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Getting to Equal: Resolving the Judicial Impasse on the Weight of Non-Monetary Contribution in Kenya's Marital Asset Division

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GETTING TO EQUAL: RESOLVING THE
JUDICIAL IMPASSE ON THE WEIGHT OF NON-
MONETARY CONTRIBUTION IN KENYA'S
MARITAL ASSET DIVISION

*Benedeta Prudence Mutiso**

ABSTRACT

Marital property law reforms and changing international human rights standards in the late 20th and early 21st century prompted Kenya to end certain discriminatory practices against women, especially in the area of property rights. For 50 years, Kenya relied on England's century-old law, the Married Women's Property Act of 1882, to regulate property rights. In 2010, Kenya adopted a new Constitution that called for equality between men and women, and in 2013, Kenya enacted independent legislation in the form of the Matrimonial Property Act (MPA). The MPA provides a basis for trial courts to divide marital property upon divorce. Specifically, it provides that monetary contribution and non-monetary contribution are the only factors for dividing marital property on divorce. The Kenyan courts have issued contradictory decisions on the weight of non-monetary contribution in long-term and short-term marriages. Without guidance on the weight of non-monetary contribution during divorce proceedings, the courts have left potential litigants, especially women, to navigate the unsettled waters of marital disputes in the legal system. Kenya's Parliament should take steps to clarify the legislation, develop regulations on the weight of non-monetary contribution, and provide statutory factors for consideration during division of marital property. This will ensure that courts meet the overriding objective of achieving a fair outcome in marital property disputes. Because of the constitutional guarantee of equality, the courts must begin analysis of property division by assuming each spouse is entitled to half of the marital property.

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INTRODUCTION

Historically, many societies, including Kenyan society, have exploited and undervalued women's uncompensated domestic work.¹ Domestic work amounts to a significant amount of time, energy, and skill.² Unfortunately, courts in Kenya have exacerbated, rather than confronted, this inequity. The courts have not equalized the weight of uncompensated domestic work and monetary contribution during the division of marital³ assets.⁴ Without a proper scheme to account for domestic work's added value to the marital unit, a homemaker spouse, typically a woman, faces an uncertain future with severe economic hardships upon divorce.⁵

After gaining independence from Britain in 1963, Kenya attempted to restructure its legal system to reflect the shifting social structure.⁶ The 1963 Constitution of Kenya solidified major barriers to women's equality, including prejudicial practices in marriage, property rights, inheritance, and limited socio-economic rights.⁷ Post-independence, Kenya ratified major international treaties, compelling the country to eliminate discriminatory practices in the administration of property rights for women.⁸

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1. Michelle Chen, *All Work and No Pay: Recognizing Women's Unpaid Labor in the Global South*, IN THESE TIMES (Feb. 28, 2013), http://inthesetimes.com/working/entry/14656/all_work_and_no_pay_recognizing_womens_unpaid_labor_in_the_global_south/.
 2. *Id.*
 3. Throughout the piece, I use the terms "marital" and "matrimonial" interchangeably, except when referring to specific statutes and definitions.
 4. See *M.A.A. v. A.R.* (2018) Matrimonial Cause No. 1 of 2017, e.K.L.R. (H.C.K.) (Kenya); *F.S. v. E.Z.* (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya); *U.M.M. v. I.M.M.* (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya). The court has stated that the law deprives spouses of the right to family property if they are unable to prove monetary or non-monetary contribution towards acquisition.
 5. Deborah J. Morris, "Breaking Up Is Hard to Do": *Proposing Legislative Action in Order to Address the Problems Surrounding Alimony and Related Divorce Matters in South Dakota*, 61 S.D.L. REV. 81, 107 (2016).
 6. See generally CONSTITUTION (1963) (Kenya) (repealed 2010).
 7. See generally CONSTITUTION art. 14–28 (1963) (Kenya) (repealed 2010).
 8. Ruth A. Odhiambo & Maurice Oduor, *Gender Equality, in THE CONSTITUTION OF KENYA: CONTEMPORARY READINGS* 99, 113–14 (Morris K. Mbondenyei, Patrick L. O. Lumumba & Steve O. Odero eds., 2011).

For 50 years, Kenya also relied on the Married Women's Property Act of 1882 ("MWPA") as the primary legislation on marital property.⁹ From 1967 to 2013, the country made three unsuccessful attempts to pass explicit laws to govern marital property.¹⁰ In the absence of a Kenyan law on division of marital property, the international human rights instruments that Kenya ratified provided a source of law to aid the courts in decision-making.¹¹ Because of Kenya's unrushed pace in implementation of human rights, these treaties did not guarantee married women equal protection before the law.¹²

During this time, the law did not recognize the equality of spouses in marriage, disregarding women's rights in this area.¹³ Women had limited rights, especially when laying claim to marital property or inheritance, once married.¹⁴ This was due partly to local customs and practices that denied women ownership or control of property.¹⁵

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9. Kenya gained independence in 1963 and relied on the MWPA until Kenya enacted the self-governing Matrimonial Property Act in December 2013, which became operational in January 2014. See Abiud Ochieng, *How Courts Have Resolved Matrimonial Disputes*, DAILY NATION (Feb. 9, 2018), <https://www.nation.co.ke/news/How-courts-have-resolved-matrimonial-disputes/1056-4298810-a63n42z/index.html>; see also Married Women's Property Act (1882) (Kenya), http://www.legislation.gov.uk/ukpga/1882/75/pdfs/ukpga_18820075_en.pdf for the MWPA's text; and Matrimonial Property Act, No. 49 (2013) (Kenya) for the Matrimonial Property Act's text.
 10. Eugene Cotran, *Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?*, 40 J. AFR. L. 194, 202 (1996) (describing futile efforts to reform women's rights regarding marriage and divorce in Kenya); Nancy Baraza, *Family Law Reforms in Kenya: An Overview* (Apr. 30, 2009) (Presentation at Heinrich Böll Foundation's Gender Forum in Nairobi) (paper on file with the University of Nairobi Research Archives) ("In the case of laws relating to marriage and divorce, three attempts were made to pass the Bill drafted by the Commission was defeated by parliament. On all these attempts, the main grounds for failure to enact the law were that it was purportedly an assault on local customs or had granted too many rights to women To date the laws relating to marriage and divorce, matrimonial property remain unlegislated.").
 11. *Echaria v. Echaria* (2007) Civil Case 663 of 2007, e.K.L.R. (H.C.K.) (Kenya).
 12. See generally HUMAN RIGHTS WATCH, *DOUBLE STANDARDS: WOMEN'S PROPERTY RIGHTS VIOLATIONS IN KENYA* 1, 16 (2003), <http://hrw.org/reports/2003/kenya0303/kenya0303.pdf>.
 13. Reem Gaafar, *Women's Land and Property Rights in Kenya*, LANDESA (Oct. 4, 2014), <https://www.landes.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>.
 14. *Id.*
 15. HUMAN RIGHTS WATCH, *supra* note 12, at 29. For women who could not afford legal counsel, customary law practices within each ethnic group deprived them of the right to property, regardless of contribution. In addition, society viewed women's uncompensated domestic work as part of their marital obligation rather than "real work." As a result, during division of marital property after divorce, women lost properties and experienced severe economic hardships. See, e.g., *Rono v. Rono* (2005)

In part because of persistent discriminatory practices against women and girls and a repressive regime,¹⁶ Kenyans advocated for change. In 2010, a new Constitution was passed.¹⁷ For the first time, the Constitution expanded the Bill of Rights to include provisions on economic, social, and cultural rights and the recognition of gender equality.¹⁸

The 2010 Constitution provided redress from harmful and discriminatory cultural practices and ensured equal protection of women before the law.¹⁹ In interpreting Article 45 of the Constitution, which states that, “[p]arties to a marriage are entitled to equal rights at the time of the marriage, during the marriage[,] and at the dissolution of the marriage,”²⁰ various courts determined that the Constitution provides for a 50-50 equitable division of property, while others have rejected this approach.²¹ However, as courts apply the legal principles

Civil Appeal 66 of 2002, e.K.L.R. (C.A.K.) (Kenya) (relying on the tradition of a sub-tribe of the Kalenjin community, brothers made attempts to deny their sisters an equal share of property because, according to customs and practices, married women could not inherit property).

16. Henry Makori, *MAKORI: Remembering Moi the Despot*, STAR (Oct. 13, 2018), https://www.the-star.co.ke/news/2018/10/13/makori-remembering-moi-the-despot_c1833949.
17. James Macharia & George Obulutsa, *Kenya Votes “Yes” to New Constitution*, REUTERS (Aug. 5, 2010), <https://www.reuters.com/article/us-kenya-referendum/kenya-votes-yes-to-new-constitution-idUSTRE6743G720100805>.
18. *Id.*
19. *See, e.g.*, CONSTITUTION art. 27 § 3 (2010) (Kenya) (“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”); *see generally* CONSTITUTION art. 2 § 4 (2010) (Kenya) (“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”).
20. CONSTITUTION art. 45 (2010) (Kenya).
21. For cases supporting spousal equality, *see, for example*, C.M.N. v. A.W.M. (2013) Env’tl. & Land Case 208 of 2012, e.K.L.R. (H.C.K.) (Kenya) (upholding principle of equality in marriage under Art. 45 (3) of the Constitution, which provides: “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.”); M.B.O. v. J.O.O. (2018) Civil Appeal No. 81 of 2017, e.K.L.R. (C.A.K.) (Kenya) (holding that the wife’s uncompensated domestic work and monetary contribution entitled her to half the marital property); M.W.G. v. T.K.G. (2016) Civil Case No. 15 of 2014, e.K.L.R. (H.C.K.) (Kenya) (holding that the wife’s uncompensated domestic work equaled the husband’s monetary contribution, and awarding her half the marital estate). For cases overlooking spousal equality, *see, for example*, A.W.N. v. F.M.N. (2018) Matrimonial Case No. 10 of 2016, e.K.L.R. (H.C.K.) (Kenya) (declining to value the wife’s uncompensated domestic work in a marriage of fourteen years because the wife did not show the efforts made to acquire the property); M.G.N.K. v. A.M.G. (2016) Civil Appeal No. 280 of 2012, e.K.L.R. (C.A.K.) (Kenya) (rejecting the principle of equality on division of matrimonial property); P.A.W.M. v. C.W.A.M. (2018) Civil Appeal No. 104

from the Constitution, women still face violations of their rights,²² including less access to education and employment because of the burden of uncompensated domestic work.

