/handle/11071/5226> accessed 4 October 222AD.","noteIndex":40},"citationItems":[{"id":62,"uris":["http://zotero.org/users/2912159/items/766IVBGU"],"itemData":{"id":62,"type":"article-journal","abstract":"The concept of equality between men and women has spurred debates both nationally and internationally over the years. This has seen the enactment of international human rights instruments with anti-discriminatory provisions and more so, a convention entirely dedicated to protecting women against any form of discrimination, that is, Convention on the Elimination of all forms of Discrimination against Women (CEDAW p.54.

set aside. Courts should take into account the enormous input of homemakers who undertake such important tasks as taking care of the sick and the home, child birth, child care, cooking, laundry and the myriad of tasks required to make a comfortable home..[37] Courts should put into consideration that it is normal for a homemaker to be the first one to wake up and the last one to go to bed in a household. The fact that they do not contribute monetarily should not mean that they are left destitute after a divorce.

The concept of substantive equality is embraced in the South African approach to division of matrimonial property. Property is automatically considered to be communal and anything owned by spouses before the marriage and during the marriage is combined into a joint estate. In the absence of a nuptial agreement, matrimonial property is divided on a 50:50 basis upon divorce. As such, the contribution of any woman who has contributed by doing unpaid care-work is rewarded automatically with half the property.[38] In deciding division of matrimonial property, Kenya should borrow a leaf from South Africa and apply the substantive equality doctrine. In doing so, courts should consider the interests of justice and the specific circumstances of each case.[39]

IV A GENDER ANALYSIS OF MATRIMONIAL PROPERTY CASE LAW 2010 – 2022

Before the 2010 Constitution, one of the issues the court grappled with was whether to allow non-monetary contributions. In 1985 in *Kivuitu vs Kivuitu*[40], the court paved the way for a blanket acceptance of non-financial contribution, with a lengthy monologue from Justice Omolo[41] where he outlined the extensive private work

37 Ibid.a convention entirely dedicated to protecting women against any form of discrimination, that is, Convention on the Elimination of all forms of Discrimination against Women (CEDAW p. 54

38 Ibid.a convention entirely dedicated to protecting women against any form of discrimination, that is, Convention on the Elimination of all forms of Discrimination against Women (CEDAW p 53

39 A Smith, 'Equality Constitutional Adjudication in South Africa' (2014) Chapter 14 Vol 2 African Human Rights Law Journal 30 <http://www.saflii.org/za/journals/AHRLJ/2014/30.html> accessed 14 October 2022.

40 *Kivuitu vs Kivuitu* [1985] LLR 141 (CAK).

41 In the words of Omolo J. 'What about the ordinary housewife in Nairobi…..she remains in the home…….generally keeping the house going. She ensures that the children are in a position to go to school in clean uniforms and that the husband also goes to work in clean clothes and attends to matters which enhance the welfare of the family. True, the money to do all this is often provided by the husband, but can it be said that such a woman is making no contribution to the family welfare and its assets?.....or where the wife is left in the rural home tilling the land and generally keeping such home going….for my part, I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of the property even though that acquisition cannot be quantified in monetary terms. In the case of the urban wife, if she were not to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him…..... In the case of the wife left in the rural home, she makes even a bigger contribution to the family by….producing either cash or food crops……Even if I had been of the view that the wife had contributed no money at all towards the purchase of the home, I would have gone on to asses her non-monetary contribution as a wife and put a value upon that…….. it would be extremely cruel to the wife and to the other women in her position that they can only have a share in property acquired during marriage if they can prove financial contribution.

done by women in Kenya both in urban and rural areas. Justice Omolo highlighted the invaluable contribution of women who do unpaid care-work and insisted that this contribution must be put into consideration.

However, in 1997 in *Kimani vs Kimani*[42], the extensive private work done by the woman during a difficult sixteen-year marriage was of absolutely no consequence when the property was divided. The court did the exact opposite in the same year in the *Nderitu*[43] case. Justice Omolo's obiter dictum in the *Kivuitu* case, now became the ratio decidendi and the woman received 50% of the property based purely on her non-monetary contribution. Shortly after this in 1998, the court once again changed its tune and rejected non-monetary contribution in the case of *Kamore vs Kamore*[44]. This fragmented and confusing jurisprudence continued in this same trend until the landmark case of *Echaria vs Echaria*[45] where the court ardently declared that non-monetary contribution was not contribution. In this very important judgement, the court held that;

> …… it is our respectful view that both Omolo Ag. JA[46] and Kwach JA[47], though undoubtedly guided by a noble notion of justice to the wife were ahead of the Parliament when they said that the wife's non-monetary contributions have to be taken into account and a value put on them.[48]

This decision greatly disadvantaged women but brought some clarity and uniformity for a short while. This was to change again in 2010 when the Constitution was promulgated. The analysis in this section shall start at 2010. The cases in this section have been divided into three categories. The first category elucidates cases where the court divided matrimonial property equally between the spouses using the argument that Article 45(3) of the Constitution demands for equality between men and women even after a marriage has ended, which to the court meant that matrimonial property was to be shared in half. This category has been named 'The Equality Jurisprudence'. The second category of cases are decisions where the court argues that Article 45(3) of the constitution did not mandate division of property on a 50:50 basis. In these cases, property was divided according to the contribution of the spouses. This category has been named 'The Contribution Jurisprudence'. The third category of cases consists of instances where the court took into consideration the non-monetary contribution of women but invariably undervalued this contribution. This category has been named 'The On-The-Fence Jurisprudence'.

