REPUBLIC OF KENYA

IN THE HIGH COURT AT KENYA IN NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 164B OF 2016

IN THE MATTER OF ARTICLES 20, 21, 22(1) and (2) & 23(1) and (3) OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(4), 2(6), 10, 27, 28, 40(1) and (2), 45 (3), 60 (1)(a)& (f) & 68(c) (iii)&(vi) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT 2013

BETWEEN

FEDERATION OF WOMEN LAWYERS KENYA (FIDA-K)..... PETITIONER

AND

THE HON. ATTORNEY GENERAL..... RESPONDENT

PLAINTIFF'S SUBMISSIONS: LIST OF CONTENTS

AMICUS

REPUBLIC OF KENYA
IN THE HIGH COURT AT KENYA IN NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 164B OF 2016

IN THE MATTER OF ARTICLES 20, 21, 22(1) and (2) & 23(1) and (3) OF THE CONSTIUTION

AND

IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(4), 2(6), 10, 27, 28, 40(1) and (2), 45 (3), 60 (1)(a)& (f) & 68(c) (iii)&(vi) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT 2013

BETWEEN

FEDERATION OF WOMEN LAWYERS KENYA (FIDA-K)..... PETITIONER

AND

THE HON. ATTORNEY GENERAL..... RESPONDENT

PETITIONER'S SUBMISSIONS

May it please Your Lordship

The Petitioner by a Petition dated 20th April 2016 and filed on 22nd April 2016 has challenged Section 7 of the Matrimonial Property Act (hereinafter referred to as "the MPA") for being unconstitutional and hence null and void as provided by Article 2(4) of the Constitution. Section 7 states:

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

The Petition seeks:

1) A DECLARATION that section 7 of the MPA to the extent that it bases division of matrimonial property upon contribution, is invalid as it is in conflict, inconsistent and contravenes Articles 27,40, 45(3), 60(1) of the Constitution and is therefore null and void;

2) An order of MANDAMUS compelling the Respondent to publish a Statute Miscellaneous Amendment Act within thirty days of delivery of judgment deleting the aforesaid Section and inserting:

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

3) Costs of this Petition be granted to the Petitioner.

4) Any other order that the court may deem fit to grant.

The Petition is supported by an affidavit sworn by the then Executive Director, Christine Ochieng on 20th April 2016 and a supplementary affidavit sworn on 21st November 2016. The Respondent herein on 28th June 2016, filed Grounds of Opposition dated 17th June 2016 and its Submissions dated 23rd June 2016. We humbly submit in support of our Petition as follows.

A. Division of matrimonial property in Kenya: A Historical Background

The Supreme Court of India in ***Namit Sharma v Union of India***[1] stated:

> "20. In order to examine the constitutionality or otherwise of a statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as the legislative history of the statute. It would help the court in arriving at a more objective and justful approach. It would be necessary for the Court to examine the reasons of enactment of a particular provision so as to find out its ultimate impact *vis-a-vis* the constitutional provisions. Therefore, we must examine the contemplations leading to the enactment of the Act..."

1. We humbly submit, in light of the foregoing, that there is a need to set out a historical background on the issue before this Honourable Court and in particular, the legislative history of the division of matrimonial property in Kenya.

2. The law in Kenya as regards division of matrimonial property was governed by the Married Women's Property Act (MWPA) of 1882, an English statute of general application in Kenya. It was in the case of ***I v I***[2] that Trevelyan J. declared that the MWPA was applicable in Kenya by virtue of it being a statute of general application in England on 12 August 1897. In as much as the decision in ***I v I*** settled the application of the MWPA in Kenya, it is the decisions in ***Petit v Petit***[3] and ***Gissing v Gissing***[4] that effectively pronounced the principles to be applied in an application of the MWPA. In *Petit* it was decided that Section 17 of the MWPA was merely a procedural provision that did not entitle the Courts to vary the existing rights of parties and *Gissing*, then developed the ratio in *Petit*, and opened the way to pleading

---

[1] (2013) 1 SCC 745

[2] [1974] EA 278

[3] (1970) AC 777.

resulting, implied or constructive trusts in a MWPA application. The MPWA applied to all Kenyan marriages regardless of the type of marriage or regime governing the marriage, including marriages contracted under customary or Islamic law.[5]

3. Section 17 of the said Act (now repealed) provided 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*" giving the courts complete discretion in the division of matrimonial property. As a result, the decisions of our courts in applying the MWPA in Kenya were varied.

4. It was in ***Kivuitu v Kivuitu***[6] that the Court of Appeal first considered the issue of indirect non-financial contribution to a marriage. The Court noted that the indirect contribution of a wife in a marriage had to be recognized whenever the question of division of matrimonial property arose. Masime, J.A. stated:-

> ***"And, even where only the husband is in the income earning sector, the wife is not relegated to total dependence on him without an ability to make some reasonable contribution towards the economic management of their family. It is no longer right to assume, as was done under customary law that the wife was totally dependent on the husband and not capable of contributing at all or substantially to the development of the household and increase in the family wealth."***

5. Omolo, Ag. J.A (as he then was) in the same case noted

> ***"For my part I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them however, make a contribution to the family welfare and assets.... Where, however such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to the court under Section 17 of the Married Women's Property Act of 1882, so that the court can determine her interest in the property, and in that case, the court would have to assess the value to be put on the wife's non-monetary contribution."***

6. In ***Nderitu v. Nderitu***[7] Kwach, J.A. (now retired) went further and held that bearing children was a form of contribution, approved the above dictum by Omolo Ag. J.A. (as he then was) and that it:

> "***....Settles what the law is in Kenya on the point of indirect contribution. A wife's contribution and more particularly a Kenyan African wife will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution."***

7. The learned Judge then concluded that it was incumbent upon a trial Judge hearing an application under ***Section 17***, above, to take into account that form of contribution (child

---

[4] [1971] AC 886.

[5] Karanja v. Karanja, (1976) 1 K.L.R. 389 and in Muslim marriages in Fathiya Essa v. Mohamed Alibhai Essa, (1995) Civil Appeal 101 of 1995 (H.C. Nairobi) (unreported),

[6] [1990-1994] E.A. 27

[7] [1995-1998] E.A. 235.

bearing) in determining the wife's interest in the assets under consideration. Most other judicial decisions which were pronounced hereafter, among them ***Muthembwa v. Muthembwa***[8] and ***Mereka v. Mereka***[9] paid loyalty to this principle.

8. It was therefore an unexpected and unforeseen shift in jurisprudence when a bench of five Judges of the Court of Appeal handed down the decision in ***Echaria v. Echaria.***[10] The Court, after a review of several local and English decisions criticized the aforementioned previous decisions on division of matrimonial property thus:

> "In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the Court has invariably given the wife an equal share (See Essa Vs Essa (Supra); Nderitu Vs Nderitu, Civil Appeal No. 74 of 203 of 1997 (unreported), Kamore Vs Kamore (Supra); Muthembwa Vs Muthembwa, Civil Appeal No. 74 of 2001 and Mereka Vs Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather in each case, the Court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property."

9. The Honourable Court went on to effectively overrule the notion of non monetary contributions being considered in division of matrimonial property by stating:
    a. "The first thing to say is that the other members of the court in *Kivuitu's* case did not express any view on the issue of the wife's nonmonetary contribution. Secondly, what was there said is nothing more than an *obiter dictum*. Similarly, what Kwach JA said in *Nderitu's* case on the status of the wife's non-monetary contribution was not a unanimous decision of the Court and likewise it was an *obiter dictum*.... In the light of those authorities, it is our respectful view that both Omolo Ag. JA. and Kwach JA., 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."

10. The Court went on to expressly note that:

> The learned Judge made a finding that the respondent made substantial indirect contribution or contributions in kind to the family fortune one of such contributions being that of the wife taking on the onerous duties of an ambassador's wife. We would readily agree that the learned Judge **misdirected** himself in several respects....the learned Judge took into account the status of being an ambassador's wife as indirect contribution towards the acquisition of the property. As the case law currently shows, the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties. Even the fact that the wife was economical in spending on house keeping will not do (see eg. *Pettitt vs. Pettitt, Burns vs. Burns* (supra) *Button vs. Button* [1968] 1 WLR 457).....The farm was purchased in the name of the appellant. The husband alone executed the loan agreement and he alone paid the instalments of the loan. The appellant is in the circumstance, prima facie, entitled to the whole of the legal interest

---

[8] (2008) 1 KLR 247.
[9] Civil Appeal No. 236 of 2001.
[10] [2007] 2 EA 139.

and whole of the beneficial interest in the suit property. Although the wife claims to have made both direct and indirect contributions towards the acquisition of the farm, the evidence does not support that she made any direct financial contribution....It is apparent from the above analysis that the respondent's indirect financial contribution towards the purchase of the property could not have been equal to that of the appellant. The respondent's contribution is realistically much less."

