Consolidating Family Law in Kenya

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Abstract

Following the adoption of a new Constitution in 2010, Kenya embarked on an extensive process of law reform in order to give effect to the provisions of the Constitution. Accordingly, in 2014, two main statutes were adopted in the area of family law: the Matrimonial Property Act and the Marriage Act. In addition, parliamentary discussion of a Bill on domestic violence was underway as of March 2015. The main outcome of the Marriage Act is the consolidation of family laws that were previously covered in multiple statutes, customary law, and common law in one Act. The Matrimonial Property Act is the first Kenyan legislation on the subject, and is therefore a critical development in Kenya's family law. The new family laws embrace a number of significant developments at the national and international levels in relation to matrimonial relations. However, the new laws also raise concerns in a number of areas of family law including; the equality of men and women in marriage, the capacity of persons with disabilities to consent to marriage, the rights of spouses to matrimonial property, kinds of marriage, and registration of marriages. This article discusses the approach of these laws to selected issues in marriage and matrimonial property, and highlights areas of concern in this regard.

Keywords: family law, matrimonial, marriage, equality, reform.

A Introduction

The need for family law reforms in Kenya was recognised at the start of independent rule in the early 1960s. In 1967, two commissions were set up to consolidate fragmented family laws in the country into a single legislation on marriage and matrimonial property.[1] The findings of the commissions were however neither taken up at the time nor in subsequent attempts on the basis that the proposals constituted an assault on local customs and granted too many rights to women.[2]

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1 N. Baraza, 'Family Law Reforms in Kenya: An Overview', Paper presented at the Heinrich Boll Foundation's Gender Forum, Nairobi 2009, p. 1.

2 Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, Vol. 15, No. 5(A), 2003, p. 8; Baraza 2009, p. 1.

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It was not until 1981 that the first of the proposed laws, the Succession Act, was adopted.[3] Another task force was constituted in 1993, and it recommended a review of the marriage, matrimonial property, and domestic violence laws. The recommendations of the latter task force were also not implemented[4] but nevertheless informed subsequent efforts of the Law Reform Commission in the development of various bills on family law.[5]

The calls for family law reforms were driven by the need to, among other things, reflect social changes including the economic and social transformation of the Kenyan society which had become increasingly secularised and less traditional since independence. The changes were also necessary to reflect the changed socio-economic circumstances of the family in terms of which the total dependence of women on men's income had been significantly eroded and the marital relationship was increasingly one of equality and personal choice.[6] In addition, law reforms were required in order to domesticate various international instruments that Kenya had ratified such as the UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), the International Covenant on Economic Social and Cultural Rights (ICESR),[7] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[8] Lastly, law reforms were necessary to safeguard women from discriminatory customs and practises that were endemic to and perpetuated in the family context.[9] In addition, the CEDAW Committee had specifically called upon Kenya to "harmonise civil, religious, and customary law with Article 16 of the Convention and complete law reform in the area of marriage and family relations".[10] Upon the adoption of a new Constitution, it became legally imperative to reform family law in order to align it with the supreme law of the country.

This article highlights the key milestones of the reform process, considers the essential tenets of the new laws, the pertinent issues in their adoption, and the potential of the laws to ensure equal protection and benefit to all parties in marriage.

B Background to the Development of Family Law in Kenya

Marriage in pre-colonial Kenya was mainly celebrated and governed by customary rules and practices. During the colonial period, several statutes were introduced and applied alongside some English laws, customary law, and religious norms. As

3 The Law of Succession Act, Chapter 160 of the Laws of Kenya.
4 Baraza 2009, p. 1.
5 J.K. Asiema, 'Gender Equity, Gender Equality and the Legal Process: The Kenyan Experience', *Transnational Law and Contemporary Problems*, Vol. 10, 2000, p. 577.
6 Baraza 2009, pp. 1-2.
7 Kenya ratified the ICESCR in 1972, and CEDAW in 1984.
8 Kenya ratified the African Women's Protocol in 2010.
9 M.O. Oduor & R.A. Odhiambo, 'Gender Equality in the New Constitutional Dispensation of Kenya', available at SSRN 1726378, 2010, <www.ssrn.com> (accessed 20 March 2015), p. 3.
10 Committee on the Elimination of All forms of Discrimination Against Women (CEDAW) Concluding Comments: Kenya UN.DOC.CEDAW/C/KEN/CO/6 (2007), para. 44.