42 *Kimani vs Kimani* [1997] LLR 553.
43 *Nderitu v Nderitu* Civil Appeal No 203 1977.
44 *Kamore vs Kamore* [1998] LLR 714.
45 *Echaria vs Echaria* Civil Appeal 75 of 2001 (2007) EKLR (CA) (KENYA).
46 *Kivuitu vs Kivuitu* (n 40).
47 *Nderitu v Nderitu* (n 43).
48 Ibid.p. 26

A THE EQUALITY JURISPRUDENCE

In the cases under this school of thought, property was divided on a 50:50 basis. The judges who developed this school of thought were of the opinion that article 45(3) of the Constitution decrees that at the time of divorce, property should be divided equally. The positive outcome of this jurisdiction is that women who contribute non-monetarily get a fair share of matrimonial property. The negative consequence of this jurisprudence is that a spouse who is a gold-digger can get away with property that they do not deserve. This has caused the judges who allude to the contribution jurisprudence to reject the equality jurisprudence

i) Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes Civil Appeal No 127 of 2011.

This was the first case on the division of matrimonial property where judgment was passed after the 2010 Constitution. The court applied Article 45 (3) of the Constitution and interpreted it to mean that property should be divided on a 50:50 basis**.** The appellate court remarked thus of Article 45 (3):

> This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends

This case is important because it demonstrated the courts' interpretation of Article 45 (3). According to the court, the Article meant that property would be shared in half, thus making the spouses equal after the dissolution of marriage. This case applied the doctrine of substantive equality as expounded in the third section of this paper. The interpretation of Article 45 (3) in this cases did not result in the woman being treated differently from the man.

ii) ZWN vs PNN [2012] eKLR.

The disputants married each other on the 16th of December 1961. The marriage ended in 1987 when the husband left their marital home. They acquired many properties in various parts of the country during the course of the marriage. Among them was a 20 acres farm in Nyahururu (Tumaini Farm) where the wife resided , two acres in Bahati with houses for rental income and a house in Donholm. All the properties were in the name of the husband.

The wife contended that all the properties were acquired and developed through joint efforts. She claimed that she contributed by running the farm whose proceeds were used to buy the other properties. Her husband's salary was also used to partly pay for the properties. She claimed that despite her substantial direct and indirect contributions to the purchase of the properties, she consented to have the properties

registered in the sole name of her husband in good faith and trust. She claimed a fifty percent share of the properties due to her direct, indirect and non-monetary contributions. The husband contended that the wife did not contribute anything to the purchase of the properties. His claim was that her teacher's salary was too little to have contributed to the purchase of the valuable properties in question. The court divided the property 50:50 on the premise of fairness and justice as guided by Article 45(3)

This case confirmed the courts resolution to divide property 50:50 in the wake of Article 45 (3). The decision was a mirror of the court's decision in the *Agnes Nanjala* case. In this case the application of the equality principles in Article 45(3) did not bring about a disparate impact on the man vis-à-vis the woman. The contribution of both of them was put into consideration and the outcome was fair.

iii) J.O.A vs. N.A [2013] eKLR.

The disputants were married on 11th August 1979. The plaintiff sought judicial separation in 2006. During the course of the marriage, the couple acquired five properties all of which were in the husband's sole name. The wife wanted the court to declare that the properties were to be shared equally. The defendant claimed that the plaintiff's salary was negligible and could not have allowed her to make any contributions towards the purchase of the properties and therefore she deserved no share in the same. The plaintiff's contention was that at one time, the defendant was laid off from work and during this time she took care of all the family expenses including offsetting the loans used to purchase some of the properties.

The court also applied Article 45 (3) of the Constitution and held that:-

> There is no doubt that the way to go is towards the principle that matrimonial property should be shared on a 50:50 basis. This will be in furtherance of the principles of the Kenyan Constitution and the Intentional treaties and conventions which have been ratified in Kenya.

The court held that the wife had demonstrated that she had contributed directly, indirectly and non-financially towards the acquisition of the properties in question and she deserved fifty percent of the properties. Obaga J explained further that:-

> It has been held that a spouses contribution need not be only financial. It can even be in the form of giving the other a peaceful time as he acquires the property e.g by taking care of the children of the marriage, taking care of the home or even improving the property.

In this case the contributions of both spouses were put into consideration and the application of Article 45(3) of the Constitution placed both the woman and the man on the same footing.

These three cases that were heard after the promulgation of the constitution but before the MPA demonstrate the fragmentation of jurisprudence on division of matrimonial property. The decisions are a complete departure from the stand the court took in the 2007 *Echaria* case where the court declared that non-monetary contributions was irrelevant.