In Kenya, uncompensated domestic work and unpaid care work constitute the major types of non-monetary work.²³ The responsibility of unpaid work falls primarily upon women and “contributes to persistent gender inequalities.”²⁴ Women’s responsibility to bear, raise, and care for children leads to violations of their basic human rights to education, political participation, decent work, and leisure.²⁵ While unpaid work is essential to the economy, the responsibility of unpaid work falls on women because of their role as mothers, wives, and daughters.²⁶ Statistics show that only 36.5 percent of women in Kenya work in the formal sector, leaving the majority of women unemployed and doing unpaid work.²⁷

In 2013, Parliament enacted the Matrimonial Property Act (“MPA”) as a result of the 2010 Constitution’s instruction to regulate matrimonial property on divorce.²⁸ The MPA recognizes both monetary and non-monetary contribution of spouses in the acquisition of marital property.²⁹ It defines “contribution” to mean monetary and non-monetary contribution, that is, both paid and unpaid work.³⁰ The MPA

of 2016, e.K.L.R. (C.A.K.) (Kenya) (holding that the husband contributed the monetary contribution and therefore deserved the bigger share of the \$600,000, and awarding the wife only \$30,000 for her non-monetary contribution).

22. See, e.g., DEBORAH BUDLENDER & RACHEL MOUSSIE, ACTIONAID, MAKING CARE VISIBLE: WOMEN’S UNPAID CARE WORK IN NEPAL, NIGERIA, UGANDA AND KENYA (2014), http://www.actionaid.org/sites/files/actionaid/making_care_visible.pdf.

23. *Id.* Uncompensated domestic work is essential to the functioning of the economy. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. KENYA NAT’L BUREAU OF STATISTICS, ECONOMIC SURVEY 43 (2018), <http://www.knbs.or.ke/download/economic-survey-2018/>.

28. See CONSTITUTION art. 68 (2010) (Kenya) (“Parliament shall— . . . (c) enact legislation . . . (iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage”); see generally Matrimonial Property Act, No. 49 (2013) (Kenya).

29. The Matrimonial Property Act, No. 49 § 2.

30. The Matrimonial Property Act, No. 49 § 2. Despite the clear provisions, the courts have not changed their rulings or judgments. For example, in the case of *F.S. v. E.Z.* (2016), Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya), in dividing three matrimonial properties, the court rejected the equality of spousal contribution. The court stated, “[S]ince the husband made monetary contribution, he is entitled to the bulk of the property while the wife gets a lesser share since she made non-monetary contribution.” *F.S.*, Matrimonial Cause No. 16 of 2014. Further, in *P.A.W.M. v. C.W.A.M.* (2018) Civil Appeal No. 104 of 2016, e.K.L.R. (C.A.K.)

defines non-monetary contribution as child care, running of family business and farm, and performing general household duties.³¹ However, the statute is not clear how much unpaid work should matter in determining settlements of marital property on divorce, or whether it should be considered equal to paid work. As a result, courts have continued to argue that the bulk of the property belongs to the spouse who has made monetary contributions and has proof of such contributions.³²

This Article argues that, because courts have not adequately accounted for the weight of uncompensated domestic work, contrary to the 2010 Constitution's statement that women are equal during and at the dissolution of marriage, Kenya's Parliament should take steps to clarify the legislation and develop regulations regarding the weight of non-monetary contribution. Specifically, Parliament should provide statutory factors for consideration during division of marital property. In a marriage constitutionally recognized as a partnership, a court should not return to the old idea that the wage earner is entitled to most, if not all, of the benefits of household wealth.³³

Section I of this Article will discuss background on Kenya. Section II will then examine key theories in marriage and property division. Section III will discuss the evolution of marital property statutes in Kenya. Section IV will then analyze judicial decision-making under Kenya's marital property regime and explore the gaps between law and practice in valuing the weight of uncompensated domestic work in property division. Section V will discuss guides for reform from other countries. Finally, Section VI will make proposals for legislative action to address marital disputes through added regulations. This will make the law more enforceable and will achieve fair divorce outcomes.

(Kenya), the court rejected the equality of spousal contribution in a marriage of ten years and awarded the wife \$30,000 for a property valued at over \$600,000, with the large portion going to the husband.

31. The Matrimonial Property Act, No. 49 § 2.

32. *Id.*; see, e.g., A.W.N. v. F.M.N. (2018) Matrimonial Cause No. 10 of 2016, e.K.L.R. (H.C.K.) (Kenya), (holding that after a 14-year marriage, the woman had no right to matrimonial property: "She does not show her involvement in domestic work and management of the matrimonial home. Neither has she given evidence of the companionship she gave to the defendant. There is no evidence of her involvement in management of family business or property."); M.A.A. v. A.R. (2018) Matrimonial Case No. 1 of 2017, e.K.L.R. (H.C.K.) (Kenya) (stating that after a 36-year marriage, it was difficult to estimate the efforts by the spouse who did not make any financial contribution and give them value, either as a percentage or as a lump sum); see also Abiud Ochieng, *Throw Out Law on Sharing of Family Wealth in Divorce, FIDA Urges Court*, DAILY NATION (Sept. 13, 2016) <http://www.nation.co.ke/news/1056-3378958-5xtgdlz/index.html>.

33. See CONSTITUTION art. 45(3) (2010) (Kenya) (recognizing spouses as equal).

I. BACKGROUND

A. *Kenyan Customary Traditions and Governance of Property*

Kenya is a multi-ethnic and multi-racial country that lacks a single unifying culture.³⁴ Because of its multi-ethnic nature, Kenya benefits from a myriad of cultures, each with its own unique attributes spread over 40 ethnic groups.³⁵ Prior to the rise of colonialism, all ethnic groups in Kenya relied on native rules of custom and tradition for governance.³⁶ In 1895, the former British Empire established Kenya as its Protectorate, and in 1926, Kenya became a British colony.³⁷ Most ethnic communities living in Kenya discriminated against women before and after gaining independence from England in 1963.³⁸

For many years, ethnic communities in Kenya have relied on native customary laws and practices.³⁹ These customary laws consist of informal, unwritten rules and constantly-evolving norms that derive legitimacy from tradition and custom.⁴⁰ From the onset of the twentieth century to date, ethnic groups in Kenya have viewed women as subservient to men.⁴¹ Many ethnic communities place women on the same level as children, while others view women as chattels and disposable possessions.⁴² Kenyan society celebrates and accepts the culture of polygamy.⁴³ Some have argued that polygamy subordinates women and propagates the de facto inequality between men and women because it enhances the

34. NEAL SOBANIA, *CULTURE AND CUSTOMS OF KENYA* 1–2 (Toyin Falola ed., 2003).

35. *Id.* at 4–5, 13. Ethnic groups include, but are not limited to, Teso, Luo, Luhya, Maasai, Pokot, Turkana, Giriama, Kamba, Meru, Kisii, Chonyi, Nandi, Keiyo, Kipsigis, Somali, Samburu, Kikuyu, Borana, and Rendile. For a list of all Tribes in Kenya, see *A List of All the Tribes in Kenya*, INFOHUB KENYA (Jun. 2016) <http://www.infohub.co.ke/2016/06/a-list-of-all-tribes-in-kenya.html>.

36. Eugene Cotran, *The Place and Future of Customary Law in East Africa*, 12 INT'L & COMP. L.Q. SUPP. PUB. 72, 72–75 (1966).

37. See Felicia A. Yieke, *Ethnicity and Development in Kenya: Lessons from the 2007 General Elections*, 3 KENYA STUD. REV. 8, 9 (2010).

38. See PHOEBE ASIYO, *IT IS POSSIBLE: AN AFRICAN WOMAN SPEAKS* 18 (2018).

39. Cotran, *supra* note 36, at 72–75.

40. Cotran, *supra* note 36, at 73; HUMAN RIGHTS WATCH, *supra* note 12, at 2.

41. HUMAN RIGHTS WATCH, *supra* note 12, at 1–2.

42. *Id.* at 34 (“The Maasai believe that the property within their homestead is theirs—the children, the wife, the cows, the land—is all a man’s property.”); Cotran, *supra* note 36, at 72–75.

43. Odhiambo & Oduor, *supra* note 8, at 111–13.

status of men in society.⁴⁴ Customary practices remain fluid with subjective interpretation by the elders, who are often men.⁴⁵

In Kenya, violation of women's property rights occurs "across a range of ethnic groups, social classes, religions, and geographic regions."⁴⁶ Unequal property rights, discriminatory customary practices, and colonial-era laws characterize Kenya's marital property history.⁴⁷ Two of the unequal practices against women were disinheritance and lack of ownership rights.⁴⁸ For example, the customs and practices of ethnic groups reserved property ownership for men.⁴⁹ Customary laws of ethnic groups in Kenya, like the Maasai, considered marital property as the husband's, which he could sell without his wife's (or his wives') consent.⁵⁰ Similarly, according to Maasai customs, when women separate or divorce from their husbands, they do not leave with any property.⁵¹ If a woman brings in separate property during the marriage, such property remains in the custody of the husband.⁵² Although new laws have rectified this to some extent, these discriminatory customs remain in practice due to the lack of awareness by women.⁵³ These practices also lock women in abusive marriages; for example, data show that 57 percent of women have experienced intimate partner violence as a result.⁵⁴

Even when courts grant women access to marital homes, women may choose to leave them because of the claim to ancestral land.⁵⁵

44. Odhiambo and Oduor, *supra* note 8, at 112.

45. HUMAN RIGHTS WATCH, *supra* note 12, at 7, 11.

46. *Id.* at 16.