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a result, marriage was subject to multiple legal regimes as contained in the Marriage Act, Christian Marriage and Divorce Act, Mohammedan Marriage, Divorce and Succession Act, Hindu Marriage and Divorce Act, and customary law.[11] The principles of common law were also applied in cases where written law did not apply. For instance, where parties had co-existed in a manner sufficient to show that they were married to one another but where conditions for a marriage under any of the five regimes of marriage law in Kenya was not fulfilled, Kenyan courts were prepared to apply a presumption of marriage based on common law, and in terms of which the parties were deemed to be husband and wife.[12]

The multiplicity of laws was a central characteristic of colonial rule, not unique to family law, and continued in independent Kenya. A plurality of laws was deemed necessary in order to recognise and retain the diversity of the population represented in the country on the basis of race, religion, and custom.[13] Indeed, there were similar plural laws in other spheres of law such as laws relating to land where at least seventy five legislations were applicable, making it difficult to enforce or adjudicate women's land rights.[14] The multiplicity of laws exacerbated women's marginalisation because women were at the intersection of state, customary, and religious legal norms all of which were inherently discriminatory and premised on gendered notions of the roles of men and women.[15] Also, plural normative regimes of family law meant that that equal justice was not feasible across the country.[16] Hence, one of the fundamental challenges of marriage law reforms in the period after the adoption of a new Constitution has been the potential to have a universally applicable law that takes into account the interests of various groups without undermining equal rights as set out in the Constitution and international law. It has been argued that previous recognition of multiple regimes in response to diversity in fact entrenched the English or statutory standard through restrictions on the application of the other regimes, at the expense of other systems of personal law.[17]

Excluding the Mohammedan Marriage Act, the statutory laws on marriage did not address the property rights of parties in or at the dissolution of marriage. Consequently, the Married Women's Property Act of 1882 (MWPA) remained

11 Chapters 150, 151, 156, and 157 of the Laws of Kenya respectively (now all repealed).

12 Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, Vol. 15, No. 5(A), 2003, p. 9. Examples of the application of the presumption include the case of *Ann Wanjiru Njoroge v. Newton Gikaru* Gathiomi and 2 others [2007] eKLR; and *Beatrice Njeri v. Lawrence Njenga Kanithi* [2005] eKLR.

13 W. Kamau, 'Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom', *International Journal of Law, Policy and the Family*, Vol. 23, 2009, p. 133.

14 FIDA (Kenya) & International Women's Human Rights Clinic Georgetown University Law Centre (hereinafter FIDA & GULC), *Supplementary Report to the Kenyan Government's Initial Report under the ICESCR*, 2008, p. 12.

15 Kamau 2009, p. 133; Oduor & Odhiambo 2010, pp. 2, 5.

16 Oduor & Odhiambo 2010, p. 9.

17 Kamau 2009, p. 138.

applicable in the determination of parties' rights to matrimonial property.[18] The significant tenet of the MWPA in this regard was the recognition of married women's capacity to own property separately before and in marriage, and to contract in their own name without need for the authorisation or trusteeship of the husband.[19] The Act further provided a basis for parties to a marriage to seek the court's determination of their respective rights at the dissolution of marriage. Section 17 of the Act provided that,

> In any question as to between husband and wife as to the title to the possession of property, either party ... may apply by summons or otherwise in summary to any judge of the High Court ... and the Judge of the High Court ... may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit.