11. Being, at the time, the highest court of the land, the ***Echaria*** judgment dealt a fatal blow to the taking into account of indirect contribution during an adjudication of division of matrimonial property matters and extinguished the notion of equality in the division of matrimonial property. While the Honourable Court lamented on the lack of legislation and that the precedents applicable in Kenya were antiquated[11], ***Echaria*** became the authoritative decision on the division of matrimonial property.[12] The lack of express legislation to resolve these disputes became a cause of concern. As was well noted by Lord Hobson in *Petit*:

> **"I do not myself see how one can correct the imbalance which may be found to exist in property rights as between husband and wife without legislation."**

12. We humbly submit that the decision of ***Echaria*** formed part of the backdrop against which the Matrimonial Property Bill was drafted and in particular Section 7(1) of the Bill to remedy the injustice thus occasioned. The Bill expressly provided thus:

> **7(1) Subject to section 6(3), ownership of matrimonial property vests in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved.**

B. Presumption of Constitutionality

13. The Respondent's first ground of opposition is that the Petitioner has not demonstrated that Section 7 of the MPA is unconstitutional yet all legislation is presumed to be constitutional. The Respondent asserts that "there is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise." We

---

[11] "It is now about seven years since this Court expressed itself in *Kamore v Kamore*, but there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform agenda to keep the country shackled to a 125 year-old foreign legislation which the mother country found wanting more than 30 years ago! In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the product of a lesser god and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value! Those precedents, as shown above, are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times."

[12] A communication lodged by the Petitioner on behalf of the respondent/wife at the African Commission on Human and Peoples' Rights was declared inadmissible for being submitted thirty one months after local remedies were exhausted. See *Communication 375/09 - Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*

humbly submit that while indeed, this is the general presumption, that this presumption is not applicable in the instant Petition. This Honourable Court has held severally that the Constitution **qualifies** this presumption with respect to statutes which limit or are intended to limit fundamental freedoms. The CRUX of this Petition is that Section 7 of the MPA limits *inter alia* the fundamental rights and freedoms of Articles 27, 28, 40 and 45 therefore this presumption is not applicable.

14. It was in ***Ahmed Abdalla Mohamed & 3 Ors v Attorney General*** 2012]eKLR where the Honourable Court first pronounced itself thus in paras 29-30:

> "29. The Court is urged to lean towards the presumption of Constitutionality of the 1989 Statute as its intention is laudable. For this Mr. Eredi referred this Court to the Decision in **Rose Moraa & Another -Vs- AG** [2006]eKLR in which the Court embraced the following passage from the Decision of the Supreme Court of India in **HAMDARDDAWAKHANA -Vs- UNION OF INDIA** AIR 1960 554-*"In examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment."*
>
> 30. This Court accepts that proposition <u>but the presumption would not extend to uphold legislation that infringes on what the Kenyan people have deemed for themselves, through Constitutional Guarantees, as a fundamental right.</u> In the article "Rethinking the Presumption of Constitutionality", F. Andrew Hessick had this to say-
>
> > "Altering judicial deference in this way would not lead to a complete change in Judicial Review as we know it. For example, the Judiciary would not necessarily be required to allow the legislature to circumvent the heightened constitutional protections that Courts have created for fundamental rights and to prevent discrimination against suspect or quash suspect classes. Those heightened protections as a result of the Court's conclusion that the current presumption of Constitutionality should not extend to laws infringing on those rights, and the same reasons may counsel against extending judicial deference to legislative interpretation of the Constitution with respect to those rights." (my emphasis) (www.nd.edu.)
>
> I have held that the enactment of the 1989 Statute lead to a Constitutional Violation of the Applicants fundamental right to property. It is a violation that this Court will not uphold."

The same holding was thereafter made in the following cases:

15. In ***Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Ors***[2015] eKLR the Court at para 95-96 held:

> "95. We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further guided by the principle enunciated in the case of *Ndyanabo vs Attorney General* [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional.

The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.

96. However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article."

16. In ***Mary Wanjuhi Muigai v Attorney General & another*** [2015] eKLR Justice M. Ngugi succinctly stated:

"47. With regard to statutes which are alleged to contain limitations of rights contained in the Bill of Rights, the Constitution itself qualifies the presumption of constitutionality by providing in Article 24 that any limitation of rights must meet the criteria set in the said Article. Article 24 requires that any limitation of rights must be by law, and in a manner that is justifiable in a free and democratic society."

17. In ***Council of Governors & 3 others v Senate & 53 others*** [2015] eKLR

"78. We agree, as found by the Court in ***Ndyanabo***, that the principle of presumption of constitutionality is a sound principle. This is so except in the case of legislation that limit fundamental rights which, in our context, the Constitution has provided, at Article 24(3), the parameters against which the constitutionality of such legislation is to be weighed. With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation is on the petitioner to establish that the legislation violates a provision(s) of the Constitution. This was the view taken by the Court in the case of ***Coalition for Reform and Democracy (CORD) vs Attorney General and Others [2015] eKLR."***

18. In ***Geoffrey Andare v Attorney General & 2 others*** [2016] eKLR the Court reiterated the same qualification at paras 71-72.

"71. I am also mindful of the words of the Court in the case of *Ndyanabo vs Attorney General of Tanzania [2001] EA 495* with regard to the constitutionality of a statute. In that case, the Court observed that there is a general presumption that every Act of Parliament is constitutional, and the burden of proving the contrary rests upon any person who alleges otherwise.

72. However, with respect to provisions of legislation that limit or are intended to limit fundamental rights and freedoms, the Constitution itself qualifies the presumption. As was observed in the CORD Case: *"[96.] However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 .... there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article."'*

19. From the foregoing caselaw, it is clear that the presumption of constitutionality is not applicable in this case. In fact, in cases where the statute is challenged on grounds of

violating/restricting a fundamental right or freedom, such as the instant Petition, the onus actually SHIFTS to the State or the person seeking to justify the said restriction/limitation.

20. This is as provided for under Article 24 of the Constitution which provides that for the Bill of Rights to be limited, the provisions of Article 24 of the Constitution must be satisfied. Article 24 (1), (2) and (3) provide as follows:

    (1) 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—

    b. The nature of the right or fundamental freedom;
    c. The importance of the purpose of the limitation;
    d. The nature and extent of the limitation;
    e. 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
    f. The relation between the limitation and its purpose and whether there are less restrictive
    g. means to achieve the purpose.
    h. (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom....
    i. h. **Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**
    j. (3) **The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.**

21. In ***Aids Law Project v Attorney General & 3 others*** [2015] eKLR the Court elaborated on this Article in paras 84-85 thus:

    a. "84. Therefore for a limitation to be justified it must satisfy the criteria that it "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". In dealing with these standards, the Supreme Court of Uganda while dealing with a similar provision in **Obbo and Another vs. Attorney General [2004] 1 EA 265** expressed itself as follows: "It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies.... When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so."
    b. 85. It is therefore imperative for the Court to take into account the international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy as well as decisions by Courts in jurisdictions with similar legal systems in

determining what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

22. It is therefore paramount for the Respondent herein, by virtue of Article 24(3), to demonstrate that Section 7 of the MPA (which has limited the rights in Articles 27, 28, 40 and 45(3) of the Constitution) is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

23. In ***Boniface Mwangi v Inspector General of Police & 5 others***[13] the Court in analyzing the 'justification' clause relied on the South African Constitutional Court decision noted at para 51 noted:

> "...The Court in ***Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*** (CCT 03/04) [2004] ZACC 10 properly summarized the duty to sufficiently place all materials before the Court as follows [Paragraph 36]; "Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the court, or to spell out the reasons for the limitation, may be fatal to the justification claim."

At paras 52 and 53 the Court went further to state:

> "52. Connected to the above finding is the determination of the question whether the limitation as set out was *'reasonable and justifiable in an open and democratic society.'* In that regard, what is reasonable and justifiable depends on the circumstances of each case and the Constitution guides this Court in determining factors to consider when assessing the merits of any prescribed limitation. These are: 24(1)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.*
>
> 53.In reference to the above guiding principles, the Constitutional Court of South Africa in the case of ***S v Manamela and Another (Director-General of Justice Intervening)*** [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC), while interpreting Section 36 of the South Africa Constitution, which is in *pari materia* with Article 24 of our Constitution, held as follows:
>
> ***"It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors***

[13] [2017] eKLR

that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be."

24. We humbly submit that the Respondent has not done so. Contrary to the holdings in the Aids ***Law Project*** and ***Boniface Mwangi*** cases, the Respondent has not established the justification for limiting the right under Article 43(5) and failed to fulfill the criteria for limitation as set in Article 24 of the Constitution.