47. *Id.* at 7–11, 45.

48. Odhiambo & Oduor, *supra* note 8, at 107–11, 133–36.

49. *Id.* at 107–08.

50. HUMAN RIGHTS WATCH, *supra* note 12, at 34.

51. *Id.* at 34.

52. *See id.* at 39.

53. CENTRE FOR WOMEN'S LAND RIGHTS, SUPPLEMENTARY INFORMATION CONCERNING WOMEN'S LAND RIGHTS IN KENYA SUBMITTED TO THE 57 SESSION (22 FEB 2016 - 04 MAR 2016) OF THE SEE COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 1, 3 (Jan. 2016), https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_CSS_KEN_22888_E.docx.

54. *See* KENYA NAT'L BUREAU OF STATISTICS ET AL., KENYA DEMOGRAPHIC AND HEALTH SURVEY 2014 294 (2014) (finding that 64.3 percent of divorced women report having ever experienced violence since age 15 compared to 32.7 percent of never-married women.); *see also* Nita Bhalla, 'Put Up and Shut Up': Polygamy Breeds Poverty for Kenyan Women and Children, THOMSON REUTERS (Aug. 18, 2014, 8:06 PM), <https://www.reuters.com/article/us-kenya-women-polygamy-insight/put-up-and-shut-up-polygamy-breeds-poverty-for-kenyan-women-and-children-idUSKBN1L0009> (noting that women in polygamous marriage, even when abusive, cannot leave due to the fear of losing property).

55. *See* Odhiambo & Oduor, *supra* note 8, at 108–09.

Ancestral lands have complicated ties to customary laws and practices. For generations, families in patrilineal lineages have occupied and held claim to ancestral lands.⁵⁶ Accordingly, married women cannot claim the husband's ancestral home. The Kenyan Constitution recognizes the value of these lands, and as such, divorcing women can lay little or no claim to the land.⁵⁷ Women end up renting houses and filing separate claims for maintenance of children.⁵⁸ For indigent women, the costs and complex procedures violate their right to effective and sufficient judicial remedies.⁵⁹ The complex processes also hinder their access to the courts and deny them enhanced access to justice.⁶⁰

While the situation has considerably changed in law, in practice, women's perceived inferiority remains.⁶¹ Kenyan society continues to view women as subservient to men, tied to conventional roles such as caregivers and housewives.⁶² Historically and even to date, ethnic communities like the Maasai subject married women to the culture of the husband's tribe, sometimes denying the women the right to make decisions or own property.⁶³ These designs "hold women back from contributing to important development goals[,] especially in the area of economic growth."⁶⁴ Additionally, women in a marital union, whether employed or unemployed, continue to bear the burden of unpaid work within the household.

B. *The Status of Unpaid Work in the Kenyan Economy*

In order to make a case for giving equal weight to monetary and non-monetary contribution in Kenya, there is a need to understand how

56. HUMAN RIGHTS WATCH, *supra* note 12, at 7.

57. CONSTITUTION art. 63 (2010) (Kenya).

58. See HUMAN RIGHTS WATCH, *supra* note 12, at 26–28.

59. See Odhiambo & Oduor, *supra* note 8, at 109–10.

60. Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Eighth Periodic Report of Kenya, ¶ 50 U.N. Doc. CEDAW/C/KEN/CO/8 (Nov. 22, 2017), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/KEN/CO/8&Lang=En [hereinafter Concluding Observations on Eighth Report] (noting women's lack of access to justice, including upon divorce, particularly due to limited resources); Odhiambo & Oduor, *supra* note 8, at 111–13.

61. See ASIYO, *supra* note 38, at 18.

62. Inst. of Anthropology, Gender & Afr. Studies, *Portrayal of Gender Roles in Kenyan Secondary School Textbooks*, UNIV. OF NAIROBI, <http://african-studies.uonbi.ac.ke/node/505> (last visited Jan. 30, 2019).

63. See Odhiambo & Oduor, *supra* note 8, at 112–13.

64. *Id.*

women's contribution through unpaid work shapes the economy. Women in Kenya perform the bulk of uncompensated domestic work.⁶⁵ Because of this, men view such jobs as disparaging to their own stature.⁶⁶ Women collect firewood, cook, and take care of the children—roles traditionally not performed by men.⁶⁷ In rural and urban settings alike, women fall into the trap where cultural norms label uncompensated domestic work as purely women's work.⁶⁸

In 2015, the United Nations General Assembly (“UNGA”) adopted 17 Sustainable Development Goals. The goals provide a shared blueprint for peace and prosperity for all people, including women.⁶⁹ They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth for women.⁷⁰ In particular, Goal Five reads: “States commit to achieve gender equality and empower all women and girls.”⁷¹ This goal calls upon countries to recognize and value unpaid care and domestic work through the provision of basic public resources and the promotion of shared responsibility within the household.⁷²

Additionally, in 2013, the Convention on the Elimination of Discrimination against Women (“CEDAW”) Committee expressed concerns that women experience a significant decline in household

65. BUDLENDER & MOUSSIE, *supra* note 22, at 7. The 2015 McKinsey report on gender equality shows that women's contribution to the economy through unpaid work exceeds that of men. MCKINSEY GLOBAL INST., THE POWER OF PARITY: HOW ADVANCING WOMEN'S EQUALITY CAN ADD \$12 TRILLION TO GLOBAL GROWTH 12 (2015), <https://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>. The report shows that women undertake 75 percent of the world's total unpaid care work, including the vital tasks that keep households functioning, such as child care, caring for the elderly, cooking, and cleaning. *Id.* The report estimates that women's unpaid work today amounts to as much as \$10 trillion of output per year, roughly equivalent to thirteen percent of global GDP. *Id.* Such work delivers essential services that ensure the economy progresses without interruption.

66. Chen, *supra* note 1.

67. *Gender Equality and Women's Empowerment in Kenya*, USAID, <https://www.usaid.gov/kenya/gender-equality-and-womens-empowerment-kenya> (last visited Nov. 28, 2018).

68. *See* Chen, *supra* note 1.

69. *See Goal 5: Gender Equality*, UNITED NATIONS DEVELOPMENT PROGRAMME, <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-5-gender-equality.html> (last visited Jan. 25, 2019).

70. *Id.*

71. *Id.*

72. *Id.*

income upon divorce in Kenya.⁷³ The Committee noted that the situation is worse in countries without a social welfare system,⁷⁴ which Kenya lacks. Thus, despite women's contribution to the economic welfare of their families, they face severe post-divorce consequences given their responsibility as care providers.⁷⁵

Historically, economic theories failed to recognize unpaid work as a part of the mainstream economy.⁷⁶ Classical economists and neo-classical economists, such as renowned economists Arthur Pigou and Alfred Marshall, considered unpaid work within households as separate from the production market and outside of economics.⁷⁷ This conception undervalues women's contribution to the economy.⁷⁸ Unpaid work substitutes services that fall within the responsibility of the government.⁷⁹ These services therefore reduce the burden on the state.⁸⁰ In the absence of the critical support of unpaid work, the state would spend much more on public provisions such as basic infrastructure.⁸¹ Unpaid work often ensures access to basic services, such as health care. In places where hospitals are located far away and access to ambulance services is limited, with the assistance of caregivers, sick people walk the long distances to reach such services. With a less supportive infrastructure and limited access to basic services, unpaid work subsidizes government.⁸²

Uncompensated domestic work is significant and indispensable to the goal of development both in developed and developing economies.⁸³

73. *Id.*

74. *Id.*

75. Comm. on the Elimination of Discrimination Against Women, General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (Economic Consequences of Marriage, Family Relations and Their Dissolution), U.N. Doc. CEDAW/C/GC/29, ¶ 4 (Oct. 30, 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/29&Lang=en.

76. Indira Hirway, *Unpaid Work and the Economy: Linkages and Their Implications* 9 (Levy Econ. Inst. of Bard College, Working Paper No. 838, 2015).

77. *Id.*

78. See, e.g., CITI, WOMEN IN THE ECONOMY: GLOBAL GROWTH GENERATORS 11 (May 2015); Ann Ferguson et al., *Feminist Perspectives on Class and Work*, STAN. ENCYCLOPEDIA PHIL., Spring 2018, at 8–9; Nancy Folbre, *Measuring Care: Gender, Empowerment and the Care Economy*, 7 J. HUM. DEV. 183, 186 (2006); Lotte Maaßen, *The Effect of Austerity on Unpaid Work and Gender Relations in Europe*, EXPLORING ECON. (Jul. 20, 2017), <https://www.exploring-economics.org/en/discover/austerity-unpaid-work/>.

79. Hirway, *supra* note 76, at 11.

80. *Id.*

81. *Id.*

82. *Id.*

83. See generally *id.*

Unpaid work ensures that the daily economy functions and proceeds without interruption.⁸⁴ By narrowing the gender gap through easing the burden of unpaid work on women, women stand a better chance of competitively participating in the labor market workforce.⁸⁵ Recent evidence shows that advancing women's equality will add twenty-eight trillion U.S. dollars to the global gross domestic product by 2025.⁸⁶ As such, Kenya should do its part to advance gender equality, too.

In Kenyan society, the failure to focus on the economic impact of unpaid work results in a connection between women's uncompensated work and post-divorce financial crisis.⁸⁷ As such, the economic consequences of divorce are highly unpredictable, especially for women.⁸⁸

C. *The Hierarchy of Courts in Kenya*

Kenya's 2010 Constitution created a new hierarchy within the judiciary. The highest court in Kenya is the Supreme Court, which may hear appeals from the Court of Appeal,⁸⁹ which is the second highest court. The Court of Appeal handles appeals arising over the decisions of the High Court, as well as any other court or Tribunal as provided for by law.⁹⁰ The Constitution empowers the High Court, as a trial court, with original and unlimited jurisdiction to hear all matters, including the division of marital property.⁹¹ Marital property disputes are civil claims in Kenya; therefore, they fall under the jurisdiction of the High Court.