Despite having been repealed in England, the MWPA continued to apply in Kenyan courts along with the interpretation of the Act by English courts as in the cases of *Gissing v. Gissing*[20] and *Pettit v. Pettit*.[21] The import of the English precedents into Kenya was initiated through the *I v. I* case.[22] The MWPA applied to matrimonial property under all kinds of marriage, including customary[23] and Islamic.[24]

Transfer of rights in property upon the death of either spouse is generally governed by the Succession Act,[25] religious laws, or customary laws. Amendments to the Succession Act have resulted in the exclusion of Muslims from its application.[26] Instead, entitlement to matrimonial property upon the demise of either spouse in an Islamic marriage is administered in accordance with the principles of Islamic law. In as far as the succession laws have not been recently revised, the Succession law is not discussed further in this article.

18 According to the Judicature Act, Section (3) (1) (c), where written laws of Kenya do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date would be applied in Kenya. This provision is regarded as the reception clause.

19 Married Women's Property Act, Section 1.

20 *Gissing v. Gissing* [1971] AC 886 House of Lords.

21 *Pettit v. Pettit* [1970] AC 777 House of Lords. In *Nderitu v. Nderitu*, the court adopted the reasoning that in the absence of a clearly declared decision of the spouses, the court ought not to consider how much the parties contributed, but rather decide on the basis of equality. *See WN v. NK* [2008] 1 KLR (G&F) 227.

22 *I v. I* [1971] EA 278.

23 *Karanja v. Karanja* [1976] KLR 307.

24 *Essa v. Essa* [1995] LLR 384 CAK.

25 Succession Act 1972 (commenced in July 1981).

26 Statute Law (Miscellaneous Amendments) (No. 2) Act 1990.

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C Recent Developments in Family Law Legislation

Kenya adopted a new Constitution in 2010, with a generally progressive bill of rights.[27] The adoption of the new Constitution triggered an extensive review of existing legislation to streamline the law with new standards and to give effect to new constitutional provisions. Following the adoption of the Constitution, a wide ranging process of law reform – including the reform of family laws – began. In December 2013, a new Matrimonial Property Act was adopted, followed by a new Marriage Act in May 2014. A Bill on protection against domestic violence was also introduced in parliament in 2013 but was yet to be adopted as at the beginning of 2015.[28]

The adoption of the Marriage and Matrimonial Property Acts consolidates a number of laws previously contained in statutory law, the principles of common law, as well as customary law. The Acts further embrace developments in the recognition of the equal rights of spouses. Nevertheless, some of the provisions of these Acts are also criticised for eroding previous gains made in the recognition of women's equal rights to access matrimonial property and to equal rights in marriage. The parliamentary process of adopting the Marriage Act in particular was characterised by heightened debates about the recognition of traditional/cultural values.[29] Some of the issues at the core of the debates were on the recognition of polygamy, the requirement of registration of marriage particularly Islamic and customary marriages, protection of property in the context of marriage, and the respective rights of men and women in marriage.[30] These issues arose despite the fact that at the time of the adoption of the Act, most of the questions on equality and the respective rights of spouses in marriage had already been settled by the Constitution.[31]

D The Constitution and the Family

Several provisions of the Constitution are relevant to family law in Kenya. First, the Constitution recognises the family as the core unit of society and provides in this regard that the "family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State".[32] It further establishes the equality of all parties in marriage, stating 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".[33] It is argued that this provision ought to apply to matrimonial property as to other areas of equal-

27 The Constitution of Kenya (2010).
28 The Protection against Domestic Violence Bill 2013.
29 National Assembly (Kenya) Official Report, 20 March 2014 pp. 19-92 (hereinafter the Hansard) available at <http://info.mzalendo.com/hansard/> (accessed 20 March 2015).
30 The Hansard 2014, pp. 19, 57-63.
31 *See* the section on the Constitution and marriage below.
32 Constitution, Section 45(1).
33 Constitution, Section 45(3).

ity of spouses.[34] The Constitution further recognises marriages concluded under any tradition or system of tradition, religious, personal, or family law so long as such systems are consistent with the Constitution.[35]

Notably also, the Constitution provides that:

> the provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.[36]

The constitutional recognition of various regimes of personal law calls for accommodative legislation that takes into account the diversities of the country. Such recognition however also creates a basis for differential treatment of parties belonging to different groups in the context of marriage. The potential for differential treatment remains despite the fact that these regimes of law, including customary law, are subject to the Constitution itself.[37]

The Constitution also states that treaties and conventions ratified by Kenya "form part of the laws of Kenya".[38] Nevertheless, the provision only affects treaties adopted after the Constitution, and whose ratification is in accordance with the Treaty Making and Ratification Act.[39] The treaties relevant to family law such as the CEDAW and the African Women's Protocol, both of which were adopted before the Constitution, still require domestication through statute.