B THE CONTRIBUTION JURISPRUDENCE

This school of thought divides property according to the contribution of each party and hence its name. The judges who ascribe to this school of thought completely reject the equality jurisprudence. They claim that dividing property 50:50 will 'convert otherwise honest people into gold-digging, sponsor- seeking, pleasure-loving and divorce-hoping brides and, alas, grooms'[49]. The positive aspect about this jurisdiction is that spouses actually have to prove their contribution and therefore gold-diggers will not succeed. However, the difficulty with this school of thought comes in when non-momentary contribution is being weighed. As there is no guide on its quantification, homemakers may find themselves short changed especially if the judge does not appreciate the value of non-financial contribution.

i) UMM v IMM [2014] eKLR.

I and U got married in 1990. The marriage was dissolved after 17years. When she got married, U was 18 years old. She did not bring any money into the marriage but she joined her husband in an ongoing auto spares business. From the proceeds of the business U and I bought four properties. U moved to court praying for a division of the properties acquired during the marriage in a 50:50 basis in accordance with the ruling of the court in the *Agnes Nanjala* case.

In this case, which was the first case heard after the MPA of 2013, the court applied section 7 of the MPA and overruled the decision in the *Agnes Nanjala* case. It rejected the idea that the word 'equality' in Article 45(3) means dividing the property 50:50. The words of Tuiyott J illustrate the views of the court.

> I take the view that at the dissolution for the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. *The bigger the contribution, the bigger the entitlement.*'

The court held that the wife was not entitled to a share in the properties in which she had not made any form of contribution.

In making its decision, the court considered that I had testified that during the marriage, U was a hardworking wife who acted as a manager for the businesses they run. This was enough for the court to hold that U made significant non-monetary

49 *Peter Njuguna Njoroge v Zipporah Wangui Njuguna (PNN vs ZWN)* [2017] eKLR. p. 17 as per Kiage J.

contributions to some of the properties that she and I acquired during the marriage. This afforded her a beneficial interest in the said properties. U was however unable to bring sufficient evidence to prove her claim of monetary contribution in the acquisition of two other properties. The court, therefore concluded that she was not entitled to any share of the said properties.

In this case the application of section 7 of the MPA which is what the court based its decision on, affected the man and the woman differently. It was very easy for I to prove his financial contributions and as such, I was awarded a share of all the properties in the suit. The situation was different for U. Proving non-financial contribution is extremely difficult. Women do not keep a daily log of their daily unpaid care activities. For this reason, U was unable to prove her contribution to some of the properties and she was therefore not awarded a share in the said properties. It is important to note that the judge in this case was a man. It is therefore likely that his gender influenced his decision which negatively impacted the woman and drastically changed cause from the three decisions discussed under the equality jurisprudence.

Unlike the *Agnes Nanjala, ZWN vs PNN* and *JOA vs NA* cases, where property was automatically divided on a 50:50 basis, the decision in this case, went back to the reasoning in the *Echaria* case where only monetary contribution mattered. This case illustrates that jurisprudence on division of matrimonial property in Kenya is fragmented and very confusing.

ii) *Peter Njuguna Njoroge v Zipporah Wangui Njuguna (PNN vs ZWN)* [2017] eKLR

This was an appeal from the earlier cited case of *ZWN vs PNN*. In the High Court, the court had interpreted Article 45(3) to mean that property should be divided on a 50:50 basis. Interestingly, on appeal the court rejected this interpretation of Article 45(3) but still concluded that the property should be divided equally after meticulously reviewing evidence of the woman's non-monetary contributions. In making its decision the court disagreed with previous decisions[50] that had written off the case of *Echaria*. One could even say that the court 'resuscitated' *Echaria* and embraced it. However, the court made it clear that although Echaria demanded for monetary contribution, non-monetary contribution was now important owing to the MPA 2013.

This case is also a perfect illustration of the divergent decisions of the courts while trying to interpret Article 45 (3) in the wake of the MPA of 2013. The same case[51] was heard in the High Court and decided before the MPA of 2013 but after the promulgation of the 2010 Constitution. As mentioned above, in the High Court, the property was divided on a 50:50 basis in accordance with Article 45 (3) and on the

50 Including the decision of the High Court in this same case.
51 *ZWN vs PNN* [2012] eKLR.

exulted mantel of fairness and justice. However, in the Court of Appeal the same facts and the same parties encountered a completely transformed court because the MPA had been enacted**.** The court saw it fit to securely and forcefully hammer the nails needed to seal the coffin of an automatic division of matrimonial property on a 50:50 basis guided by Article 45 (3). As Kiage JA wrote in his judgement;

> ……..from a practical stand-point and from the statute law now ruling,….. neither the Constitution nor general law imposes, compels….the doctrine or 50:50 sharing or division of matrimonial property.

Despite this reasoning, the Court of Appeal still divided the property 50:50, based on Section 7 of the MPA. Basically, upon appeal, the court reached the exact same conclusion as the court of first instance but with a completely different *ratio decidendi.* It is as if the court did a 360-degree turn between *ZWN vs PNN* and *PNN vs ZWN* ending up at the same position. In applying section 7, the court closely examined the contribution of the woman. Such an examination was not carried out regarding the man's contribution. It is interesting to note that all the three judges of the Court of Appeal who made this decision were men. Hence it is not true to say that whenever a male judge considers the non-monetary contribution of a woman she will find herself short changed.

iii) *ACV vs JAC* [2017] eKLR

The case involved a wife, the applicant, who worked in the family business for thirteen years. The business was the incubator from which the couple acquired several other properties. The properties were divided on a 50:50 basis owing to the wife's direct and indirect contributions. In making this decision the court relied on the principles of equality as entrenched by Article 45 (3) and sections 2 and 4[52] of the MPA 2013. However, the court did not follow the automatic 50:50 division. It relied heavily on the fact that the applicant contributed directly and indirectly by working in the family business evidenced by a monthly salary.