84. *Id.* at 5.

85. JONATHAN WOETZEL ET AL., MCKINSEY & COMPANY, THE POWER OF PARITY: HOW ADVANCING WOMEN'S EQUALITY CAN ADD \$12 TRILLION TO GLOBAL GROWTH 2 (Sept. 2015), <https://www.mckinsey.com/featured-insights/employment-and-growth/How-advancing-womens-equality-can-add-12-trillion-to-global-growth> (follow the "Full Report" hyperlink).

86. *Id.*

87. David Westfall, *Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property*, 27 HARV. J.L. & PUB. POL'Y 917, 920 (2004).

88. *Id.*; see, e.g., Echaria v. Echaria (2007) Civil Suit No. 663 of 2007, e.K.L.R. 1 (H.C.K.) (Kenya) (awarding the wife only 25 percent of the marital assets after 34 years of marriage.); V.W.N. v. F.N. (2015), Civil Appeal No. 179 of 2009, e.K.L.R. (C.A.K.) (Kenya) (awarding the husband 70 percent and the wife 30 percent of the marital assets after 10 years of marriage and reversing a lower court's equal division of the property).

89. CONSTITUTION art. 163 (2010) (Kenya).

90. CONSTITUTION art. 164 (2010) (Kenya).

91. See CONSTITUTION art. 165 (2010) (Kenya).

II. THEORIES OF MARRIAGE AND PROPERTY DIVISION

Cost-benefit analysis, game theory, and division of labor are the three major economic theories of marriage.⁹² Cost-benefit analysis is defined as a weighing scale approach for estimating all costs involved in and possible profits to be derived from an opportunity or proposal.⁹³ The analysis ascertains the security of the proposal and provides a basis for making comparisons with others.⁹⁴ Cost-benefit analysis considers whether the marginal cost of doing something is worth more or less than the benefit that would be received from it.⁹⁵ The approach puts all the positives (benefits) on one side and the negatives (costs) on the other side; whichever weighs heavier forms the basis for decision-making.⁹⁶

In marriage, cost-benefit analysis compares whether people marry for love or for practical reasons, such as getting a spouse to do the household work.⁹⁷ Professor Evelyn Lehrer, a leading scholar in the field of economics of union formation and dissolution, proposes that men and women may perform such an analysis even when the factors considered as costs and benefits differ.⁹⁸ Marina Adshade, an economics professor at the University of British Columbia, argues that people marry because of the opportunity to share consumption.⁹⁹ Adshade also argues that “marriage is about consuming and valuing that consumption.”¹⁰⁰ For example, a man with a higher income could marry so that he specializes in income earning as his spouse takes care of the household.¹⁰¹

On the other hand, game theory describes the strategic decision-making used when dealing with situations where the outcome of one’s

92. Shoshana Grossbard-Shechtman, *Marriage and the Economy*, in MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES 2 (Shoshana A. Grossbard-Shechtman ed., 2003).

93. Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 176–77 (1999).

94. *Id.* at 178.

95. Fred Anderson et al., *Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review*, 11 DUKE ENVTL. L. & POL’Y F. 89, 92 (2000).

96. Adler & Posner, *supra* note 99, at 178–79.

97. Evelyn L. Lehrer, *The Economics of Divorce*, in MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES, *supra* note 92, at 56.

98. *See id.*

99. Erich Saide, *What Do the Numbers Say? A Cost-Benefit Analysis of Love and Sex*, GLOBE & MAIL, (Feb. 28, 2013), <https://www.theglobeandmail.com/life/relationships/what-do-the-numbers-say-a-cost-benefit-analysis-of-love-and-sex/article9159919/> (last updated May 11, 2018).

100. *Id.*

101. *Id.*

choice of action depends on the choice of action of the other participants.¹⁰² Under game theory, each person in a marriage tries to further his or her interest but is limited by the presence of the other partner. Game theory presupposes that married couples should cooperate in decision-making in order to achieve the most benefits.¹⁰³

Just like renowned economist Gary Becker, Professor Lehrer views marriage as a household production system that allows for the efficient division of labor.¹⁰⁴ Becker “sees marriage in terms of an exchange of domestic services, typically by the female, in exchange for long-term financial support.”¹⁰⁵ The unequal burden of unpaid work on women divides the labor market on gender lines.¹⁰⁶ The gendered distribution of work has an underlying link to the economics of marriage.¹⁰⁷ It shows that women’s burden of unpaid work is tied to the gendered role differentiation of parties in the household as a production unit.¹⁰⁸ In the household, women perform the bulk of unpaid work as opposed to men.¹⁰⁹ The household, as a production and consumption unit, provides a link between household economy and monetized economy.¹¹⁰ As such, the exclusion of unpaid work from economics fosters patriarchal values and bias against such work. Therefore, it is necessary to incorporate unpaid work within the boundaries of the macro-economy.¹¹¹

Recent scholars like Alicia B. Kelly recognize marriage as a form of partnership where spouses make financial and non-financial contributions towards the marital unit.¹¹² Several jurisdictions adopted the approach of equal property division using the partnership model.¹¹³ The partnership model conceives of a marriage as a place of equality in

102. *The Presence of Game Theory in Marriage*, CORNELL UNIV.: NETWORKS (Sept. 18, 2015), <https://blogs.cornell.edu/info2040/2015/09/18/the-presence-of-game-theory-in-marriage/>.

103. *Id.*

104. Lehrer, *supra* note 97, at 56.

105. Antony W. Dnes, *The Division of Marital Assets Following Divorce*, 25 J.L. & SOC’Y 336, 340 (1998).

106. Hirway, *supra* note 76, at 12.

107. *Id.* at 7.

108. *Id.* at 12.

109. *Id.* at 5.

110. *Id.* at 1–2.

111. *See generally* Hirway, *supra* note 76 (discussing the patriarchal implications of excluding unpaid work from economic calculations).

112. Alicia B. Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 157 (2004).

113. A partnership model presents a form of an updated contractual model of marriage. The model argues that spouses in the partnership are equal and they contribute to and share in the benefits equally. *See id.* at 158.

which both spouses contribute to and share in the benefits and costs equally.¹¹⁴ This means that each spouse has an equal, vested interest in the property acquired during marriage.¹¹⁵

Scholar Antony Dnes says that equal division of property meets demands for lost career opportunities, especially for the homemaker spouse.¹¹⁶ Because of the division of labor in the marriage, the female employment rate decreases with marriage.¹¹⁷ Lehrer argues that the equitable division of labor within the family unit increases productivity and represents key gains from marriage; for example, if one spouse becomes unemployed, the level of labor force participation may increase for the other spouse.¹¹⁸ The unemployed spouse does more unpaid work than the employed spouse.¹¹⁹ Because the unemployed spouse provides critical support, the career prospects of the other spouse will advance.¹²⁰ Evidence shows that more often than not, women tend to specialize in home production.¹²¹ Therefore, women are most likely to provide the critical support towards advancing the career trajectory of the man. Even when working as a full-time homemaker or working both in the labor market and at home, home production affects the wife's earnings by lowering her stock of labor market-related human capital.¹²² Labor market-related human capital refers to the education, skills, and health of women.

Economic theories stipulate that individuals with greater amounts of labor market-oriented human capital benefit from higher earnings, while "a wife's home production affects her own earnings by lowering her stock of labor market-related human capital."¹²³ When women bear the burden of unpaid work, it lowers their human capital.¹²⁴ Time spent on housework rather than at a salaried job consistently produces a nega-

114. Marjorie Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1416–17 (1996).

115. See Kelly, *supra* note 112.

116. Dnes, *supra* note 105, at 350.

117. Lehrer, *supra* note 97, at 66.

118. *Id.* at 56.

119. *Id.*; *contra* Patrick Parkinson, *Quantifying the Homemaker Contribution in Family Property Law*, 31 FED. L. REV. 1, 45 (2003) (arguing that women experience the double burden or triple burden in household work whether employed or unemployed).

120. Lehrer, *supra* note 97, at 57.

121. See BUDLENDER & MOUSSIE, *supra* note 22, at 4, 20.

122. Joni Hersch, *Marriage, Household Production, and Earnings*, in MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES, *supra* note 92, at 216.

123. *Id.* at 207.

124. Hirway, *supra* note 76.

tive relationship between housework and wages, particularly for women.¹²⁵ Because of the increase of the burden of uncompensated domestic work on women, their earnings decrease as stated. In addition, women may miss opportunities for higher income because of the burden of uncompensated domestic work. Consequently, when courts undervalue such work, they impede women's economic growth, causing negative economic impact.

Joni Hersch, a leading scholar in the field of economics, compares different methods of valuing the economic and non-economic contribution of spouses.¹²⁶ One of the methods analyzed by Hersch is the human capital method.¹²⁷ This method provides for equal division of property regardless of economic and non-economic spousal contribution.¹²⁸ In the United States case of *Wendt v. Wendt* (2000), the Connecticut Court of Appeals rejected the human capital method and based the award of two million dollars on the wife's needs.¹²⁹ In the case, the court valued the woman's non-monetary contribution based on her needs and her role as a corporate wife.¹³⁰

These theories of marriage and property division provide a lens through which to view Kenya's marital property division on divorce.¹³¹ Article 45(3) of the Constitution of Kenya advances the equality of parties in a marriage, which follows the definition of marriage in a partnership model.¹³²

III. MARITAL PROPERTY LAW IN KENYA: ORIGINS AND MODERN REACH

A. *Origins and Constitutional Change*

In 1882, the British Parliament enacted the Married Women's Property Act to guarantee women's separate ownership and control of property upon marriage.¹³³ The MWPA affirmed a woman's right to

125. *Id.*

126. *See* Hersch, *supra* note 122, at 216.