The Marriage and Matrimonial Property Act therefore give effect to the constitutional provisions on marriage and family. Some of the issues arising in these two laws are considered below.

E A Consideration of Some Issues in the New Family Laws

The process of the drafting and parliamentary discussion of the Matrimonial Property Act was concurrent with the Marriage Act, hence some of the underlying attitudes regarding spousal relations and gender are evident in both Acts. The Matrimonial Property Act provides for the rights and responsibilities of spouses in relation to matrimonial property and is the first Kenyan legislation to address matrimonial property. The gap left by the absence of a specific legislation on matrimonial property was/is filled by principles of common law, equity, and the MWPA.[40] Kenyan courts, cognisant of the gap left by the absence of a law, had

34 Oduor & Odhiambo 2010, p. 25.
35 Constitution, Section 45(4).
36 Constitution, Section 36.
37 Constitution, Section 2(4).
38 Constitution, Section 2(5).
39 Treaty Making and Ratification Act, Chapter No. 45, 2012.
40 Oduor & Odhiambo 2010, p. 11.

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called for parliament to adopt the relevant laws to address matrimonial property rights.[41]

A number of issues emanate from the new legislations. These include non-recognition of non-heterosexual unions, the requirement of registration for all marriages, changes in the preconditions for polygamous unions, and the recognition of pre-nuptial agreements. Also, the approach of the Marriage Act to disability is worth mentioning, while the issue of contribution in matrimonial property is also highly contentious.

I Kinds of Marriage

According to the Marriage Act, for a marriage to be recognised in Kenya, it has to be one of five kinds: Christian, civil, customary, Hindu, or Islamic.[42] While Christian, civil, and Hindu marriages are monogamous in nature, customary and Islamic marriages are presumed to – potentially – be polygamous.[43] The recognition of the five kinds of marriage under the new Act is in fact not new since the same kinds were recognised and legislated in the defunct Acts. Nevertheless, the new Act clarifies the relationship of each of the marriages to one another, as well as the pathways for the conversion from one form to another. One such example is the provision that parties to a potentially polygamous union can convert the marriage into a monogamous one on condition that they both agree to the conversion and that the marriage is not yet polygamous.[44]

The Marriage Act reiterates the equality of all parties to a marriage in tandem with the Constitution. The Act provides in this regard that "parties to a marriage have equal rights and obligations at the time of marriage, during the marriage, and at the dissolution of marriage".[45] However, in as far as there is deference to customary or religious laws in some marriages, such equality is not guaranteed, especially for women.

The Marriage Act's recognition of polygamy[46] is consistent with the demographic realities of Kenya because approximately 10% of Kenya's population are classified as Muslim,[47] while a significant majority of Kenyans live by the tenets of customary law, especially in matters of personal law.[48] Accordingly, polygamy is widespread in practice and the failure to recognise the practice as a legal institution has the potential to disenfranchise a significant number of people in the country, particularly in the enforcement of their rights in matrimonial property. Indeed, polygamy is one of the major causes for the disinheritance of women in

41 The Court of Appeal in *Kamore v. Kamore* called upon parliament to adopt a law to regulate matrimonial property disputes. The same call was reiterated in the *Echaria v. Echaria* case.

42 Marriage Act, Section 6.

43 Marriage Act, Section 6(3).

44 Marriage Act, Section 8(1) & (2).

45 Marriage Act, Section 3(2).

46 Marriage Act, Section 6(3).

47 *See* <http://republicofkenya.org/culture/religion/> (accessed 15 March 2015).