This case illustrates that despite the courts shying away from a 50:50 division of property, after the passing of the MPA, there is still a willingness to rely on the equality of spouses buttressed by section 4 of the MPA, and divide the property into equal shares, where an applicant was able to prove direct or indirect monetary contribution. The court focused on direct and indirect contributions and did not put any attention to non-financial contributions. This is despite the fact that the wife was able to prove that she worked for many years in a family business. This is one of the ways a spouse can contribute non-monetarily as stipulated under section 2 of the MPA. The court shied away from engaging with this section of the Act. Could this be because it is difficult to apply the parameters in section 2 without quantification in place? The author believes so.

52 Matrimonial Property Act, 2013, (No. 49 if 2013), Kenya Gazette Supplement No. 183.

In the case, the court once again ignored the non-monetary contribution of the woman. She contributed non-financially by working in a family business for 13 years. This significant contribution may have increased the percentage of property she got had it been considered. Men do not suffer from this disadvantage as they generally do not contribute non-monetarily.

iv) *AKM vs NNN* [2019] eKLR

The plaintiff claimed that she contributed towards the acquisition of the properties acquired during the marriage by taking loans in her name to purchase the said properties. The defendant claimed that he procured all the properties acquired during the marriage through his own means without any assistance from his former wife. The court held that despite the fact that the plaintiff did not have convincing evidence of her contribution, the fact that she was married to the defendant for 27 years indicates that she must have made significant contributions in particular to the actual construction and maintenance of the matrimonial home.

The court applied its discretion and awarded the plaintiff Kshs 1.5 million, which was considered to be enough to cover her monetary and non-monetary contributions to the construction and maintenance of the matrimonial home. In addition to this, the court awarded the wife 50% of one of the properties attained during the marriage. The 50:50 division was arrived at due to the fact that both parties had contradicting accounts about the procurement of the said property.

In its decision, the court relied on Article 45(3) of the Constitution but was categorical that that article did not mean that property was to be divided on a 50:50 basis. The court read the article to mean that the rights of the spouses were to be applied equally and fairly. The court also quoted Section 7 of the MPA. The application of principles of fairness and equality in this case ensured that the outcome for the woman and the man was not different.

This decision rubber stamps the courts stand post the MPA and again illustrates the inconsistency of the court's decisions on division of matrimonial property. The automatic 50:50 division of matrimonial property that was the order of the day between the promulgation of the new constitution and the advent of the Matrimonial Property Act 2013, was long gone. The court was focused on section 7 of the MPA and the key question before property was divided was, *what did the applicant contribute?*. Hence the contribution jurisprudence.

B THE ON-THE-FENCE JURISPRUDENCE

The proponents of this school of thought undervalue non-monetary contribution. Although they recognize it as contribution, they are subscribers to neo-liberal conceptions of work and therefore value the financial contributions of men much higher than the non-financial contributions of women. The upside to this jurisprudence is that, it recognises non-monetary contribution as contribution.

Non-financial contribution is not completely ignored. The down side is that non-monetary contribution is undervalued. As such women who contribute by way of unpaid care work are not properly rewarded. This jurisprudence gets its name from the fact that although it recognizes non-financial contribution as contribution, it does not fully commit to the cause of recognising the value of unpaid-care work because it does not recognise the true weight and worth of this work, hence it is on the fence.

i) *F.S vs E.Z* [2016] eKLR

The parties were married for 10 years. The woman was the applicant seeking a 50:50 division of property, while the man was the respondent. The woman contributed non-monetarily by managing properties and providing companionship. The court rejected the argument that Art 45(3) called for a 50:50 division of property. After acknowledging that there was no guide for judges on how exactly to apportion matrimonial property in the event of non-financial contribution[53], the court declared that the man deserved a bigger share because the woman did not contribute monetarily. Using this reasoning the court divided the property in the ratio of 55.4 : 44.6. Here we see the court applying neo-liberal conceptions of work that produce a disparate impact on the woman as compared to the man. By valuing the public work of the man over the private work of the woman, the court disadvantaged the woman and did not perpetuate equality as proclaimed by the Constitution.

This case indicates that in each case involving the division of matrimonial property, property can be divided by the court differently depending entirely on the circumstances of each case and what the court deems fair. This in turn leads to fragmented judgments because what is fair to one judge may not be fair to another judge. There is a need to quantify the parameters outlined in Section 2 of the MPA so that judges do not guess figures every time matrimonial property needs to be divided.

ii) *MAA vs AR* [2018] eKLR

This case involved a wife, who was the plaintiff, who had contributed non-monetarily by taking care of her ailing mother–in-law for 10 years, taking care of her children and step-children despite a very rocky relationship with her husband. The wife got married when she was 14years old and the couple was married for 35 years before they were divorced. The couple lived together for only nine out of these 35 years as the husband moved from their home in Marsabit to Mombasa, where he lived with another woman.