127. *Id.*

128. *Id.* at 217.

129. *See* *Wendt v. Wendt*, 757 A.2d 1225, 1237 (2000).

130. *See* *Wendt*, 757 A2d at 1233.

131. The Matrimonial Property Act, No. 49 (2013) (Kenya).

132. *See, e.g.*, Baraza, *supra* note 10.

133. Odhiambo & Oduor, *supra* note 8, at 113–14.

own property in her own name.¹³⁴ In legislating marital property rights, Kenya adopted the legislation from England.¹³⁵ Although the MWPA dispelled, in part, the discriminatory cultural practices against women, women's pursuit of equal property ownership failed to materialize.

Though the MWPA did not recognize non-monetary contribution to marital assets, the law changed how courts perceived women's property rights.¹³⁶ In accordance with the provisions of the law, married women could only benefit in the division of the marital estate if they had made substantial monetary contributions. As such, women undertaking uncompensated domestic work had limited benefits from the law.

Due to changing social structures in England and the need for change sparked by women's rights movements, the British Parliament shifted matrimonial property and divorce governance in 1974 to the Matrimonial Causes Act of 1973.¹³⁷ Meanwhile, Kenya's marital property regime continued to rely on the century-old MWPA.¹³⁸ Kenya's marital property regime only began to change in 2010, when Kenyans adopted a new and progressive Constitution, hailed as one of the most pro-citizen frameworks in Kenya.¹³⁹ Article 27 of the Constitution provides that: "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."¹⁴⁰ Article 45(3) establishes equality within marriage and provides that: "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."¹⁴¹ With a progressive Bill of Rights, the Constitution provided remedies that addressed the existing gender inequalities.¹⁴²

In addition, Article 2(4) of the Constitution provides that: "any law, including customary law, which is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."¹⁴³ In theory, this means that even customary law that does not treat women equally is invalid.

134. *See id.*

135. Married Women's Property Act 1882, 45 & 46 Vict. c. 75 (Eng.); *see* Odhiambo & Oduor, *supra* note 8, at 113 ("The English Married Women's Property Act ('MWPA') of 1882 was imported as a statute of general application [in Kenya].").

136. *See* Odhiambo & Oduor, *supra* note 8, at 116.

137. The Matrimonial Causes Act 1973, c. 18 § 25(2) (Eng.).

138. *See* Baraza, *supra* note 10, at 5.

139. Odhiambo & Oduor, *supra* note 8, at 123.

140. CONSTITUTION art. 27 (2010) (Kenya).

141. CONSTITUTION art. 45(3) (2010) (Kenya).

142. Odhiambo & Oduor, *supra* note 8, at 124.

143. CONSTITUTION art. 2(4) (2010) (Kenya).

B. Kenya's International Obligations Toward Gender Equality

Toward the last decades of the twentieth century, Kenya signed and ratified major human rights conventions in compliance with international human rights standards.¹⁴⁴ Kenya ratified the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention on the Elimination of Discrimination against Women (“CEDAW”) in 1972 and 1984, respectively.¹⁴⁵ In ratifying the two human rights conventions, Kenya imposed on itself a duty to respect, protect, and promote the rights of all citizens, including women. Under CEDAW, Kenya had an obligation to end biased and exclusionary practices against women through the enactment of progressive laws and practices.¹⁴⁶ As a result, the courts began to reflect a change in their reasoning regarding gender responsibilities for men and women in marriage.

As the women’s rights movement gained momentum through global developments and internal push by advocates, Kenya took steps to reform its existing marital property laws.¹⁴⁷ At the time, the United Nations member countries, including Kenya, adopted and committed to achieve the Millennium Development Goals (“MDG”), which called upon world leaders to combat discrimination against women.¹⁴⁸

Goal Three of the MDG called on countries to: “[p]romote gender equality in all levels of education and empower women.”¹⁴⁹

144. Baraza, *supra* note 10, at 2; *Ratification Status of Kenya*, UNITED NATIONS HUMAN RIGHTS OFF. HIGH COMMISSIONER, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN (last visited Apr. 12, 2019).

145. See *Ratification Status of Kenya*, *supra* note 150. The UNGA adopted the ICCPR in 1966 as an instrument to protect and promote civil and political rights of individuals across the world and to recognize the inherent dignity of all individuals, calling upon states to provide conditions for enjoyment of civil and political rights. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966). In 1979, the UNGA adopted CEDAW as an international treaty, entrenching comprehensive women rights and requiring countries to eliminate discriminatory practices against women and promote the equal status of women and girls in society. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

146. See Joy K. Asiema, *Gender Equality and the Legal Process: The Kenyan Experience*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 561, 562–63 (2000).

147. Odhiambo & Oduor, *supra* note 8, at 99–100.

148. G.A. Res 52/2 United Nations Millennium Declaration, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/2 (Sept. 8, 2000); see also *United Nations Millennium Development Goals*, UNITED NATIONS, <http://www.un.org/millenniumgoals/> (last visited Jan. 28, 2019).

149. *Id.*

Furthermore, during Kenya's periodic review before the CEDAW, the Committee recommended that courts equate nonmonetary contribution to monetary contribution during property division.¹⁵⁰ Other recommendations included awarding women an equal share in property regardless of the nature of their contribution and broadening the definition of marital property to include both tangible and non-tangible assets.¹⁵¹

During its forty-eighth session in 2011, the CEDAW Committee suggested that Kenya should broaden the meaning of matrimonial property to advance women's equality and meet the existing international standards.¹⁵² The Committee emphasized the need for equality in dividing marital assets.¹⁵³ The human rights body made several key recommendations for Kenya's consideration. First, the Committee recommended that in dividing assets between men and women in marriage, economic and non-economic contribution should be accorded the same weight.¹⁵⁴ Second, in assessing potential post-divorce economic consequences, the courts should consider the woman's loss of economic opportunity.¹⁵⁵ Third, the Committee noted that courts have to evaluate the financial or non-financial investment in development of a husband's economic activity.¹⁵⁶ Finally, on the definition of matrimonial property, the Committee recommended that all property accumulated during the marriage, including real estate, household goods, savings and investments, interest in pensions or retirement accounts, businesses, and increases in value of non-marital property, forms part of the marital es-

150. See Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kenya, ¶¶ 12, 42, 46, U.N. Doc. CEDAW/C/KEN/CO/7 (Feb. 2, 2011) [hereinafter Concluding Observations on Kenya].

151. *Id.* ¶ 45.

152. Concluding Observations on Kenya, *supra* note 150, ¶¶ 46, 52.

153. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 21: Equality in Marriage and Family Relations, ¶ 34, U.N. Doc. CEDAW/C/G/21 (1994), <https://www.refworld.org/docid/48abd52c0.html> [hereinafter General Recommendation No. 21].

154. *Id.* ¶ 32; see also Concluding Observations on Eighth Report, *supra* note 60, ¶ 50(b) (expressing concern about "the requirement to prove contribution to marital property under the Matrimonial Property Act of 2013, which discriminates against women who face challenges proving and quantifying non-monetary contributions"). The Committee recommended a repeal of Section 7 of the Matrimonial Property Act and for the State to recognize the principle of equality in all areas of marriage, including property. *Id.* ¶ 51(a).

155. Concluding Observations on Kenya, *supra* note 150, ¶ 45.

156. *Id.*

tate.¹⁵⁷ Kenya reserved the application of CEDAW recommendations and enacted its new matrimonial property law without the CEDAW Committee's suggested changes.¹⁵⁸

In 2013, the CEDAW Committee, in its General Recommendation No. 29, discouraged polygamous marriages, as they contravene women's rights by imposing serious emotional and financial consequences.¹⁵⁹ The violations affect women and their dependents; therefore, the CEDAW Committee recommended that state parties like Kenya abolish polygamous marriages to ensure equal property rights after divorce.¹⁶⁰

C. *The Current State of the Matrimonial Property Regime in Kenya*

The Constitution that Kenya adopted in 2010 provided for equality in marriage and was hailed as a beacon of hope for many women.¹⁶¹ The principle of equality in marriage signified a major win for women's rights and a step toward ending discriminatory practices against women. In the years following the passage of the Constitution, Article 45(3) became a guiding principle and a basis for determining marital property disputes.¹⁶² As a result, some courts adopted an equitable-share approach in dividing marital property; however, others ruled against such an approach.¹⁶³ Thus, despite the Constitution's

157. *Id.*

158. Compare Concluding Observations on Eighth Report, *supra* note 60, with The Matrimonial Property Act, No. 49 (showing that Kenya rejected the CEDAW's recommendations in its new law).

159. Comm. on the Elimination of Discrimination Against Women, General Recommendation 29, *Economic Consequences of Marriage, Family Relations, and their Dissolution*, ¶ 27 U.N. Doc. (Feb. 26, 2013) http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf [hereinafter General Recommendation 29]; Bhalla, *supra* note 54.

160. General Recommendation 29, *supra* note 159.

161. CONSTITUTION art. 45(3) (2010) (Kenya) ("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.").

162. See, e.g., M.W.M. v. H.M.M. (2017) Civil Suit No. 75 of 2014, e.K.L.R. (H.C.K.) (Kenya); *F.S.*, Matrimonial Cause No. 16 of 2014, e.K.L.R.; U.M.M. v. I.M.M. (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya).