C. Demonstration of the unconstitutionality of Section 7 of the MPA

25. We humbly submit that Section 7 is unconstitutional as it promotes inequality, it is discriminatory and it contravenes international treaties which have been ratified by Kenya and form part of the law of the land.

i) Section 7 of the MPA promotes inequality

26. The expression *equality before the law* means that all laws must apply to everyone, including those who enact and/or sanction them, and that the law so enacted or sanctioned cannot be used to apprehend or isolate a group of individuals for discrimination.[14] James Madison stated that one of the core values of a Constitution was to prevent the majority from being able to "carry into effect schemes of oppression"[15], as a check on majority rule to ensure that the dignity and equality of all persons remains inviolate.

27. Equality applies to the minority as well as to the majority, to those with unpopular views and to those who are marginalised. The promise of our Constitution is that the dignity and equality **of all** persons will henceforth be respected. We submit that it is those who are vulnerable in society and those who lack political power are the people who most need the fundamental protection against discrimination and inequality which only a Constitution can provide.

28. The principle of equality, we humbly submit is the raison d'être of Article 45(3) of the Constitution: **Parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage."**

29. In ***R. v. Turpin***[16] the Supreme Court of Canada in a constitutional matter before it stated:
    a. The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. Here, the

---

[14] Clever Mapaure, "Decoding the right to equality: A scrutiny of judiciary perspicacity over 20 years of Namibia's existence" Namibia Law Journal Volume 2 Issue 2 July 2010at pg 31 available at < www.kas.de/upload/auslandshomepages/namibia/.../NLJ_section_4.pdf>

[15] The Federalist Papers : No. 10 available at <http://avalon.law.yale.edu/18th_century/fed10.asp>

[16] [1989] 1 S.C.R. 1296

impugned provisions denied the appellants equality before the law.....In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context..... A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

30. Mr Justice Bokhary PJ sitting at the Court of Final Appeal of Hong Kong in ***Secretary for Justice v Yau Yuk Lung Zigo and Another***[17] noted:

"36. Guaranteed in unlimited terms and interpreted generously, equality before the law inevitably amounts to an absolute right not to be discriminated against. So any departure from identical treatment is liable to scrutiny. And the ultimate test of whether any such departure offends against equality before the law is whether the departure amounts to discrimination against any person or category of persons : in short, whether it is discriminatory. If it is discriminatory, it will offend against equality before the law. It will so offend whether discrimination is its objective or merely its effect.

37. Within the ultimate test of whether the departure from identical treatment is discriminatory, it is possible and useful to identify various factors by reference to which any such departure can be examined with a view to determining whether it is non-discriminatory and therefore compatible with equality before the law. My earliest attempt to identify such factors was made in a case decided under the equality before the courts clause of art.10 of the Bill of Rights. It was the case of *R v. Man Wai-keung (No.2)* [1992] 2 HKCLR 207 where I said this (at p.217) :

(1) "Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown : one, that sensible and fair-minded people would recognise a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need."

"Restrictions on fundamental rights and freedoms need to be, as Lord Nicholls of Birkenhead said in *R (Prolife Alliance) v. British Broadcasting Corp* [2004] 1 AC 185 at p.224 C, "examined rigorously by all concerned, not least the courts".

31. Article 45(3) provides that each party to the marriage would be subjected to equal demands and burdens by the law and not suffer any greater disability in the application of the law than the other party. There was to be identical treatment to the parties of a marriage at every point of the marriage, including its dissolution. Thus the reason why section 7(1) of the Matrimonial Bill was drafted as follows:

a. **Subject to section 6(3), ownership of matrimonial property vests in the spouses in equal shares irrespective of the contribution of either spouse**

---

[17] [2006] 4 HKLRD 196

towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved.

32. As stated by Hon. Mr Justice Bokhary PJ, the starting point is identical treatment and any departure therefrom must be **justified**. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognise a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need.

33. We humbly submit that the Respondent has failed to show any of the conditions herein stated for the departure from the identical treatment i.e equal division of matrimonial property after dissolution of a marriage.

34. To further buttress the fact that Section 7 promotes inequality, Section 10 of the MPA which deals with liabilities clearly provides that:
    a. "10 (3) Parties to a marriage **shall share equally any—**
        a) **liability incurred during the subsistence of the marriage for the benefit of the marriage; or (b) reasonable and justifiable expense incurred for the benefit of the marriage."**

35. These two provisions are in stark contrast to one another. Why the different treatment in division of assets? Was there a legal justification for the limitation of this right? We humbly submit that there was/is none and if it exists, it is upon the Respondent to articulate it as per Article 24(3).

36. Chief Justice Li in the aforementioned ***Secretary for Justice v Yau Yuk Lung Zigo and Another***[18] dealt with the issue thus:

> "19. In general, the law should usually accord identical treatment to comparable situations. As Lord Nicholls observed in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 566C: 'Like cases should be treated alike, unlike cases should not to be treated alike.'
>
> 20. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that:
>
> (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.
>
> (2) The difference in treatment must be rationally connected to the legitimate aim.
>
> (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.
>
> The above test will be referred to as "the justification test".
>
> **21. The burden is on the Government to satisfy the court that the justification test is satisfied.**
>
> 27. The appellant's submission does not address the critical question. What must be established is a genuine need for the differential treatment. That need cannot be established from the mere act of legislative enactment. It must be identified and made out. In the present case, no genuine need for the difference in treatment has been shown. That being so, it has not been established that the differential

[18] [2006] 4 HKLRD 196

treatment in question pursues any legitimate aim. The matter fails at the first stage of the justification test."

37. We submit that the Respondent (read, Government) in this case, has failed to satisfy the justification test. In ***Namit Sharma v Union of India***[19]the Supreme Court of India in paragraph 39 well observed that:

> "39. If the law deals equally with members of a well defined class, it is not open to the charge of denial of equal protection."

38. Section 7 of the MPA does not deal equally with members of the married class when it comes to the distribution of matrimonial property upon dissolution of the marriage: thus, we submit, it IS open to the charge of unequal protection.

ii) Section 7 of the MPA is contrary to the principle of equality

39. Section 7 of the MPA is evidence of Parliament's intention to eliminate the principle of equality as provided under Article 45(3) of the Constitution. This is however, not the first time that Parliament has sought to eliminate said principle. During the constitutional reform process in 2008, the Constitution of Kenya Review Act, 2008 provided for the establishment or recognition of four organs to be involved in facilitating the review process and drafting the new Constitution namely; the Committee of Experts (COE), the Parliamentary Select Committee (PSC), the National Assembly, the Referendum.[20]

40. As provided by Section 32 of said Act, the COE draft harmonized Constitution was to be presented to the PSC for deliberation and consensus building on the contentious issues on the basis of the recommendations of the COE. The COE draft harmonized Constitution at clause 42 (4) stated 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.** When the PSC revised the said Draft, they deleted the said clause and inserted the following: **48(3) Parliament shall enact legislation that recognises- (b) the rights of parties to a marriage at the time of marriage, during the marriage and at the dissolution of the marriage.**[21]

41. The PSC Draft eliminated the affirmative declaration of equal rights and replaced it with languid language that "Parliament shall enact legislation that **recognizes** the rights of parties to a marriage at the time of marriage, during the marriage, and at the dissolution of the marriage." The words "**entitled to**" and **"equal"** were markedly absent in the PSC Draft in a clear attempt to eliminate the principle of equality in marriage, which attempt thankfully failed as the final draft adopted the wording of the COE draft Constitution.

42. After the promulgation of the Constitution in 2010 and **prior** to the enactment of the MPA by Parliament, the Courts were alive, emphatic and in agreement on their interpretation of Article 45(3) on its principle of equality and its application in the distribution of matrimonial property as being equal or 50:50. Article 45(3) of the Constitution envisaged the creation of a scheme that promotes social and economic justice requiring a fundamental

---

[19] (2013) 1 SCC 745

[20] Section 5 Constitution of Kenya Review Act, 2008.

[21] Available at https://kenyastockholm.files.wordpress.com/2010/02/psc draft to coe - 29-01-20101.pdf accessed 14/3/2017

recognition of marriage as an equal partnership in which the partners make contributions which are different in nature but equally valuable. **The following 4 cases, decided just after the Constitution 2010 and before enactment of the MPA will buttress our argument.**

43. The Court of Appeal in ***Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes***[22] (unreported) in interpreting the above Article of the Constitution held at page 21:

> "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 in Article 10(2) which include sharing, equity, social justice and protection of the marginalized. 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 recognize and protect matrimonial property, particularly the matrimonial home."