53 According to Chitembwe J, 'The distribution herein is based on the applicant's non-monetary contribution on the one part and the financial contribution of the respondent on the other. The task of distributing matrimonial property is based on judicial discretion and what the trial court would consider to be just in each particular case. Unlike disputes involving award of damages where there are precedents to guide the court, disputes relating to distribution of matrimonial properties are unique in the sense that at times it is difficult to determine the level of contribution of each party. Spouses would usually not keep records of individual contribution wherever acquiring properties during their happy lives.' p 6-7.

The dispute involved two properties. One was known as Plot No. 11 and the other was known as Plot No. 37. Plot No. 11 was the matrimonial home where the plaintiff, her co-wife and the defendant's mother lived. Plot No. 37, had 11 rental houses. During the defendant's extended absence, the plaintiff collected the rent and used the money to feed the family, buy diapers for her mother-in-law and pay school fees. The plaintiff also used the proceeds from the rent to develop Plot No 37.

The court held that Plot No. 11 was not matrimonial property because it was property that was subject to succession. Although the plaintiff had lived in it for 37 years, she was not entitled to a claim on the plot because the defendant had not acquired any interest in it. The court, however, declared that Plot No 37 was matrimonial property because the defendant acquired it during the marriage and it was clear that the plaintiff had contributed to it by improving it.[54]

In making the decision that plot No 11 was not matrimonial property the court relied on section 35(1) and (2) of the Succession Act. This section decrees that if a spouse dies intestate the surviving spouse shall be entitled to a life interest in the whole residue of the net intestate estate. The section also indicates that the surviving spouse shall have the power to bequeath any part of the estate to the children of the deceased. This section negatively impacts women because if a woman finds herself living in her father-in-law's house as the plaintiff did for 37 years, the only way she can get title to the house is if her father-in-law or her mother-in-law transfers ownership to her husband, thereby, giving her a proprietary interest.

The court then delved into the question of what ratio of Plot No 37 the plaintiff deserved. The court once again, expressed the difficulty of quantifying Section 2 of the MPA;

> There is no formula for distribution of matrimonial property. What the court should consider is the contribution by the parties towards the property which is the subject of distribution. Where the financial contribution of each party is known, it becomes easy for the court to distribute the property in line with Section 7 of the Matrimonial Property Act. However, where the contribution is non-monetary, the situation becomes difficult. The court has to *estimate* (emphasis added) the efforts by the spouse who did not make any financial contribution and give it a value.[55]

After commending the plaintiff for her selfless care work, the court proceeded to award her only 30% of Plot No 37. The court did not explain how it arrived at the

54 In making this decision the court relied on Section 9 of the MPA which states that; '....where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.'

55 *MAA vs AR* (n 1).

figure of 30 per cent. In this case both parties had not contributed monetarily. The contribution of the plaintiff was clear to the court. She had been the focal point of the family. In addition to all this, the plaintiff had made significant improvements to Plot No. 37. This plot originally belonged to the defendant's father. Upon his death it was passed on to his wife who later gave it to her son, the defendant. The defendant had, therefore not made any contribution whatsoever to the plot.

This case is yet another illustration of the fact that the court regards monetary contribution to be more valuable than non-monetary contribution. Why should the plaintiff not have at least 50%? The defendant did not lift a finger in either the plot's acquisition or its development. The court put the contribution of the plaintiff to close scrutiny before awarding her 30% of the property. The courts declared that the plaintiff deserved a share of the matrimonial property because 'the plaintiff has lived with the defendant for a longer period than the other wives. Although the property was acquired in 2012, it is only the Plaintiff who has dealt with the property among the defendant's wives'[56]. Her contribution was the reason why she was awarded 30%. The man's contribution or lack thereof was not considered whatsoever. Accordingly, it seems that a woman must prove her contribution but not a man. It is interesting to note that in this case, the judge was a man. Would the decision have been different if the judge were a woman?

This is yet another case that illustrates the fragmentation of the decisions made by the courts involving division of matrimonial property. Section 2 of the MPA needs to be quantified so that courts are not forced to estimate in what ratios property will be divided. The problem of courts coming up with fragmented decisions due to having to estimate ratios in which to divide property, can only be brought to an end by the quantification and interpretation of the six factors of non-monetary contribution as elucidated by section 2 of the MPA. Another reason why guidelines are needed in weighing non-monetary contribution is because it is unfair for a woman to toil with unpaid care-work for years and then be awarded a share of matrimonial property by way of an estimate as happened in this case.

iii) GKO vs HOO [2018] eKLR

The Plaintiff filed this suit claiming that two pieces of land, one of which held the matrimonial home, were matrimonial property and should be divided equally between herself and the defendant. The plaintiff testified to having taken a loan from her parents to contribute to the purchasing of the land where the matrimonial home stood. She also claimed to have assisted in developing rental houses on the land.