163. See, e.g., M.W.M. v. H.M.M. (2017) Civil Suit No. 75 of 2014, e.K.L.R. (H.C.K.) (Kenya) (deciding that each spouse is entitled to 50 percent of the marital estate in the absence of actual evidence of contribution of either party); *F.S.*, Matrimonial Cause No. 16 of 2014, e.K.L.R. (arguing that the husband should get the bulk of the property because of his monetary contribution); U.M.M. v. I.M.M. (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya) (arguing that Article 45(3) of the

provision for equality, women encounter varying interpretations on the meaning of equality during property division on divorce under Article 45(3) of the Constitution.¹⁶⁴

Following the passage of the Constitution in 2010 and the CEDAW Committee's recommendations in 2011, Kenya enacted a self-governing matrimonial property law, the Matrimonial Property Act, in 2013.¹⁶⁵ The enactment of the MPA effectively repealed the MWPA as it applied to Kenya.¹⁶⁶ The MPA limits the definition of matrimonial property to only tangible assets.¹⁶⁷ Section 6 of the MPA states: "matrimonial property means— (a) the matrimonial home or homes, (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."¹⁶⁸ Section 7 of the MPA provides that: "ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."¹⁶⁹ The MPA also defines "contribution," stating that it "means monetary and non-monetary contribution and includes— (a) domestic work and management of the matrimonial home; (b) child care; (c) companionship; (d) management of family business or

Constitution does not grant an automatic 50:50 sharing of the marital estate and that such an approach would derail the institution of marriage).

164. CONSTITUTION art. 45(3) (2010) (Kenya) ("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."); *see* P.N.N. v. Z.W.N. (2017) Civil Appeal No. 128 of 2014, e.K.L.R. (C.A.K.) (Kenya) ("I am unpersuaded that the provision commands a 50:50 partitioning of marital property upon the dissolution of the marriage."); C.M.N. v. A.W.M. (2013) Envtl. & Land Case 208 of 2012, e.K.L.R. (H.C.K.) (Kenya) ("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 changed so that it is no longer a question of how much each spouse contributed towards the purchase of a matrimonial property which matters . . . [B]y registering the Defendant as the joint owner of the Suit Property, the Defendant acquired, jointly with the Plaintiff, absolute ownership in the Suit Property that cannot be challenged or simply wished away. It can be said that the Plaintiff gifted the Defendant a half share in the Suit Property. That gift cannot be taken away from her."); F.S. v. E.Z. (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya) (rejecting the equality of spousal contribution); M.W.G. v. T.K.G. (2016) Civil Case No. 15 of 2014, e.K.L.R. (H.C.K.) (Kenya) (upholding the equality of spousal contribution).

165. *See, e.g.*, The Matrimonial Property Act, No. 49.

166. The Matrimonial Property Act, No. 49 § 19.

167. The Matrimonial Property Act, No. 49 § 6.

168. The Matrimonial Property Act, No. 49 § 6.

169. The Matrimonial Property Act, No. 49 § 7.

property; and (e) farm work.”¹⁷⁰ Therefore, the MPA explicitly recognizes non-monetary contribution.

The MPA contains several other key provisions that relate to matrimonial property. Section 12 requires spousal consent before selling or mortgaging property.¹⁷¹ Section 11 provides that, subject to the Constitution, the courts shall take into account the customary law relating to divorce or dissolution of marriage and the protection of ancestral land as required under Article 63 of the Constitution.¹⁷² Therefore, upon divorce, women cannot claim ownership of historically ancestral or community-owned land. Women have suffered economic hardship post-divorce because of this.¹⁷³ Like the Constitution, the Section 7 of the MPA provides that each spouse is a separate individual with separate legal and property rights.¹⁷⁴ Thus, each spouse has the ability to acquire and own individual income or property.¹⁷⁵ Section 6 provides that even where customary law marriages exist, spouses have the capacity to own and manage their property.¹⁷⁶

Section 8 of the MPA provides for the acquisition of property in polygamous marriage, taking into account any contributions made by the husband and each of his wives.¹⁷⁷ Yet, this section perpetuates unequal property rights between men and women in polygamous unions.¹⁷⁸ In Kenya, the polygamous culture allows a man to marry many wives, while society frowns upon women with numerous partners.¹⁷⁹ The MPA remains silent.¹⁸⁰

170. The Matrimonial Property Act, No. 49 § 2.

171. The Matrimonial Property Act, No. 49 § 12(5) (2013) (Kenya).

172. The Matrimonial Property Act, No. 49 § 11 (2013) (Kenya) (“During the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including— . . . the customary law relating to divorce or dissolution of marriage; the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution.”).

173. Bhalla, *supra* note 54; Ruth H. Kaddari & Marsha A. Freeman, *Economic Consequences of Marriage and its Dissolution: Applying a Universal Equality Norm in a Fragmented Universe*, 13 THEORETICAL INQUIRIES L. 323, 334 (2012).

174. CONSTITUTION art. 40 (2010) (Kenya); The Matrimonial Property Act, No. 49 § 7.

175. CONSTITUTION art. 40 (2010) (Kenya); The Matrimonial Property Act, No. 49 § 7.

176. The Matrimonial Property Act, No. 49 § 6.

177. The Matrimonial Property Act, No. 49 § 8.

178. The Matrimonial Property Act, No. 49 § 8.

179. Odhiambo and Oduor, *supra* note 8, at 112.

180. The Matrimonial Property Act, No. 49.

The Constitution and the MPA repealed imbalanced laws and reinforced Kenya's commitment to advance gender equality.¹⁸¹ The Constitution counsels against discrimination based on sex, pregnancy, and marital status and provides for equal rights in marriages.¹⁸² And, despite its limitations, the MPA defines matrimonial property for the first time.¹⁸³ It defines contribution, provides for the property rights of parties in polygamous unions and customary marriages, and recognizes prenuptial agreements and acquisition of interest in property by contribution.¹⁸⁴

As with the principle of equality in marriage, the legal recognition of non-monetary contribution to the marital unit shows progress in women's rights.¹⁸⁵ In legislating what qualifies as a non-monetary contribution, Parliament reformed the inequality of women's uncompensated domestic work in Kenya.¹⁸⁶ The legal recognition of such contribution eliminates the frequent application of discriminatory laws and practices against women's property ownership.¹⁸⁷ Further, it ensures that women's work within the duration of marriage is recognized as work rather than a marital obligation.

Although the MPA now explicitly defines non-monetary contribution, in implementing the provision, the courts have undervalued women's uncompensated domestic work and given differing interpretations of its value.¹⁸⁸ The emerging jurisprudence currently reflects a shift from the initial approach of equal division adopted by the courts from 2010 to 2013. Women's rights activist groups like FIDA-Kenya continue to

181. CONSTITUTION art. 27(3) (2010) (Kenya); *see also* CONSTITUTION art. 45 (2010) (Kenya).

182. CONSTITUTION art. 27(3)–(4), 45(3) (2010) (Kenya).

183. The Matrimonial Property Act, No. 49 § 2, 6–8 (2013) (Kenya).

184. The Matrimonial Property Act, No. 49 § 2, 6–8 (2013) (Kenya).

185. The Matrimonial Property Act, No. 49 § 2; CONSTITUTION art. 45 (2010) (Kenya).

186. Lucyline Nkatha Murungi, *Consolidating Family Laws in Kenya*, 17 EUR. J.L. REFORM. 317, 327 (2015).

187. Kaddari & Freeman, *supra* note 173, at 335.

188. *See, e.g.*, U.M.M. v. I.M.M. (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya) (ruling that monetary contribution is on a higher pedestal than non-monetary contribution and opining that valuing non-monetary contributions “would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property”); M.W.G. v. T.K.G. (2016) Civil Case No. 15 of 2014, e.K.L.R. (H.C.K.) (Kenya) (ruling that non-monetary contribution is equal to monetary contribution and stating that it would be “impossible to attach any value to such marital chores as companionship, parental child care and management of a matrimonial home”).

criticize some aspects of the MPA for eroding the constitutional gains made in achieving gender equality in 2010.¹⁸⁹

In 2018, FIDA-Kenya unsuccessfully challenged the constitutionality of Section 7 of the MPA as read together with Article 45 of the Constitution.¹⁹⁰ Section 7 of the MPA implies that each spouse should prove their contribution toward acquisition of matrimonial property.¹⁹¹ In its case, FIDA-Kenya argued that Section 7 of the MPA offends Article 45 of the Constitution because it calls for proof of contribution contrary to the principle of equality in marriage.¹⁹² In dismissing the petition, the court held that Section 7 of the MPA “does not offend any provisions of the Constitution as alleged,” and “[b]y providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.”¹⁹³

At times, courts’ traditional values and biases have also influenced some decisions when evaluating non-monetary contribution.¹⁹⁴ For example, in *F.S. v. E.Z.* (2016), the court acknowledged the woman’s non-monetary contribution but held that the husband deserved the bulk of the property since he made the monetary contribution.¹⁹⁵ In addition, Patrick Parkinson, a leading specialist in the field of family law, argues that in cases where a man is a caregiver, the courts elaborate more on the facts.¹⁹⁶ In contrast, caring work disappears from view where it is the woman’s role.¹⁹⁷ Thus, some courts that deal with division of marital

189. Murungi, *supra* note 186, at 321.

190. Fed’n of Women Lawyers Kenya (FIDA) v. Hon. Att’y Gen. (2018) Petition No. 164B of 2016, e.K.L.R. (H.C.K.) (Kenya).

191. The Matrimonial Property Act, No. 49 § 7 (2013) (Kenya) (“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.”).

192. *Fed’n of Women Lawyers Kenya (FIDA)*, Petition No. 164B of 2016, e.K.L.R.

193. *Fed’n of Women Lawyers Kenya (FIDA)*, Petition No. 164B of 2016, e.K.L.R.

194. *See Nderitu v. Nderitu* (1997) Civil Appeal 203 of 1997, e.K.L.R. (H.C.K.) (Kenya) (devaluing the wife’s contribution and ruling that since the wife gave birth through caesarian section, her capacity to acquire property towards the marital estate diminished) (reversed on appeal); *see also F.S. v. E.Z.* (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya) (holding that non-monetary contribution weighed less than monetary contribution).

195. *F.S.*, Matrimonial Cause No. 16 of 2014, e.K.L.R. (“[M]arriages 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.”).