44. In ***J A O v N A*** [2013] eKLR, a case decided prior to the enactment of the MPA, the Honourable High Court stated thus:

> "When it comes to distribution of matrimonial property, there are a number of decisions which have laid down principles which are used to determine contribution of a spouse towards matrimonial property. It has been held that a spouse's contribution need not only be financial. It can even be in form of giving the other 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 improvement of the property..... Article 45 (3) of the Constitution of Kenya 2010 provides as follows:-*"Parties to a marriage are entitled to equal rights as at the time of marriage, during the marriage and at the dissolution of the marriage".* Article 159 (2) of the Constitution provides that in exercising judicial authority, the Courts and Tribunals shall be guided by the following principles:- **a. .....b. ..... e*) the purpose and principles of this Constitution shall be protected and promoted.***
> What the Court of Appeal judges were lamenting on during the *Echaria v Echaria* case was seen in what is now the Matrimonial Property Bill of 2012 which has not been enacted into law. The international conventions mentioned in their judgment are now fully part of the Kenyan law courtesy of Article 2(5) & (6) of the Kenya Constitution 2010. There is no doubt that the way to go is towards the principle that matrimonial property should be shared on 50:50 basis. This will be in furtherance of the principles of the Kenyan Constitution and the International treaties and conventions which have been ratified in Kenya. We do not have to wait until the matrimonial property bill is enacted into law to start applying what is contained therein. The Constitution, international conventions and treaties which have been ratified by Kenya have shown the way."

---

[22] Mombasa CA Civil Appeal No.127 of 2011

45. In ***Z.W.N v P.N.N*** [2012] eKLR the Court, while being urged to apply *Echaria v Echaria*, demonstrated that by virtue of the new Constitution, the **principle of equality enshrined in Article 45(3)** was a constitutional principle that would oust any law or case law that ran contrary to it.

> "This court is however alive to the fact that as at the time of drafting this judgment there are operative constitutional provisions on matrimonial property contained in the current Kenya constitution 2010. The court appreciates that the proceedings herein were initiated before the promulgation of the constitution aforesaid but final submissions were made after the promulgation of the constitution and the proceedings are therefore subject to the provisions therein which cannot be ignored. The relevant article is Article 45 (3) of the constitution of Kenya 2010. It provides:- **"Article 45(3) parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage"**...
> The court has judicial notice of the fact that the provision of Article 45(3) (supra) has been lifted from Article 16(1) of the Universal Declaration of Human Rights to which the court has judicial notice that Kenya is a signatory and has undertaken to uphold those ideals for the benefit of its citizenry. Article 16(1) of the UDHR provides:- *"Married women of full age without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."* A similar prescription is found in Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the rights of women in Africa. It provides:- *"In cases of separation, divorce or annulment of marriage women and men shall have the right to an equitable right to an equitable sharing of the property deriving from the marriage".* There is also Article 6(1) (h) of the International Convention on the Elimination of All Forms of Discrimination against Women which enjoins state parties:- *"To ensure on the basis of equality the same rights for both spouses in respect of the ownership, acquisition, management, administration enjoyment and disposing of property whether free of charge or for valuable consideration."*
>
> Currently these prescriptions are applicable by the courts in this jurisdiction through Article 2(5) of the same Kenyan constitution 2010.... This court notes and appreciates that the principle of law set by the court in ECHARIA VERSUS ECHARIA (SUPRA) stems from provisions of a legislation subordinate to constitutional provisions, meaning that the constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property has primacy over the principle of law enunciated by the decision in ECHARIA VERSUS ECHARIA (SUPRA) which stems from an ordinary legislation. In the premises this court proceeds to apply the afore set out identified principle of equality on distribution of matrimonial property to the determination of this matter as hereunder."[23]

[23] On appeal, Justice Waki in upholding the decision by the Superior Court stated thus: "Speaking for myself, I would find little, if any, utility in applying the *Echaria case* post the provisions of the *Constitution* and the *Matrimonial Property Act* examined above. The former is loud on equality while the latter has an expansive definition of 'contribution'. As stated earlier, those provisions lay a new basis for the future which will generate its own jurisprudence."

46. In ***C.M.N v A.W.M*** [2013] eKLR, the Honourable Court reiterated the principle of equality thus:

    a. "All these laws point to the equality of both a man and his wife or if divorced, ex-wife and require that the principle of equality be applied when it comes to the division of matrimonial property. This **principle of equality** was applied in the case of ***Z.W.N. v. P.N.N.*** Civil suit No. 10 of 2004.....
    b. In this case, plenty of effort has been expended to demonstrate that in fact, the Plaintiff is the one who made all the contributions to purchase the suit property and that the Defendant was just a joy rider. In fact, this has been established through the various evidence that has been adduced before this court. It has been established without a doubt that the Plaintiff is the one who met all the financial requirements towards the acquisition of the Suit Property. However, the legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of a matrimonial property which matters. The foregoing legal provisions spell a different legal landscape. Essentially, the foregoing legal provisions seek to change the position previously prevailing in which the court considered the level of financial contribution made by each spouse in deciding what percentage to apportion to them. The legal provision in force now requires this court to apply the principle of equality instead. This court is duty bound to share the Suit Property equally between the Plaintiff and the Defendant."

47. The aforementioned cases aptly illustrate the Jurisprudence of Equality Principle which had been applied by the Supreme Court of Ghana in the division of matrimonial property in ***Mensah v Mensah:***[24]

> "The Jurisprudence of Equality Principle (JEP), has been defined by the International Association of Women Judges in their November, 2006 USAID Rule of Law Project in Jordan as "the application of international human rights treaties and laws to national and local domestic cases alleging discrimination and violence against women." Such that the rights of women will no longer be discriminated against and there will be equal application of laws to the determination of women issues in all aspects of social, legal, economic and cultural affairs.....On the basis of the above conventions and treaties and drawing a linkage between them and the Constitution 1992, it is our considered view that the time has indeed come for the integration of this principle of "Jurisprudence of Equality" into our rules of interpretation such that meaning will be given to the contents of the Constitution 1992, especially on the devolution of property to spouses after divorce. Using this principle as a guide we are of the view that it is unconstitutional for the courts in Ghana to discriminate against women in particular whenever issues pertaining to distribution of property acquired during marriage come up during divorce. There should in all appropriate cases be sharing of property on equality basis.
>
> We are therefore of the considered view that the time has come for this court to institutionalise this principle of equality in the sharing of marital property by spouses, after divorce, of all property acquired during the subsistence of a marriage in appropriate cases. This is based on the constitutional provisions in article 22 (3) and 33 (5) of the Constitution 1992, the principle of Jurisprudence of Equality and the need to follow, apply and improve our previous decisions in **Mensah v Mensah**

[24] [1998-1999] SCGLR 350.

and **Boafo v Boafo** already referred to supra. The Petitioner should be treated as an equal partner even after divorce in the devolution of the properties."

48. The Matrimonial Property Bill was soon thereafter drafted to articulate the principle of equality in Article 45(3) by providing in Section 7(1):

> **(1) Subject to section 6(3), ownership of matrimonial property vests in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved.**

iii) Section 7 of the MPA is discriminatory

49. We humbly submit that this provision of the law is discriminatory. The Constitution of Kenya articulates discrimination as either "direct' or "indirect."[25] While on the face of it Section 7 has produced an adverse indirect discrimination on women by legislating that matrimonial property shall only vest according to contribution which must be proved. The Supreme Court of Canada defined discrimination in ***Egan v Canada***[26]as follows:

> "168. Direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. **Adverse effect discrimination occurs when a law, rule or practice is facially neutral but has a disproportionate impact on a group because of a particular characteristic of that group."**

50. We humbly submit that section 7 of the MPA while facially neutral has a disproportionate impact on women because of the particular characteristic of the fact that most married women fall under the non-monetary contribution category; a category, that as will be seen later on, is viewed as having **less** contribution in a marriage and whose proof of value is almost always impossible to quantify.

51. In ***Egan,*** the SCC went further to articulate how to identify discriminatory laws thus:

> *"58. The nature of the group affected*
> No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable. As such, a distinction may be discriminatory in its impact upon one group yet not discriminatory in its impact upon another group. While it may be discriminatory against women to prohibit female guards from searching male prisoners, it may not be discriminatory against men to prohibit male guards from searching female prisoners: *Weatherall v. Canada (Attorney General), supra.* Put another way, it is merely admitting reality to acknowledge that members of advantaged groups are generally less sensitive to, and less likely to experience, discrimination than members of disadvantaged, socially vulnerable or marginalized groups.

---

[25] Articles 27(4) and 27(5)
[26] [1995] 2 S.C.R. 513

62. The nature of the affected interest

In the same way that a very dense projectile will impact upon a surface more sharply than a less dense projectile, an examination of the nature of the interest affected by the impugned distinction is helpful in determining whether that distinction is discriminatory. This examination requires an evaluation of both economic and non-economic elements.