The court applied section 14 (a) and section 2 of the MPA and found that the wife had made considerable non-financial contributions towards the acquisition of the

56 Ibid. p. 10.

land and proceeded to award her a 40% share in the matrimonial property. The court held that the fact that the defendant claimed that the plaintiff was abusive and disrespectful towards him, did not subtract from the fact that for the better part of a decade they lived as husband and wife and she bore him seven children. During this time, she took care of the home and the children, which allowed him peace of mind and time to work and come up with the money to improve the property. Her abusive nature did not therefore disentitle her from her rightful claim on the matrimonial property. The court went on to say that a spouse's contribution vested a right which could not be wished away. As such the land and the matrimonial home was to be divided on a 60:40 basis.

This case illustrates the courts' erratic pronouncement of figures and percentages and the fragmented nature of the jurisprudence on division of matrimonial property. There is no explanation as to where the court derived the 40% share. The absence of guidelines on how to weigh non-monetary contribution combined with the courts undervaluation of non-monetary contribution produced an outcome in this case that favoured the man and disadvantaged the woman. This case is an indication of the urgent need for a study on the ways in which section 2 of the MPA can be quantified so that the court does not engage in guessing games that produce conflicting and confusing decisions which mostly favour the man.

iv) *RNM v FM* [2022] eKLR

The applicant and the respondent got married in 1988 and lived together until the marriage was dissolved in 2018. The applicant stated that she was involved in the acquisition of the suit property, their matrimonial home, through the identification of the property, attendance of site meetings and approval of designs and drawings for the construction of the residential house. She further made non-monetary contributions by providing encouragement and support for the respondent and taking up the responsibility of shopping, cooking, planning meals and general maintenance of the home. The respondent denied that the applicant was entitled to 50% of the property since he single-handedly identified and purchased the suit property. He further denied that the applicant had made any non-monetary contribution towards the acquisition of the property.

The Court found that as both parties conceded that in the beginning their marriage was harmonious, the applicant in her capacity as a wife must have participated in the acquisition, building and furnishing of the matrimonial home. The applicant was also in full time employment and must have made monetary contributions to the upkeep and maintenance of the family home. Further, the applicant, as the wife, had the responsibility of managing and supervising the domestic workers and this would not have been a task that the respondent would have done as he held down a full-time job. The applicant further attended the site visits for the construction of their home and went on to provide companionship and peace of mind which enabled the respondent to have the capacity to finance the acquisition of the property. The

Court stated that such non-monetary contribution, though not quantifiable, had to be given recognition. The Court found that the applicant was entitled to 30% share in the suit property.

Once again this case illustrates the disparities in the jurisprudence on division of matrimonial property. It also shows, once again, that judges will often value productive work done by men higher than the reproductive work done by women. In this case both the woman and man were in full time employment. The man contributed monetarily and the woman contributed both monetary and non-monetarily. Despite this, the woman received a lower percentage of matrimonial property than the man. Although the different contributions of the man and woman were put into consideration by the court the non-monetary contribution of the woman was not as valuable as the contribution of the man in the eyes of the court. Due to this neo-liberal view of work, the woman and the man were not treated equally. This court was '*on-the-fence*' as far as non-monetary contribution was concerned.

C CONCLUSION

This paper has illustrated that although Article 45(3) of the Constitution indicates that parties to a marriage are equal before, during and after marriage, division of matrimonial property does not perpetuate equality between men and women because it favours monetary contribution over non-monetary contribution. The paper has also illustrated that this jurisprudence is fragmented.

Between 2010 and 2013, The court took on the view that Article 45(3) of the Constitution means that property is to be divided equally and hence began the happy but short-lived period where property was divided strictly on a 50:50 basis. Any case the court decided during this short period, ended up with the parties each getting half the property. This exultant state of affairs was cut short when the MPA was passed. The court decided to ignore its earlier stand and clutched onto Section 7 of the MPA . This meant that division of matrimonial property now depended entirely on contribution.

Despite the fact that the Constitution of Kenya provides for equality at the dissolution of a marriage and that legislation further provides that spouses can contribute non-monetarily, nevertheless, the case law on matrimonial property jurisprudence indicates that where a spouse contributes non-monetarily the weight of her contribution is not equal to the weight of the spouse who contributes monetarily. As a result, this discrepancy between the valuation of monetary contribution and non-monetary contribution brings about inequality between men and women.

This paper has made four main arguments. The first argument is that matrimonial property law continues to be premised on neo-liberal conceptions of work which privilege public work done for financial gain over private work which is done at

home and is unpaid. The second argument is that by privileging productive work done by men over reproductive work done by women, matrimonial property law as practiced by the Kenyan courts fails to reflect the spirit of the Constitution which decrees social equality between men and women. The third argument is that the reason for the discrepancies in the case law is that non-financial contribution, as outlined by Section 2 of the MPA, 2013 has not been interpreted nor quantified. The fourth argument is that as a result of these discrepancies three schools of thought have emerged from the jurisprudence. These schools have been named; The Equality Jurisprudence, The Contribution Jurisprudence and The On-The-Fence Jurisprudence.