196. Regina Graycar, *Gendered Assumptions in Family Law Decision-Making*, 22 *FED. L. REV.* 278, 289 (1994).

197. *See id.*

assets consider the work of men caregivers as exceptional, in contrast to women's daily routine as homemakers and breadwinners.¹⁹⁸

In order to make these court decisions more predictable and uniform, and to ensure that courts are deciding these cases with the constitutional principle of spousal equality in mind, Parliament should adopt, by statute, specific factors the courts should address. Currently, the lack of statutory factors leaves the door wide open for trial courts to determine applicable factors in any given circumstance.¹⁹⁹ The judicial decision-making demonstrates the bias against women's non-monetary contribution, whether explicit or implicit. These decisions have produced outcomes riddled with inconsistency and arbitrariness.²⁰⁰ The addition of statutory factors would address these concerns.

Additionally, Kenya has come under scrutiny from the CEDAW Committee for its current law on distribution of marital property in divorce cases. During Kenya's review in 2017, the CEDAW Committee noted that some provisions of the MPA, as currently drafted, continue to perpetuate unfair practices against women.²⁰¹ The Committee stated that Section 7 of the MPA deprives women of their fundamental right to property and violates equal protection before the law as required under the Convention.²⁰² The MPA's definition of matrimonial property is

198. *Id.* at 288.

199. P.W.K. v. J.K.G. (2015) Civil Appeal No. 33 of 2014, e.K.L.R. (C.A.K.) (Kenya) (considering the husband's wasteful disposition of assets & transfer of matrimonial property to third parties); S.N.K. v. M.S.K. (2015) Civil Appeal No. 139 of 2010, e.K.L.R. (C.A.K.) (Kenya) (considering matrimonial property held in a limited liability company as well as provisions for minor children).

200. U.M.M. v. I.M.M. (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya) (arguing that Article 45(3) of the Constitution does not grant an automatic 50:50 sharing of the marital estate and that entitlement is proportionate to contribution); M.W.G. v. T.K.G., Civil Case No. 15 of 2014, e.K.L.R. (H.C.K.) (Kenya) (explaining that it would be impossible to attach any value to non-monetary contributions such as companionship, parental child care, and management of a matrimonial home); F.S. v. E.Z. (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya) (holding in favor of the husband, who made monetary contribution, as opposed to the wife, who made non-monetary contribution). For further discussion of the reasons why judicial discretion at divorce needs curtailment, see Marsha Garrison, *How Do Judges Decide Divorce Cases: An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 412, 552 (1996) (arguing that indeterminate judicial standards have produced inequitable results) [hereinafter *How Do Judges Decide*].

201. Concluding Observations on Eighth Report, *supra* note 60, ¶¶ 50–51.

202. The Matrimonial Property Act, No. 49 § 7 (2013) (Kenya) ("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.").

limited to property jointly owned by the spouses.²⁰³ This definition excludes other properties that may not be jointly owned, but could qualify as matrimonial property, such as intellectual property, business goodwill, and life insurance, therefore limiting the pool of marital assets.²⁰⁴ In addition, the MPA requires spouses to prove their contribution towards the acquisition of such property during the divorce.²⁰⁵ This implies that women who do not prove their non-monetary contribution lose their property. Thus, the CEDAW Committee recommended that Kenya “[r]epeal section 7 of the [MPA] and recognize the principle of equality in all areas of marriage, including property.”²⁰⁶

IV. JUDICIAL DECISION-MAKING UNDER KENYA’S MATRIMONIAL PROPERTY LAW: CONTRIBUTION AND PROPERTY DIVISION

A. *Judicial Approach to Spousal Contribution*

Courts in Kenya have reached inconsistent decisions on the weight of non-monetary contribution in determining property allocation among spouses on divorce. Some courts have embraced the constitutional principle of equality in marriage by granting each spouse a 50 percent distribution of marital property on divorce, while others have downplayed the value of non-monetary contribution and given spouses whose contributions were mostly non-monetary less than 50 percent of marital assets on divorce.

In Kenya, the Constitution and the MPA provide guiding tools to the courts in valuing spousal contribution to marital property.²⁰⁷ Kenyan courts have interpreted the Constitution differently in explaining its provision for equality in marriage. In *A.N.W. v. J.P.N.V.G.* (2011), the court stated that “Article 45(3) of the Constitution provides that parties are equal in marriage. The equality also 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.”²⁰⁸ However, in rejecting an equal division, the court in

203. The Matrimonial Property Act, No. 49 § 6(1).

204. Concluding Observations on Kenya, *supra* note 150, ¶ 5.

205. The Matrimonial Property Act, No. 49 § 7.

206. Concluding Observations on Eighth Report, *supra* note 60, ¶ 51.

280. The Matrimonial Property Act, No. 49 § 2 (2013) (Kenya); CONSTITUTION art. 45 (2010) (Kenya).

208. *J.P.V.G. v. A.N.W.* (2011) Divorce Cause No. 19 of 2004, e.K.L.R (C.A.K.) (Kenya) (upholding the principle of equality in marriage and stating that Article 45 of the

P.W.K. v. J.K.G. (2015) interpreted Article 45 of the Constitution as follows:

Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality or equity²⁰⁹

This shows the inconsistency in court interpretations of the Constitution as it applies to marriage and property division.

Additionally, the MPA does not guide courts on how to account for non-monetary contribution, and it lacks factors that can assist courts in valuing the homemaker contribution.²¹⁰ Thus, courts have broad discretion to determine the weight of non-monetary contribution to the marital unit.²¹¹ In most cases where women have shown non-monetary contribution to marital property, courts have undervalued their worth.²¹² For example, in *P.A.W.M. v. C.W.A.W.M.* (2018), the court rejected an application to share a property worth \$600,000 equally.²¹³ The court awarded the woman \$30,000 for her non-monetary contribution.²¹⁴ Similarly, in *M.A.A. v. A.R.* (2018), which involved a marriage of 36 years, the court held as follows:

[W]here the contribution is non-monetary, the situation becomes difficult. The court has to estimate the efforts by the spouse who did not make any financial contribution and give it a value, either as a percentage or as a lump sum. I do assess

Constitution calls for an equal distribution of all property acquired during the marriage).

209. *P.W.K. v. J.K.G.* (2015) Civil Appeal No. 33 of 2014, e.K.L.R. (C.A.K.) (Kenya) (quoting *Echaria v. Echaria* (2007) Civil Case 663 of 2007, e.K.L.R. (C.A.K.) (Kenya)).

210. The Matrimonial Property Act, No. 49 § 2 (2013) (Kenya).

211. The Matrimonial Property Act, No. 49 § 2 (2013) (Kenya).

212. *F.S. v. E.Z.* (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya);

U.M.M. v. I.M.M. (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya).

213. *P.A.W.M. v. C.M.A.W.M.* (2018) Civil Appeal No. 104 of 2016, e.K.L.R. (C.A.K.) (Kenya).

214. *P.A.W.M. v. C.M.A.W.M.* (2018) Civil Appeal No. 104 of 2016, e.K.L.R.

the [wife's] contribution towards Plot No. 37 to be 30%.
The [wife] is entitled to 30% of the property.²¹⁵

In both cases, the women showed their non-monetary contribution, but the courts still undervalued it. In resolving such disputes, some courts have stated that each party should walk away with what they deserve,²¹⁶ while other courts have stated that spousal contribution determines the claim to marital property.²¹⁷ The state of the law in the courts is thus unclear.

B. *Judicial Decisions on the Weight of Uncompensated Domestic Work Pre-2010: Contribution as the Basis for Marital Property Division*

In a number of marital property disputes, the courts gave the wife almost an equal share to that of the husband.²¹⁸ The precedent set by the Court of Appeal in *Kivuitu v. Kivuitu* (1991) recognized a wife's indirect contribution to the household unit.²¹⁹ From 1991 to 2006, the courts followed the *Kivuitu v. Kivuitu* decision.²²⁰ In that case, the parties' marriage lasted for more than 20 years.²²¹ The husband argued that he solely contributed to the acquisition of marital property and that the wife was not entitled to a share.²²² However, the court held that the wife made indirect contributions and, as such, she was entitled to 50 percent.²²³ Similarly, the court in *Muthembwa v. Muthembwa* (2001) adopted the same holding and recognized the woman's non-monetary contribution to the marital estate.²²⁴

215. M.A.A. v. A.R. (2018) Matrimonial Cause No. 1 of 2017, e.K.L.R. (H.C.K.) (Kenya).

216. *F.S.*, Matrimonial Cause No. 16 of 2014, e.K.L.R.

217. *U.M.M.*, Civil Suit No. 39 of 2012, e.K.L.R.

218. See *Nderitu v. Kariuki* (1998) Civil Appeal 203 of 1997, e.K.L.R. (C.A.K.) (Kenya); *Muthembwa v. Muthembwa* (2002) 1 E.A. 186 (C.A.K.) (Kenya); *D.M.M. v. M.N.M.* (2001) Civil Appeal 236 of 2001, e.K.L.R. (C.A.K.) (Kenya). These cases involved disputes between husband and wife over beneficial interest in the property acquired during marriage. In each of the cases, the wife had to prove contributions towards the acquisition of property.

219. *Kivuitu v. Kivuitu* (1991) Civil Appeal No. 26 of 1985, K.L.R. 6, 7 (C.A.K.) (Kenya).

220. See generally *Kivuitu*, Civil Appeal No. 26 of 1985, K.L.R.

221. *Kivuitu*, Civil Appeal No. 26 of 1985, K.L.R., at 255.

222. *Kivuitu*, Civil Appeal No. 26 of 1985, K.L.R., at 261.

223. See *Kivuitu*, Civil Appeal No. 26 of 1985, K.L.R., at 258.

224. *Muthembwa v. Muthembwa* (2002) 1 E.A. 186, 194 (C.A.K.) (Kenya).