63. ....the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory...."

52. This test is similar to the test enunciated in South African Constitutional Case *Harksen v Lane NO and Others*[27] where Goldstone J noted:

"[51] In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
b) the nature of the provision or power and the purpose sought to be achieved by it.
c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

53. From the foregoing, we humbly submit that this Court take judicial notice of the fact that women in Kenya have endured a history of significant disadvantages be it economically, socially or politically and are indeed termed as marginalized[28] and socially vulnerable under the Constitution.

54. The group most greatly affected by Section 7 of the MPA are women: married women. The nature of the interest affected by section 7 of the MPA is economic. When a divorced woman fails to prove her contribution towards a matrimonial asset, she is denied the same and this results in an economic hardship to the said woman making Section 7 clearly discriminatory.

55. It is not a disputed fact that it is mostly women who constitute the non-monetized sector of the Kenyan economy *ergo* non-monetary contributions in a marriage as well. The Honourable Lady Justice Joyce Aluoch (as she then was) was adamant in pointing out that:

"Very few African women will make financial contributions, very few. We should always be talking about the woman in the rural area; where would she get the

---

[27] (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997)

[28] Article 110(a) Constitution of Kenya

money to contribute to the property? Her money goes to feed the children. That is her contribution."[29]

56. Whether in rural or urban Kenya, women are in the care labour industry.[30] It has been persuasively argued that the purpose of this work is to reproduce the family by reproducing labour power and the children. In this role, women are not recognized, are invisible and marginalized in the mainstream capitalist mode of production and they are not compensated at all. This is in keeping with the privatization of domestic labour and its exclusion from social production.[31] A woman's role is seen as reproductive and not productive.

57. A marriage relationship is primarily seen as a relationship of trust complicated by the emotional side to it, unlike a purely business partnership and while the family is still a happy, going concern many see it as permanent relationship. Most women understand marriage to be an equal partnership, to which each of the spouses contributed through earned income or through unpaid work done. As Lord Hobson observed in ***Petitt:***

> *"That these disputes are difficult to resolve is plain enough, if only because of the special relationship between husband and wife. They do not, as a rule, enter into contracts with one another so long as they are living together on good terms. It would be very odd if they did."*

58. Consequently, a lot of women have been put in a disadvantaged position with the provision of proof of contribution to a relationship which was not businesslike in nature. Section 7 of the MPA is having the effect of being discriminatory and a tool to disenfranchise women economically post-divorce.

59. While the CEDAW committee has stated that "**financial and non-financial contributions should be accorded the same weight**"[32] section 7 of the MPA does not accord non-financial contribution to the acquisition of marital assets the same relevance or weight as financial contribution. It demands **proof** of said contribution which has been interpreted an issue of money. The partner with the paycheck or proof of financial input in a marriage is often a man. Thus the contribution of men is regarded as more important than that of women and therefore constitutes a differential and discriminatory treatment of women during property settlement upon divorce. This differential treatment cannot be said to be justifiable since both financial and non-financial contributions in the family is what sustains the economic survival of the families and hence it is discriminatory.

---

[29] Andrew Commins "Dividing Matrimonial Property on Divorce: Colonialism, Chauvinism and Modernism in Kenya" JUNE [2010] IFL at page 167 available at <http://www.stjohnschambers.co.uk/dashboard/wp-content/uploads/2012/07/Dividing-Matrimonial-Property-on-Divorce-Colonialism-Chauvinism-and-Modernism-in-Kenya.pdf>

[30] This industry includes the industry of child bearing, childcare, household maintenance, shopping, child rearing, farming, caring for the ill, elderly and handicapped at home, entertainment, companionship etc

[31] Ncube W. (1986) *The matrimonial property rights of women in Zimbabwe: A study in property relations, domestic labour and power relations within the family*, M. Phil thesis, University of Zimbabwe, Harare.

[32] General Recommendation 21 at para. 32

60. We humbly submit that the correct approach should be as stated by Gray:

> "A just and realistic evaluation of her efforts depends instead upon the avoidance of the absolute terms of cash value in preference for the relative approach of differential equality between financial and nonfinancial contributions to the acquisition of matrimonial assets."[33]

61. We wish to illustrate this point further by showing the EFFECT of the judgments that have been pronounced by the courts subsequent to the enactment of the MPA and in particular Section 7 and the economic hardship it has occasioned on women.

- **Effect of Section 7 of the MPA: Decisions after enactment of the MPA**

62. In the ***CORD case***, the Court held:

> "98. In addition, in determining whether a statute meets constitutional muster, the Court must have regard not only to its purpose **but also its effect**. In the case of ***R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295***, cited by CIC, the Canadian Supreme Court enunciated this principle as follows;
>
> *"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."*

63. If by its effect, as stated by Hon Justice Onguto in ***Law Society of Kenya v Attorney General & 3 others*** [2016] eKLR the legislation infringed a right guaranteed by the Constitution, then such section would be declared unconstitutional:

> " 63. In determining the constitutionality of a statute, the court in the case of **Olum and another v Attorney General [2002] 2 EA** held that the court had to consider the purpose and effect of the impugned statute by the Constitution. If the purpose was not to infringe a right guaranteed by the Constitution, the court had to go further and **examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional.**

64. We submit that the effect of section 7 of the MPA has been to make it the operative guiding provision of the law on division of matrimonial property regardless of Article 45(3) of the Constitution and resulted in the deprivation and limitation of the right of women to own property contrary to Article 40(2).

65. In ***N W N v J N K*** [2015] eKLR, the applicant wife sought division of the matrimonial property after dissolution of a marriage that lasted for **twenty six (26) years**. The Court held thus:

    a. 18. Under **Article 45 (3)** of the Constitution, 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. Such rights would invariably extend to matrimonial property thereby implying that all the property listed in this cause by the plaintiff ought to be

[33] Gray K. (1976), Reallocation of property on divorce, Prof. Books, London.

equally distributed between herself and the defendant. This however, has to be done in accordance with section 7 of the Matrimonial Property Act 2013 which creates a mode of distribution commensurate with the monetary or non-monetary contribution made towards the acquisition of the property or in other words direct or indirect contribution made towards the acquisition of the matrimonial property. **The provision clearly does away with a fifty by fifty (i.e. 50:50) mode of distribution.** A party is thus entitled to a share of the matrimonial property equal to his or her contribution towards its acquisition during the subsistence of the marriage....

b. 27. In the end result, the plaintiff's claim is allowed only to the extent that she is entitled to a share or interest of 30% in the property known as Parcel No. *[particulars withheld]* and 15% in the property known as Plot No. *[particulars withheld]* along the Eldoret – Turbo Road. **Otherwise, the plaintiff is not entitled to the division or distribution of the rest of the immovable and movable property in her favour.**

66. In ***F.S v E.Z*** [2016] eKLR the applicant was the wife and the Court in applying Section 7 of the MPA stated:

a. "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.

b. **Article 45 of the Constitution stipulates 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. My interpretation of Article 45 of the Constitution is that it does not call for 50:50 sharing of matrimonial properties after a marriage is dissolved**. If that were to be the case, then marriages would be converted to economic traps whereby an individual would lure a rich man or woman, get married to them and soon thereafter seek divorce. Such a person can repeat the same process with another spouse and enrich himself or herself **without making any monetary contribution.** (Note the court's emphasis on monetary contribution). It is important to note that there are certain past decisions which are of the view that matrimonial properties should be shared equally. **Most of those decisions were made before the coming into force of the Matrimonial Property Act, 2013.... I do find that since the respondent made the entire monetary contribution, he should get a bigger share than that of the applicant."**

67. In ***J.W.N.T v C.J.T*** [2015] eKLR the wife, who was the Claimant, also contended with Section 7:

"19. The next matter for consideration is whether the claimant contributed to the acquisition of the said assets. The determination of this question will assist the court decide on how the matrimonial property is to be shared out between the parties.
20. Section 7 of the Matrimonial Property Act provides that the ownership of matrimonial property vests in the spouses according to the contribution of either

spouse towards its acquisition. Section 7 must be read together with section 14 of the Act, which provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.

21. It is plainly clear that the petitioner did not contribute financially or monetarily to the acquisition of the said assets or at any rate her financial contribution was minimal. She was a housewife and it would appear that she hardly engaged in any income generating activity. This is common ground. It was the respondent who worked and therefore directly acquired the house, the motor vehicles and the household goods.

22. Does that mean that the property therefore solely belongs to him? Not quite. The law is notorious that contribution to acquisition of property can be direct or indirect. The petitioner pleads that her contribution to the acquisition of the property was indirect. She took care of the home, the children and the respondent. While she was busy at the home front, the respondent was busy at the workplace. She created an enabling environment for the respondent to raise the money necessary for the acquisitions in issue. She is no doubt entitled to a share of the matrimonial property going by the provisions of the law that I have cited above.