48 Customary law is predominantly applied in the rural areas where approximately 70% of the population lives. *See* <www.prb.org/pdf11/kenya-population-data-sheet-2011.pdf> (accessed 20 March 2015), p. 2.

Kenya, thus the reason that women's rights activists were discontent with the Act's failure to outlaw polygamy. The CEDAW Committee has also, prior to the adoption of the Constitution, called upon Kenya to outlaw polygamy in favour of monogamous marriages with the view that polygamy negatively impacts on the rights of women.[49] The justifiability of polygamy has to be considered against the Constitutional rights to equality and non-discrimination on various grounds including religion, belief, and social origin,[50] and the freedom of religion including the right to practice the teachings of such religion individually or in community.[51]

II Parties to a Marriage

Following the lead of the Constitution,[52] the Marriage Act provides that "marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union…."[53] This provision effectively outlaws any other marriage except heterosexual adult marriages. During the parliamentary discussion of the Act, the potential of allowing homosexual marriages was specifically pointed out as a loophole that needed to be sealed, leaving no room for speculation as to the intention and sentiments of the legislators.[54]

The Marriage Act further sets the minimum age of marriage to eighteen, thereby outlawing child marriage.[55] The violation of this provision leads to a sentence of a maximum of five years or a fine.[56] This provision is an essential safeguard for children in a country where the rate of child marriage is at approximately 26% nationally, and as high as 47% in some parts of the country.[57] It is nevertheless imperative to acknowledge that despite the existence of other laws prohibiting child marriage before the Act,[58] child marriage was unabatedly perpetuated under customary and religious law. Hence, while the express and universal prohibition of such marriages is a welcome development, the optimism on the potential of the provision to guarantee protection of children ought to be considerably tempered.

The Marriage Act contains a number of provisions which are clearly out of step with recent developments in the context of disability rights, particularly intellectual disability. The Act provides that a marriage is voidable if at the time of the marriage and thereafter either of the parties "remained subject to recurrent

49 CEDAW Committee, 'Concluding Observations on the Elimination of Discrimination against Women: Kenya', *CEDAW/C/KEN/CO/7*, 2011, paras. 17, 45 & 46.
50 Constitution, Section 27(4).
51 Constitution, Section 32(1) & (2).
52 Constitution, Section 45(2) provides that every adult has a right to marry a person of the *opposite sex*.
53 Marriage Act, Section 3(1).
54 The Hansard 2014, pp. 34 & 70.
55 Marriage Act, Section 4.
56 Marriage Act, Section 87.
57 *See* 'UNICEF Statistics: Kenya' available at <www.unicef.org/infobycountry/kenya_statistics.html#121> (accessed 20 March 2015).
58 The Children Act of 2001 prohibited 'early marriage' as a form of harmful cultural practice. *See* Section 14 of the Act.

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attacks of insanity".[59] Where a party "at the time of the marriage and without the knowledge of the petitioner, the other party suffers recurrent bouts of insanity" then the other spouse is entitled to an annulment of the marriage.[60] The Act further provides that one of the reasons upon which a marriage may be considered irretrievably broken down and hence eligible for dissolution is if a spouse

> suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge.[61]

The foregoing provisions have, besides the obvious terminological lag behind currently accepted terms such as intellectual disability or mental illness where appropriate, the effect of emphasising disability as a medical problem and thereby perpetuating the stigma and abuse often associated with a purely medical approach to disability. The approach of the Act does not pay attention to the responsibility of the individual's social environment to mitigate the effects of the impairment on their life. These provisions are retrogressive and a breach of the Convention on the Rights of Persons with Disabilities which Kenya has ratified and which calls for non-discrimination of persons with disabilities in the context of marriage and family. The Convention specifically calls for the recognition of the rights of persons with disabilities "who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses".[62] The provisions of the Act also contravene the Constitution in this regard in as far as non-discrimination on the basis of disability.