A REVIEW OF MITU-BELL WELFARE SOCIETY V KENYA AIRPORTS AUTHORITY; INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) [2019] EKLR

Rodgers Garvin*

I INTRODUCTION

Realisation of socio-economic rights requires innovative remedies to the violations of the rights. The Supreme Court of Kenya by recognising structural interdicts as remedies restores hope to many poor Kenyans, and ensures that judgements in socio-economic cases are not rendered in futility. Post-judgement supervision is a way of enforcing socio-economic rights. While the Supreme Court's recognition of structural interdicts reaffirms the fact that structural interdicts offer more fundamentally fair outcomes in socio-economic cases, the court's distinction between public land and private land is illogical within the context of equal tenure rights the Constitution provides; squatters should receive equal protection regardless of the land they are living on.

This review is divided into three main parts: the introduction section that contains facts of the case, the procedural history of the case, and the holding made by the Supreme Court; the analysis section that focuses on dissecting the court's decision and determining its implication; and finally, the conclusion section that reiterates the papers main arguments.

II BRIEF FACTS OF THE CASE

The case at the Supreme Court arose out of a petition lodged by Mitu Bell Welfare Society on behalf of the Mitumba Village members on 21st September 2011 against Kenya Airports Authority. Mitumba village is situated on Plot Number 209/12908 near Wilson airport; a plot that Kenya Airports Authority claimed to own. The Kenya Airports Authority on 15th September 2011 had issued a notice requiring the members of Mitumba Village to vacate the land on which they were staying. Mitu-Bell Welfare Society approached the High Court, arguing that the seven days' notice was insufficient. Despite the court granting an interim order in favour of Mitubell, Kenya Airports Authority went ahead and demolished buildings housing the Mitumba village members. Household goods were destroyed during the process. After the demolition the court allowed Mitu-Bell to amend the petition to include prayers to the effect that the demolition and the resulting destruction of property were unconstitutional.

III PROCEDURAL HISTORY

At the High Court, the issues for determination were whether the Mitumba Village members had any rights over the property, whether the demolition violated constitutional provisions and the reliefs that the court could avail to the villagers. The High Court ruled in favour of Mitu-Bell Welfare Society asserting that the demolition violated the constitutional rights of the members of Mitu-Bell Village.[1]

Aggrieved by the decision, Kenya Airports Authority approached the Court of Appeal, challenging the entire judgmentss and decree. The Court of Appeal found that the High Court erred by reserving to itself some matters to be handled after judgements, rendering continuing partial or interim judgement which is not part of Kenyan law, issuing orders on unpled issues, and giving itself supervisory roles. The Court of Appeal also argued that international law did cover the issue as the Constitution and other local legislations covered the issue. Finally, the Court of Appeal was of the opinion that socio-economic rights are progressively realized and, therefore, unenforceable and that it's not the work of the court to distribute private property.

Aggrieved by the Court of Appeal decision, Mitu-Bell Welfare Society sought certification for an appeal at the Supreme Court on 11th August 2016 on the ground that the appeal raised issues of general public importance under Article 163(4) (b) of the Constitution. Through a ruling delivered on 2nd February 2018, the Court of Appeal certified the matter, thereby, allowing Mitu-Bell Welfare Society to appeal to the Supreme Court.

IV ISSUES FOR DETERMINATION

At the Supreme Court, the issues identified for determination included; place of structural interdicts (if any) as forms of relief in human rights litigation under the Constitution, the effect of Article 2 (5) and 2 (6) of the Constitution regarding the applicability of international law in general, international human rights in particular and extent to which the Guidelines by UN bodies are relevant in the interpretation and application of socio-economic rights by Kenyan Courts.

V HOLDING

On the first issue on structural interdicts, the court relied on the provisions of Article 23 of the Constitution to determine the scope of remedies under the laws of the country. The court argued that Article 23(3) as read together with Article 165 (3) (d) of the Constitution allows the courts to grant appropriate relief, including the structural interdicts. Citing the case of *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others*, the court argued that precedents confirm

1 Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) [2019] eKLR.

structural interdicts' inclusion in the Constitution.[2] On whether international law applies to Kenya, the court ruled that international laws apply to Kenya and that it was in order for the High Court to refer to the Guidelines by UN bodies to fill the lacunas in Kenyan laws.

VI LEGAL ANALYSIS

A RIGHT TO HOUSING

The right to housing is provided for under Article 43 of the 2010 Constitution. The court noted that the right to housing is founded on a person's ability to own a piece of land. As such, any person, who does not have a valid title under the land laws in Kenya cannot enjoy the right to housing. Therefore, illegal occupants of private land cannot enjoy any rights associated with the land even when they are faced with eviction. But, the land in question in the case was public land; therefore, it belongs to the people of Kenya collectively. The court asserted that Kenyans have an interest in public land, "however indescribable, however unrecognisable, or however transient, the interest in public land may be."[3] Through the above argument, the Supreme Court of Kenya promoted a radical opinion that despite being landless, the fact that the land was a public land entitles the members of Mitumba village to an interest in the land.[4] Basing its arguments on the democratic principles that all the land belongs to the people of Kenya and that each Kenyan is entitled to equitable access to land, the court is then promoting the idea that despite landless people not having rights over public land, they have interests in the public land that the courts must protect.