23. The only issue for me to determine is the proportion of her contribution. **She seeks equal division. Would such division be right or fair in the circumstances? The respondent acquired the assets from money raised from various sources. He funded the domestic budget, catered for the children's education and medical care, among others. Can his contribution be treated as equal to that of the petitioner – running the home, caring for the respondent and children when they were younger. I find myself unable to hold that their respective contributions were equal. The respondent no doubt contributed more.**

26. In the end I do hereby make the following final orders: - That the property known as Nairobi/Block ***[particulars withheld]*** being the matrimonial home situate at ***[particulars withheld]*** Crescent, Loresho, **shall be shared at the ratio of 30:70, with the petitioner taking the 30% thereof..."**

68. From the foregoing jurisprudence emanating from the courts under Section 7 of the MPA, the effect of this Section has been to also deprive, limit and restrict the enjoyment of the aforesaid women to property. Article 40(2) provides that:

> "(2) Parliament shall not enact a law that permits the State or any person(*a*) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (*b*) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)."

69. The aforementioned decisions succinctly show how women's indirect contributions are generally undervalued and discriminated. That there is no monetary value placed on non-monetary contributions such as child care or on domestic work that produces **use value** rather than **exchange value**. The effect of Section 7 of the MPA has been the undervaluing and discrimination of indirect contributions to a marriage, contributions which most married women will make in a marriage.

70. In the South African Constitutional Case *City Council of Pretoria v Walker*[34] Langa DP emphasized that:

> "[45] What is of importance at this stage of the enquiry is the interplay between the discriminatory measure and the person or group affected by it. As pointed out by O'Regan J in *Hugo*: The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."

71. The female petitioners/applicants in these cases were, as a result of Section 7 of the MPA, deprived of their fundamental rights to own an equal share in the matrimonial property. Poverty is a consequence of property rights restrictions and the application of Section 7 of the MPA has had this effect thus resulting in the marginalization and feminization of poverty. Further, Section 7 of the MPA does not correspond with the reality of how spouses deal with property by making internal arrangements, dividing roles and responsibilities. Section 7 fails to take into account the socio-economic realities of married life by not recognizing the assigned role of the wife as a homemaker in the acquisition and preservation of the matrimonial home and the internal division of labour within the family.

- **Effect of Section 7 of the MPA: indirect discrimination**

72. In ***Vanessa Michelle Van Der Merwe v The Road Accident Fund & Anor***[35] the Constitutional Court of South Africa addressed the constitutional validity of legislative provisions of their Matrimonial Property Act that concerned patrimonial arrangements between spouses married in community of property and of profit and loss.

73. Moseneke DCJ, stated as foregoing jurists quoted have noted that:

> "[33] A court remains obliged to identify and examine the specific government object sought to be achieved by the impugned rule of law or provision."

74. In addressing the issue of equality and discrimination, we humbly rely on the Honourable Judge's dictum as follows:

> "[49]...Yet it bears repetition that when a law elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of equality, if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it..... This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis. That would be, an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes."

---

[34] (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998)

[35] CCT 48/05

75. The Honourable Judge went further to note that, even in marriage, which is a personal choice, there was no waiver of rights not to be treated unequally or contrary to the law and **the test of justification was to be fulfilled by the State.**

> [61]...the constitutional validity or otherwise of legislation does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in section 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid.... Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue."
>
> "[62] Second, ordinarily the starting point of a justification enquiry would be to examine the purpose the government articulates in support of the legislation under challenge. In this case the government did not proffer a purpose to validate the impugned provision.
>
> [63] Of course, the pursuit of a legitimate government purpose is central to a limitation analysis. The court is required to assess the importance of the purpose of a law, the relationship between a limitation and its purpose and the existence of less restricted means to achieve the purpose. However, in this case there is no legitimate purpose to validate the impugned law. The absence of a legitimate purpose means that there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable. I am satisfied that section 18(b) of the Act is inconsistent with the Constitution because it limits the equality provision of section 9(1) without any justification."

76. Most pertinently, Moseneke DCJ held that in questions of constitutional importance, it behooved the court to consider the context; historical, social or textual under which the contested law operated and the constitutional guarantee that it infringed. **Further, that the law in question was indirect discrimination against women even though on the face of it, the provision appeared gender-neutral.**

> "[66] Second, the amicus urged us to find that section 18(b) is problematic because it amounts to indirect and unfair discrimination against women. To this assertion, the Fund protested that the scantily stated facts does not permit a speculative foray into the conditions under which women married in community of property find themselves. It is so that ordinarily when a court is invited to decide a legal issue only on an agreed set of facts, it may not depart from the facts. However when the constitutional validity of a law or conduct is challenged by invoking one or more guarantees in the Bill of Rights, contextual analysis is often all important. The validity or otherwise of a law has implications that go well beyond the parties before court. It is a matter of public concern. For that reason a court is obliged, where appropriate, to consider the context, historical or social or textual, in which the guarantees should be understood and the impugned law operates.

"[67] There is nonetheless much cogency in the submission of the amicus that despite its gender-neutral terms, the probable effect of section 18(b) on women married in community of property is likely to be more devastating than on their male counterparts. There is no doubt that in our society domestic violence and economic vulnerability are gendered in nature. Both are a sad sequel to patriarchy....Although on its face the provision appears gender-neutral, there is much to be said for the inference that it is bound to work a more severe hardship on women married in community of property than men similarly situated."

We humbly submit that the aforementioned decision is on fours with the present Petition before your Lordship.

77. Without prejudice to the foregoing, we humbly submit that even with no proof of prejudice (which we have shown), the violation of a fundamental right itself is sufficient to render Section 7 invalid. As was held by the Supreme Court of India in ***Namit Sharma v Union of India***[36]

"12. Since great emphasis has been placed on the violation of fundamental rights, we may notice that no prejudice needs to be proved in cases where breach of fundamental rights is claimed. Violation of a fundamental right itself renders the impugned action void {Ref. *A.R. Antulay v. R.S. Nayak & Anr.* [(1988) 2 SCC 602]}."

v) Section 7 of the MPA is a contravention of international law and treaties

78. Is Section 7 of the MPA unconstitutional in light of various international treaties, ratified by Kenya and by virtue of Article 2(6) "form part of the law of Kenya under this Constitution?" We submit that it is. The equal division of property and the equal weight of indirect contribution are both firmly established in a plethora of international human rights treaties ratified by Kenya.

79. The Universal Declaration of Human Rights: At article 16(1) the UDHR provides that:

All men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.[37]

80. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[38] under Article 16 obligates States Parties:

"To take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations".

81. More specifically, men and women must have on a basis of equality the same right to enter into marriage and the *"same rights and responsibilities during marriage and at its*

---

[36] (2013) 1 SCC 745

[37] Ratified by Kenya on 31st July 1990

[38] Ratified by Kenya in 1984. It is often described as an international bill of rights for women. CEDAW defines what constitutes discrimination against women and countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports at least every four years on measures they have taken to comply with their treaty obligations.

dissolution". They must also have the same rights "*in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration*".[39]

82. From time to time the Committee on CEDAW issues **General Recommendations** intended to serve as guides to the interpretation of CEDAW.[40] In 1994, **General Recommendation 21** was issued to inform on the right of women to an equal share in, and equal control over, property in a marriage. GC No. 21 of CEDAW relates article 16 to article 15(1) which guarantees women equality with men before the law. It states *inter alia:*

> "28. In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. **Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory** and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.
>
> 32. In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. **Financial and non-financial contributions should be accorded the same weight."**

83. In 2013, the CEDAW Committee issued **General Recommendation 29** on the economic consequences of marriage, family relations and their dissolution which "builds upon the principles articulated in GC 21, other relevant GCs such as GC 27 and the Committee's jurisprudence."[41]

> "10. Some States parties have adopted constitutions that include equal protection and non-discrimination provisions but have not revised or adopted legislation to eliminate the discriminatory aspects of their family law regimes, whether they are regulated by civil code, religious law, ethnic custom or any combination of laws and practices. All these legal frameworks are discriminatory, in violation of article 2 in conjunction with articles 5, 15 and 16 of the Convention.

84. We humbly submit that this is indeed the Kenyan position especially in light of section 7 of the MPA. GC 29 goes on to provide that:

---

[39] Article 16(1)(h) CEDAW

[40] The General Recommendations indicate how some of the articles of CEDAW have been amplified, what practical measures should be taken to implement them and what information state reports should include on specific articles.

[41] Para 16 available at <http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf>

11. States parties should guarantee equality between women and men in their constitutions and should eliminate any constitutional exemptions that would serve to protect or preserve discriminatory laws and practices with regard to family relations.