III Dissolution of Marriage

The grounds for dissolution of marriage vary from one kind of marriage to the other, though some grounds such as cruelty, desertion, adultery, and irretrievable breakdown are common to all regimes of marriages except Islamic marriages. As previously highlighted, the dissolution of the latter is governed by Islamic law. While Civil and Hindu marriages can be dissolved without the need for recourse to any other mechanism of dispute resolution, parties to a Christian marriage are encouraged to seek reconciliation from the church bodies where the marriage was celebrated, while parties to the customary marriage are urged to pursue traditional dispute resolution mechanisms that are in conformity with the Constitution and to file a report of such process with the courts.[63] Civil marriages however, except if voidable, cannot be dissolved before the end of three years from the date they are celebrated.[64]

59 Marriage Act, Section 12(a).
60 Marriage Act, Section 73(1)(g).
61 Marriage Act, Section 66(6)(g).
62 UN Convention on the Rights of Persons with Disabilities, Art 23(1)(a).
63 Marriage Act, Sections 64 and 68.
64 Marriage Act, Section 66(1).

IV Matrimonial Property

The Matrimonial Property Act refers to matrimonial property as the matrimonial home and household goods therein, as well as movable and immovable property that is jointly owned or acquired during the subsistence of the marriage.[65] The Act further recognises the rights of parties to enter an agreement to determine their property rights before marriage.[66] The latter provision provides the legal basis for prenuptial agreements, though such agreements can be nullified by the court if found to be influenced by fraud, coercion, or if they are manifestly unjust. Prenuptial agreements, once entered in accordance with the regulations under the Act, preclude the application of general provisions of the Act in relation to spouses' entitlements to matrimonial property.

Recognition of prenuptial agreements is a new development in Kenya, and Kenya is now one of the few African countries to have such a provision. The other countries with similar provisions include South Africa and Ethiopia.[67] The provision is also a marked departure from English law, which despite having governed matrimonial property causes in Kenya for so long does not currently strictly recognise enforceable prenuptial agreements.[68] Nevertheless, following the UK Court's decision in *Radmacher v. Granatino*, there is a growing acceptance of prenuptial agreements and their potential to be upheld in UK courts.[69] In the case, the court stated that:

> the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement.[70]

V Spousal Contribution

Regarding ownership of property, the Matrimonial Property Act provides 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.[71]

In effect, the Act reintroduces the need to establish a spouses' extent of contribution in the determination of their respective entitlement in the matrimonial property. This is significant because before the Act, the approach to the determination of a spouses' entitlement, particularly a wife's contribution was contested.

65 Matrimonial Property Act, Section 6.
66 Marriage Act, Section 6(3).
67 *See* the Ethiopian Revised Family Code of 2000, Chapter 3, Section 3; and Section 21 of the South African Matrimonial Property Act of 1984.
68 UK Matrimonial Proceedings and Property Act 1970 gives courts considerable discretion to vary prenuptial and post nuptial agreements in the interests of the parties or children of the marriage. *See* section 4 of the Act.
69 *Radmacher (formerly Gratino) v. Gratino* [2010] UKSC 42.
70 *Radmacher v. Gratino*, para. 75.
71 Matrimonial Property Act 2013, Section 7.

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The general approach was set out in case law including the *Kivuitu v. Kivuitu*[72] and the *Echaria v. Echaria*[73] cases. In the *Kivuitu* case, the Court of Appeal was of the view that matrimonial property ought to be presumed to be jointly equally owned between the wife and husband, and that non-monetary contribution ought to be taken into account when determining the parties' contribution. As a court of appeal decision, the *Kivuitu* case was binding on subsequent decisions of the lower courts. Accordingly, subsequent decisions proceeded on the basis of a rebuttable presumption of equal entitlement of spouses unless equal entitlement was expressly precluded. The presumption of equal entitlement however only applied to matrimonial property that was jointly owned and registered in the names of both spouses.[74]

The precedent in the *Kivuitu* case was however definitively reversed by the *Echaria* case which determined that except in cases of joint ownership in which ownership could be presumed equal, the determination of the respective entitlements had to be determined case by case and respective contribution has to be established. The *Echaria* case was the culmination of a strong tide against the presumption of equal contribution, which started in the *Kimani v. Kimani* case.[75] There were highly gendered and discriminatory undertones in most of the jurisprudence in this regards as was epitomised by the words of one judge who stated that:

> .... a wife has to show .... that she contributed directly or indirectly to the acquisition of the assets. It is not enough for her to simply show that during the period under review she was sitting on the husband's back with her hands in his pockets. She has to bring evidence to show that she made a contribution towards the acquisition of the properties. That is a burden she has to discharge.[76]

The potential of the *Echaria* case to deleteriously affect the rights of women to access matrimonial property was raised with the UN committee on Economic Social and Cultural Rights during the consideration of Kenya's periodic report on the ICESCR in an attempt to push the government to act towards the promulgation of the necessary laws.[77] Also, the CEDAW Committee called upon Kenya to recognise non-monetary contribution in the determination of the respective contributions of spouses in matrimonial property.[78] The Matrimonial Property Act recognises domestic work and management of the matrimonial home, child care, companionship, management of family business or property, and farm work as

72 *Kivuitu v. Kivuitu* [1991] KLR.
73 *Peter Mburu Echaria v. Priscilla Njeri Echaria* [2007] eKLR.
74 *Essa v. Essa* Civil Appeal 101 of 1995 (Unreported); *Mtembwa v. Mtembwa*; and *Kamore v. Kamore* [2001] 1 EA 8.1.
75 *Kimani v. Kimani* [1995] eKLR.
76 *Tabitha Wangechi Nderitu v. Simon Nderitu Kariuki* (1997) Civil Appeal No. 203 (NRB).
77 FIDA & GULC 2008, p. 6.
78 CEDAW, 'Committee Concluding Observations on the Elimination of Discrimination Against Women: Kenya', *CEDAW /C/KEN/CO/7*, 2011, para 46(b).

constituting 'contribution' for the purposes of the Act. However, the stipulation of the Act that interest in matrimonial property vests 'according to the contribution of either spouse' means that equal spousal entitlement to matrimonial is neither automatic nor guaranteed.

A significant question in this regard ought to be whether this provision adequately gives effect to the constitutional provision on the equality of all parties in and after marriage. The Constitutional recognition of the right to equality ought to be interpreted to require equal entitlement to matrimonial property, and it is hoped that courts will interpret the Matrimonial Property Act's requirement of contribution in light of the need to guarantee equality.[79] The Constitution also calls for the elimination of gender discrimination in law, customs, and practices related to land and property in land,[80] a provision that should be applied to further safeguard equal entitlement to matrimonial property in land. This is essential because a significant proportion of married women take up the role of home making and child care at the expense of their careers. Hence, it is highly likely that pegging entitlement to the actual monetary value of a woman's contribution would result in less entitlement for women in a majority of the cases. In the interests of the equality of all parties in a marriage, it is arguable that the Act is a missed opportunity to expressly guarantee equality after marriage.

F Conclusion

Family law reforms in Kenya have introduced a number of desirable changes to matrimonial relations in Kenya. The consolidation and harmonisation of the various regimes of laws is a welcome development. The laws adopted in the period after the new Constitution also formalise previously covert processes and hence enhance the protection of the rights of all parties, especially women. For instance, the requirement of registration of all marriages including Islamic and customary and the express prohibition of child marriage across all regimes of personal law is a great milestone towards adequate protection of the respective rights.

It is however evident that there are some remnants of traditional thinking that curtail the optimum protection of the rights of all parties in the context of family relations, mainly to the disadvantage of women. The Marriage Act is a missed opportunity to ensure uniformity in the application of personal laws on all citizens and, thus, equality before the law. The differential standards are however, to a great extent, sanctioned by the Constitution itself, which, while recognising the equal rights of all people, also recognises equal choice in the exercise of culture and religion. This recognition essentially results in different standards for different social groups. The approach of the Act to marginalised groups, particularly sexual minorities and persons with intellectual disability, is also a cause for concern?

79 Oduor & Odhiambo 2010, p. 25.
80 Constitution, Section 60.

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