The court's argument that there is a principle that states that all the land belongs to the people by virtue of Kenya being democracy create a problem of unattainability. If all the land belongs to the people, the classification of public and private land is not sustainable. The court reached the correct decision in the case by propagating the wrong argument. If indeed there exists a democratic principle to the effect that all land belongs to the people, then it is only prudent that it applies to both the public and private land. As such, the reliefs that the court granted, in this case, would also apply to private land.[5] The court should have addressed how to realize right to housing for squatters in both private and public lands.

2 Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR.
3 Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) [2019] eKLR.
4 Gautam Bhatia, 'Notes from a Foreign Field: The Kenyan Supreme Court on Housing, Evictions, and the Right to Land' (*Indian Constitutional Law and Philosophy*, 14 January 2021) <https://indconlawphil.wordpress.com/2021/01/14/notes-from-a-foreign-field-the-kenyan-supreme-court-on-housing-evictions-and-the-right-to-land/> accessed 4 February 2021.
5 ibid.

B STRUCTURAL INTERDICTS

The court is to be lauded for ruling that structural interdicts form part of the remedies that the courts may grant. It is not enough for a court to declare violation of socio-economic rights, then leave the issue to government officials to make it right. Through the operationalization of structural interdicts, the Supreme Court was able to ensure that there is a meaningful engagement between the landless people and the group carrying out the eviction. It is worth noting that despite the Court of Appeal's assertion that structural interdicts are not allowed by Kenyan laws, cases such *as Moi University v Council of Legal Education & another* indicate otherwise.[6] By recognising the place of structural interdicts in Kenyan laws, the Supreme Court reinforced the idea that embracing structural interdicts is the way to enforce socio-economic rights without infringing on the doctrine of separation of powers. [7]

It is worth noting that the court's supervisory role is not to be regarded as a breach of the separation of powers concept, but should be considered as a collaboration between the judiciary and other arms of the government. Structural interdicts remedy violation of rights without plunging the judiciary into the field of policymaking.[8] The court uses structural interdicts to supervise the constitutionality of government actions.

C APPLICATION OF INTERNATIONAL LAW

The Supreme Court made the wrong assertion by reaching a conclusion that "the expression "shall form part of the law of Kenya" as used in the Article does not transform Kenya from a dualist to a monist State as understood in international discourse." The assertion has no basis and indicates a glaring misunderstanding of the application of the international laws in Kenya within the context of Article 2(5) and (6) of the Constitution of Kenya, 2010. Article 2(6) of the Constitution provides that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under

this Constitution" means that upon ratification, the international laws atomically become part of Kenya's law.[9] The Constitution and Treaty Ratification Act, which are the principal legislation on the application of international laws in Kenya, do not require the domestication of the international laws. The approval by the parliament does not amount to domestication. As such, by application of Article 2(5) and (6),

6 Moi University v Council of Legal Education & another [2016] eKLR

7 Andrew Barney Khakula, 'Embracing Structural Interdicts in the Enforcement of Socio-Economic Rights in Kenya: Analysis of the Court of Appeal Decision in the Mitubell Case'; Cephas Doc, 'The Case for Structural Interdicts in the Protection and Fulfillment of Socio-Economic Rights in Kenya' <https://su-plus.strathmore.edu/handle/11071/6203> accessed 4 February 2021.

8 Joshua Malidzo Nyawa, 'The Role of Courts in Forging Innovative Remedies: Interrogating Kenyan Court of Appeal's Mitu Bell Judicial Myth and Formalism' [2019] Available at SSRN 3442478; Khakula (n 7).

9 Mathenge, 'Not yet Uhuru: The Supreme Court's Heresy in Mitu-Bell Welfare Society v Kenya Airports Authority and 2 Others, SC Petition 3 of 2018' [2021] The Platform.

Kenya is a monist State. The court's argument that argument whether a country is a monist or dualist, is becoming sterile because modern treaties are non-self-executing does not excuse its misguided conclusion that Kenya is a dualist state.

C WHETHER PROVISIONS OF ARTICLE 43 OF THE CONSTITUTION ON THE RIGHT TO HOUSING ONLY APPLY TO CITIZENS

Article 43 of the Constitution, 2010 stipulates that "Every person has the right to adequate and accessible housing". The Article does not refer to citizens. By Asserting that the right to housing is only to be enjoyed by the citizens, the supreme erred and failed to recognise the fact that constitutional personhood is deeply meaningful in some respects, such as enjoyment of government protection.[10] Further, the recognition of personhood also ensures that law acknowledges that everyone is within the pale, within the law, for purposes of basic functioning in a contemporary liberal society. Interpretation of Article 43 by the supreme amounts to an evasion of personhood. As such, the court erred by asserting that only citizens enjoy the rights under Article 43, while the Constitution provides that the rights are to be enjoyed by everyone.[11]

VII CONCLUSION

The process of enforcing socio-economic rights in Kenya can only be achieved through the use of innovative ways. By correctly pronouncing itself to the structural interdicts concept, the Supreme Court created the much-needed clarity on post-judgement supervisions. While the court's recognition of structural interdicts is a growth of enforcement of socio-economic rights jurisprudence in Kenya, the distinction between public land and private land in relation to squatters deals a blow to this growth. The distinction leaves the squatters on private land unprotected.

10 Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9.

11 Ibid.

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Rodgers Garvin

School of Law, University of Nairobi
P. O. Box 30197-00100, Nairobi, Kenya

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