43.... Property distribution and post-dissolution maintenance regimes often favour husbands regardless of whether laws appear neutral, because of gendered assumptions relating to the classification of marital property subject to division, insufficient recognition of non-financial contributions, women's lack of legal capacity to manage property, and gendered family roles.

45.**The guiding principle should be that the economic advantages and disadvantages related to the relationship and its dissolution should be borne equally by both parties. The division of roles and functions during the spouses' life together should not result in detrimental economic consequences for either party.**

46.States parties are obligated to provide, upon divorce and/or separation, **for equality between the parties in the division of all property accumulated during the marriage."**

85. Under the International Covenant on Civil and Political Rights (CCPR),[42] the Human Rights Committee (HRC) in addressing Article 23 of the CCPR (The Equality of Rights Between Men and Women): *23(4). States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution* issued **General Comment No. 28**:

> 25. To fulfil their obligations under article 23, paragraph 4, States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children's religious and moral education, the capacity to transmit to children the parent's nationality, and the ownership or administration of property, whether common property or property in the sole ownership of either spouse. States parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property.
>
> 26. States parties must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. **The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution..."**

86. The African Charter on Human and People's Rights (ACHPR)[43] provides in article 18(3), that the state undertakes to ensure elimination of every discrimination against women and also ensure the protection of the rights of the woman and child **as stipulated in international declarations and conventions**. This implies that member states to the ACHPR are also subject to the provisions of CEDAW, CCPR and the Universal Declaration of Human Rights, as explained above.

---

[42] Accession by Kenya in 1976

[43] Ratified by Kenya in 1992

87. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[44] Article 7 (d) of the Maputo Protocol provides: *States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of Marriage. In this regard, they shall ensure that: d) in case of separation, divorce or annulment of Marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the Marriage.*

88. This Article has generated a Draft General Comment[45] which has defined the term "equitable sharing" thus:

> "25. The notion of 'equitable sharing' as provided in Article 7(d) should be seen through the lens of substantive equality, also known as *de facto* equality, or equality of results, and cannot be interpreted in a manner which is inconsistent with this principle. A substantive equality approach also requires States to recognise that women are in an unequal position and implement temporary special measures aimed at ensuring their rights.

D. **The debate on the amendment of Section 7(1) of the MPA: Parliament's Defiance**

89. The Supreme Court of India in ***Namit Sharma v Union of India***[46] stated:

> "9....The Court would not allow the legislature to overlook a constitutional provision by employing indirect methods. In *Minerva Mills Ltd. & Ors. v. Union of India & Ors.* [(1980) 3 SCC 625], this Court mandated without ambiguity, that it is the Constitution which is supreme in India and not the Parliament. The Parliament cannot damage the Constitution, to which it owes its existence, with unlimited amending power.

90. In ***Council of Governors & 3 others v Senate & 53 others*** [2015] eKLR the Court noted:

> "16. The 1st petitioner relies on **Speaker of the National Assembly & Others vs De Lille, M.P. & Another [297/298] [199] ZASCA**, where the Supreme Court of South Africa held that no matter how formidable, efficient or well-meaning a legislature, it cannot make law or perform any act which is not sanctioned by the Constitution."

---

[44] Ratified by Kenya in 2010

[45] "CESCRA on women, land and property rights in Africa." CESCRA is part of the team of expert NGOs on the Africa continent to discuss a draft General Comment on Article 7 of the Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol). The proposed General Comment is aimed at setting pace for the justiciability of women's land and property rights during divorce, judicial separation and nullification of marriage. CESCRA contributed to the regional meeting held in Nairobi to discuss the draft which attracted one Commissioner Reine Gansaou from the African Commissioner on Human and people's Rights (ACHPR). The Draft General Comment will be tabled to ACHPR Commissioners meeting during the ACHPR Ordinary session in May 2015. Available at <http://www.cescra.org/index.php/advocacy/regional-advocacy/28-cescra-on-women-land-and-property-rights-in-africa>

[46] (2013) 1 SCC 745

91. We humbly submit that Parliament, expressly ignored and contravened the Constitution in its debate to amend Section 7 of the MPA. We have annexed the Hansard of the National Assembly dated Tuesday 12th November 2013 and reproduce part of the deliberations by the National Assembly on said date **in particular** the express objections raised to the proposed amendment and its unconstitutionality.

92. At pg 18 **Hon Mille Grace Akoth Odhiambo Mabona:**

> "Contrary to what hon. Prof. Nyikal has said, this principle is already a constitutional principle. So, what we are basically doing is to give guidance and direction on how it is done by law. Otherwise, we will be leaving it to the discretion of the courts and we will be leaving our responsibilities to the courts. The Constitution is very clear about equal rights before, during and after the dissolution of a marriage. So, really, it is not anything worth a choice; it is constitutional and that is an argument that would have done very well at the point of making the Constitution. At this point, unless he is really calling for the amendment of the Constitution, the principle is clear in the same Constitution."

93. At pg 19 **Hon Samuel Kiprono Chepkonga:**

> "Hon. Temporary Deputy Chairlady, I wish to move an amendment by removing the words "in equal shares irrespective" in lines two and three and replace thereof with the words "according to". Hon. Temporary Deputy Chairlady, this is so that if there is any property to be divided, then it must be in accordance with the share of each spouse's contribution to the matrimonial property. This will ensure that no one person just sits and waits for the other person to acquire property and then claim half of it."

94. At pg 24-25 **Hon Alice Muthoni Wahome** soon after the said amendment, stated:

> "Hon. Temporary Deputy Chairlady, I just want your directions before we proceed because my reading of Article 45 tells me that, if we allow that Clause 7 to go the way it has been amended, I think we shall be infringing on the Constitution. With your permission, hon. Members, Article 45 is the one that relates to the family. The family is the natural and fundamental unit of the society. But then, if you go to Article 45(3), it reads: "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."
> Hon. Temporary Deputy Chairlady, the words are: "equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage." Equal rights have not been defined to exclude property and, therefore, hon. Members, we need to be aware of that. I am sure there are lawyers and Members like Mbadi and Jakoyo Midiwo who will understand that. I think it is important that we work within the law and I think the provision should go the way it goes. Therefore, I would still want to propose that we come up with another amendment. It is outside the law, which is the Constitution."

95. At pg 25 **Hon Kenneth Odhiambo Okoth**:

> "Thank you, hon. Temporary Deputy Chairlady. I just want to clarify quickly that hon. Alice Wahome has just pointed out something that is of constitutional concern. We know that the Constitution overrides any other law since it is the supreme law and yet, we are in the process of making this one. We are saying that our Standing Orders forbid us from thinking about this and addressing it even though she has

raised something that is constitutional and is higher. Which is higher? Is it the Constitution or the Standing Orders?

96. **The Temporary Deputy Chairlady** (Hon. (Ms.) Shebesh):
Hon. Member, I have already ruled on that issue. I will, therefore, move on.

Hon Okoth:
Please, clarify it for me. I am not challenging you, but I just need a clarification.

The Temporary Deputy Chairlady (Hon. (Ms.) Shebesh):
Hon. Okoth, I have already ruled on that issue. I also clarified to the Member who spoke on it and so far, there is nothing unconstitutional that we are doing. Otherwise, it would have been raised and picked up by the Committee itself and the Speaker's office.

97. At pg 35 **Hon Wanjiku Muhia:**
Thank you, hon. Deputy Speaker. I am frustrated because I opposed everything but I was defeated. I want to say that there is no history I have made; the Bill is unconstitutional. It is obvious that in African context every property is registered in a man's name and so when we pass such a Bill and say that we are proud to have passed a Bill, we are lying to ourselves.

98. At pg 35 **Hon Samuel Kiprono Chepkonga:**
On a point of order, hon. Deputy Speaker. I totally disagree with hon. (Ms.) Muhia. Much as I have a lot of respect for her, this Bill is not unconstitutional. There is no part of the Constitution which has been breached. The Committee went through the Constitution and we are happy with the contents of the Bill. Hon. Deputy Speaker, as you know, this Bill has been with the Committee for the last six weeks; over and above the 20 days that were allowed. So, we did a very thorough job. Therefore, this Bill is in accordance with Article 45 of the Constitution. There is nothing that contradicts it.

99. Despite the many interventions and objections that amending Section 7 was contrary to Article 45(3) of the Constitution, Parliament effectively used their power to pass a law that was oppressive, discriminatory, unconstitutional and contrary to the right to equality. They capriciously used their power to benefit a few and oppress many. The legislators enacted a law that actually apprehended and isolated a group of individuals for discrimination when it came to the division of matrimonial property: women. Women's dignity is at stake when the law fails to protect women from persistent, discriminatory practices that entrench their economic and social disempowerment.

100. To further cement their resolve to curtail woman's right to property, Parliament ensured that **Article 10** of the MPA on the division of liabilities was left in "equal shares" so that **a woman is an equal partner in liabilities but not in the assets of a marriage.** The effect of Section 7 of the MPA has been to oust the express constitutional provision of equal distribution of matrimonial property. This provision, being inconsistent with the Constitution is null, void and invalid as provided in Article 2(4) of the Constitution.

101. We submit that as was held by the South African Constitutional Court in ***Prinsloo v Van der Linde and Another***[47]

> "[25]... It (the State) should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner."[66]

E. Did the Respondent fail/neglect to advise Parliament or the President of the unconstitutionality of the Act?

102. We humbly submit that this must be answered in the affirmative. The Respondent has alleged at page 6 that no proof has been raised to support the same. We have annexed the HANSARD to show that several MPs raised the said issue on the unconstitutionality of said amendment.

103. It was then, incumbent on the Respondent to either advise the National Assembly or the President on the Constitutional issues that had arisen. Article 156 mandates the Respondent not only to be "the principal legal adviser to the Government" but that he "shall promote, protect and uphold the rule of law and defend the public interest."[48] The Respondent herein, was well placed and familiar with the drawn out, age old arduous battle that Kenyan women had faced in the division of matrimonial property. This was therefore a matter in which his legal advice and expertise to Parliament and/or the President was most needed being a champion and ardent proponent of women's rights being human rights.

104. In 1989, the Respondent authored a seminal paper entitled "Women and Property Rights in Kenya"[49] and stated:

a. Most Kenyan women still do household chores, hence their positions regarding their property acquired by the husband should be well defined. Even if not employed, a housewife may, by her thrift, contribute as much to the acquisition of the matrimonial home or consumer durables as if she earned a wage. Lord Denning long championed the judicial recognition of the housewife's share in matrimonial assets. He sought to remove any references to the wife's contribution being specifically traceable to the acquisition of the property. In *Hazell v Hazell* he stated:

   (1) It is sufficient if the contributions made by the wife as such as to relieve the husband from expenditure which he would otherwise have to bear. By so doing, the wife helps him indirectly with the mortgage instalments because he has more money in his pocket with which to pay them. It may be that he does not strictly need her help-he may have enough money of his own without it-but, if, he accepts it (and is thus entitled to save more of his own money) she becomes entitled to a share.

b. Clearly Lord Denning's position conflicts with the House of Lord's decision in *Gissing v Gissing* that the indirect contribution has to relate to purchasing the property. But

---

[47] (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012

[48] Article 156(6)

[49] Githu Muigai "Women and Property Rights in Kenya" in Women and Law in Kenya: Perspectives and Emerging Issues eds. M.A. Mbeo & O. Ombaka , Public Law Institute (1989) at page 118.

Lord Denning's position conforms more with reality and addresses more substantially the interests of justice.

105. The Respondent concluded thus:

a. "Women should prosecute their rights under the law and push for more amendments for the letter of the law in the statute book is empty unless given social expression....the concern with women rights is therefore not only prerequisite in the search for a just and democratic society but it is an integral part of such society."

F. Other remedies

106. The Respondent has averred that the Petitioner has not utilized Article 119(1) of the Constitution. We submit that the same argument is without merit as was held *in extensor* by this Honourable Court in paras 71-75 of ***Council of Governors & 3 others v Senate & 53 others***[50]:

"Whether Article 119(1) of the Constitution Applies:

"It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of Article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of Article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:

a. *"Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation. 2. Parliament shall make provision for the procedure for the exercise of this right."*

The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under Articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under Article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including *"the question whether any law is inconsistent with or in contravention of"* the Constitution, or under Article 165(3)(d)(iii), to determine any matter *"...relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government"*?

In our view, the answer must be in the negative. Doubtless, Article 119(1) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that Article 119 is not intended to cover situations such as is presently before this Court. The question of the constitutionality of the impugned CGAA was raised with Parliament prior to its enactment. As deposed by Mr. Charles Nyachae, the Chairman of CIC, in his affidavit sworn on 19th September 2014, the issue had been brought to the attention of Parliament through CIC's Advisory Opinion in the month of August 2014, prior to the enactment of the CGAA. Parliament, nonetheless, appears to have disregarded the

[50] [2015] eKLR.

concerns raised regarding its conformity with the Constitution and proceeded to enact the legislation.

It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and Articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.

This Court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or An Act of Parliament, that procedure should be strictly followed. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Similarly, Article 258(1) thereof donates the power to every person to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. If this Court were to shirk its constitutional duty under Article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under Article 119(1) is without merit."

G. Section 7 of the MPA is based on prejudicial attitudes contrary to the Constitution

107. Article 10 of the Constitution provided as follows:
"(1) **The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them--**....(*a*) applies or interprets this Constitution; (*b*) **enacts, applies or interprets any law;** or (*c*) makes or implements public policy decisions.
(2) The national values and principles of governance include--..... (*b*) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

108. From the foregoing, it is clear that a law cannot be enacted or interpreted to uphold or propagate a prejudice or bias that is contrary to the Constitution. From a reading of the Hansard (annexed and excerpts reproduced herein) and certain judicial pronouncements made in some cases of division of matrimonial property, it is clear that section 7 of the MPA is seen as a reflection of the societal values held in marriage; that one spouse may be a gold digger, wasteful, an accumulator of another's wealth hence the need to legislate against such persons. This is contrary to Article 10 of the Constitution.

109. The SACC in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*[51] (O'Regan and Sachs JJ.) noted:

[51] (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117

It is our view that by criminalising primarily the prostitute, the law reinforces and perpetuates sexual stereotypes which degrade the prostitute but does not equally stigmatise the client, if it does so at all. The law is thus partly constitutive of invidious social standards which are in conflict with our Constitution. The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values, when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution. Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge.

110. Further, Section 6(3) of the MPA provides for pre-nuptial contracts in scenarios where parties wish to protect their assets from the other.

H. **Prayers sought**

111. When Parliament makes a law not sanctioned by the Constitution, it is the mandate of the Court to step in, as the guardian of the Constitution and correct the same. We submit that in this present case, the prayer to declare section 7 of the MPA unconstitutional ought to be so granted.

112. Under Article 23(1) of the Constitution, this Honourable Court has jurisdiction to hear this present Petition and as per Article 23(3) may grant a plethora of reliefs including declarations and an order for judicial review. We have sought, apart from a declaration, the order of mandamus, a judicial review order, to compel the Respondent herein to, should the Petition be allowed, to publish a deletion of section 7 and replace it with the prior provision under the Bill.

113. In the SACC decision ***Doctors for Life International v The Speaker of the National Assembly & 11 Ors***[52] Ngcobo J stated:

> [70] The primary duty of the courts in this country is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice....and if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution....."

114. We humbly submit that the said mandamus prayer can indeed be granted owing to the fact that Constitutional Courts all over the world have evolved to being **'positive legislators'**[53]. An excellent example is the Supreme Court of India which has, on several instances issued directions and guidelines which have had the force of law.

---

[52] (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)

[53] Allan R. Brewer-Carías Constitutional Courts as Positive Legislators: a comparative law study Cambridge University Press, 2011.

115. In ***Shri D.K. Basu,Ashok K. Johri vs State Of West Bengal,State Of U.P***[54] the Court was moved for relief via a letter on concerns of frequent complaints regarding custodial violence and deaths during police lock up. The court noted:

"In all custodial crimes that is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law.....We therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures..."

The Court went on to issue 10 guidelines (see attached case law) and provided that "failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render his liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter."

116. In ***Vishaka & Ors vs State Of Rajasthan & Ors***[55] the Court in determining a petition before it for safeguarding women's rights in the workplace went on to establish 11 guidelines and held:

> "In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.....Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field."

We therefore humbly submit that Your Lordship can and should grant the mandamus order so sought by the Petitioner in this case.

Your Lordship, in light of the foregoing submissions, your Petitioner humbly prays that the Petition be allowed as prayed. We are most obliged.

DATED at **NAIROBI** this 12th day of February 2018

W. NDEGWA & ASSOCIATES
ADVOCATES FOR THE PETITIONER

---

[54] 18 December, 1996.
[55] 13 August, 1997.

DRAWN & FILED BY:-
W. Ndegwa & Associates
Advocates
Summit House, 1st Floor Suite 109
University Way
P.O. Box 32852-00600
NAIROBI

TO BE SERVED UPON:

1. The Honourable The Attorney General
   Sheria House
   NAIROBI Ref: AG/CPT/MJ 117/16

2. Carolene Kituku
   Advocate
   c/o Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN)
   4th Floor Somak Bldg, Mombasa Road
   NAIROBI