In contrast, the trial court in *Nderitu v. Nderitu* (1997) overlooked the Court of Appeal *Kivuitu* decision. The court determined that the wife, who claimed non-monetary contribution, was entitled to only 30 percent of the marital property.²²⁵ Additionally, the judge declined to award the woman 50 percent of the property due to her incapacity after childbirth, stating, “[T]here is . . . evidence that the caesarian deliveries reduced for those periods she was delivering, her capacity to exert herself in any gainful activity I take note of the delivery condition and award the wife thirty percent.”²²⁶ Here, the lower court viewed the dispute through the lens of a traditional marriage theory.²²⁷ In an ideal approach, free of biased, traditional values, the court would have considered the wife’s life-threatening risk as an extraordinary contribution. Instead, the trial court failed to consider women’s unpaid work as work by devaluing the woman’s non-monetary contribution.²²⁸

Then the Court of Appeal reversed the lower court’s decision here and granted the husband and wife each 50 percent of the marital property.²²⁹ The Court of Appeal noted that the wife’s contribution amounted to an indirect contribution that allowed the marital estate to grow.²³⁰

In 2007, *Echaria v. Echaria* reversed the weight accorded to women’s uncompensated domestic work.²³¹ In that case, the parties’ marriage lasted for more than 30 years, and they accumulated a vast marital estate.²³² In settling the marital dispute, the Court of Appeal awarded the wife, who had provided non-monetary contribution, but had limited proof of such contribution, only 25 percent of the property.²³³

From 2007 through 2010 (when Kenya adopted its new constitution), the *Echaria* decision bound the lower courts in Kenya.²³⁴ The *Echaria* standard required proof of non-monetary contribution as the basis for spousal contribution.²³⁵ At the time the case was decided, Kenyan law did not recognize non-monetary contribution to marital assets.

225. *Nderitu v. Nderitu* (1998), Civil Appeal 203 of 1997, e.K.L.R. (C.A.K.) (Kenya).

226. *Nderitu*, Civil Appeal 203 of 1997, e.K.L.R.

227. *See Nderitu*, Civil Appeal 203 of 1997, e.K.L.R.

228. *See Nderitu*, Civil Appeal 203 of 1997, e.K.L.R.

229. *Nderitu v. Nderitu* (1998), Civil Appeal 203 of 1997, e.K.L.R.

230. *Nderitu*, Civil Appeal 203 of 1997, e.K.L.R.

231. *See Echaria v. Echaria* (2007) Civil Appeal No. 75 of 2001, e.K.L.R. (C.A.K.) (Kenya).

232. *Echaria*, Civil Appeal No. 75 of 2001, e.K.L.R.

233. *Echaria*, Civil Appeal No. 75 of 2001, e.K.L.R.

234. In 2010, Kenya promulgated a new Constitution that provided for the rights of parties within a marriage. Specifically, the courts relied on Article 45 of the Constitution on the principle of equality in marriage. *See Baraza, supra* note 10, at 9.

235. *See Echaria*, Civil Appeal No. 75 of 2001, e.K.L.R.

C. *Judicial Decisions on the Weight of Uncompensated Domestic Work Post-2010: Statutory Recognition of Non-Monetary Contribution*

In practice some courts have held that Section 7 of the MPA expands on the *Echaria* standard as to what constitutes spousal contribution.²³⁶

A review of recent decisions from the courts indicates the emergence of two schools of thought in determining the weight attached to uncompensated domestic work during property division on divorce. The leading school of thought rejects the equality of spousal contribution, while the other lauds the equality of non-monetary contribution. In rejecting equality of spousal contribution, most courts have determined that monetary contribution weighs heavier than non-monetary contribution, therefore ruling in favor of the husbands. In contrast, very few court decisions have held that non-monetary contributions allowed for an equal split of the marital estate upon divorce.

Most judicial decisions post-2010 have disregarded the equality of spousal contribution. For example, the court in *U.M.M. v. I.M.M.* (2014) rejected the equal distribution of marital property under Article 45 of the Constitution.²³⁷ While analyzing Section 7 of the MPA, the court noted that proof of non-monetary contribution could entitle the proving spouse to 50 percent of the marital property.²³⁸ In the course of their 17-year marriage, the husband and wife acquired six properties.²³⁹ The wife sought an equal share of the marital property on divorce.²⁴⁰ In making the determination, the court recognized that the wife made non-monetary contributions to the acquisition of the marital property.²⁴¹ However, the court rejected the wife's non-monetary contribution to one of the properties when she failed to provide evidence to support her financial contribution to the property.²⁴²

236. *P.N.N. v. Z.W.N.* (2017), Civil Appeal No. 128 of 2014, e.K.L.R. (C.A.K.) (Kenya).

237. *U.M.M. v. I.M.M.* (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya) (stating that it would be "oppressive" to the contributing spouse for the non-contributing spouse to receive 50 percent of the marital property on divorce and therefore "cannot be the sense of equality contemplated by Article 45(3)").

238. *U.M.M.*, Civil Suit No. 39 of 2012, e.K.L.R.

239. *U.M.M.*, Civil Suit No. 39 of 2012, e.K.L.R.

240. *See U.M.M.*, Civil Suit No. 39 of 2012, e.K.L.R.

241. *U.M.M.*, Civil Suit No. 39 of 2012, e.K.L.R.

242. *U.M.M.*, Civil Suit No. 39 of 2012, e.K.L.R.

This shows that even when women plead non-monetary contribution, they must provide documentary evidence of such work.²⁴³ This is reminiscent of *Echaria*, which courts followed until the adoption of the 2010 Constitution.²⁴⁴ It is hard to provide documentary evidence of grocery shopping undertaken in a period spanning decades.²⁴⁵ People do not wed planning to provide evidence in their divorce case; therefore, most women undertaking such work do not keep track of all the receipts or documents that could prove their contribution.²⁴⁶ Additionally, even when women provide such evidence, the courts fail to equalize non-monetary contribution with monetary contribution. According to advocates, the patriarchal attitudes and breadwinner mentality prohibit courts from fully realizing the equality of spousal contribution.²⁴⁷

Similar to *U.M.M. v. I.M.M.*, the court in *M.A.A. v. A.R.* (2018) acknowledged the non-monetary contribution of the wife in a 36-year marriage, but ruled in favor of the husband's monetary contribution, assessing the wife's contribution to be only 30 percent.²⁴⁸ Additionally, in rejecting the wife's non-monetary contribution in a marriage of 14 years, the court in *A.W.N. v. F.M.N.* (2018), stated: "She does not show her involvement in domestic work and management of the matrimonial home. Neither has she given evidence of the companionship she gave to the defendant. There is no evidence of her involvement in management of family business or property."²⁴⁹

243. Odhiambo & Oduor, *supra* note 8, at 10–11; *See also* Kivuitu v. Kivuitu (1991) Civil Appeal No. 26 of 1985, K.L.R. 248 (C.A.K.) (Kenya).

244. *See* Echaria v. Echaria (2007) Civil Appeal No. 75 of 2001, e.K.L.R. (C.A.K.) (Kenya) (holding that a spouse seeking non-monetary contribution must prove such contribution).

245. *See generally* Odhiambo & Oduor, *supra* note 8, at 12.

246. M.G.N.K. v. A.W.G. (2016), Civil Appeal No. 208 of 2012, e.K.L.R. (C.A.K.) (Kenya). The court stated that it would be impossible for any married couple to keep track of documents and records of every contribution made. This is because at the time of marriage and during marriage, divorce is not on the horizon.

247. *See generally* Odhiambo & Oduor, *supra* note 8, at 12–13.

248. *M.A.A. v. A.R.* (2018) Matrimonial Cause No. 1 of 2017, e.K.L.R. (H.C.K.) (Kenya); *see also* P.A.W.M. v. C.W.A.W.M. (2018), Civil Appeal No. 104 of 2016, e.K.L.R. (C.A.K.) (Kenya) (further illustrating the conflicting decisions, awarding the wife a meager \$30,000 for her non-monetary contribution to matrimonial property valued at \$600,000).

249. *A.W.N. v. F.M.N.* (2018) Matrimonial Cause No. 10 of 2016, e.K.L.R. (H.C.K.) (Kenya). Further, in *S.A.O. v. F.O.M.*, in rejecting the wife's contribution in a marriage of 15 years, the court established that out of three matrimonial properties, the wife could only share equally in just one of the properties. *S.A.O. v. F.O.M.* (2018) Civil Suit No. 1 of 2016, e.K.L.R. (H.C.K.) (Kenya).

Some courts have also allowed spouses to transfer marital assets to limited liability companies to deprive the other spouse from accessing the property on divorce.²⁵⁰ For example, the lower court in *P.W.K. v. J.K.G.* (2015) disregarded the wife's contribution in dividing marital property.²⁵¹ In the course of their 34-year union, the parties had accumulated 18 properties.²⁵² In an attempt to keep the properties for himself, the husband transferred most of them to a limited company, a lawyer, and relatives as gifts.²⁵³ The husband argued that the wife's contribution was minimal as she used the money to buy cosmetics and clothes.²⁵⁴ The trial court held that the company did not constitute marital property.²⁵⁵ The court directed that parties were not to share equally in the remaining property, either.²⁵⁶

However, the Court of Appeal rejected the trial court's analysis, holding that marital property placed in the name of a company forms part of the marital assets.²⁵⁷ Typically, under the principle of distinctions, company property is separate from marital property; however, the court determined that marital property placed in the company became altered, such that typical company law distinctions were inapplicable.²⁵⁸ The Court of Appeal intervened in the injustice perpetuated by the patriarchal approach of the lower court and reversed the holding.²⁵⁹ Similarly, in the case of *M.S.K. v. S.N.K.* (2015), the court refused to be bound by the company form where the husband had

250. See, e.g., *P.W.K. v. J.K.G.* (2015) Civil Appeal No. 33 of 2014, e.K.L.R. (C.A.K.) (Kenya).

251. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

252. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

253. See *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

254. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

255. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

256. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

257. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

258. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R.

259. *P.W.K.*, Civil Appeal No. 33 of 2014, e.K.L.R. The Court stated: "We observe at the outset that the learned Judge appears to have addressed the matter before him in a rather casual manner and does not appear to have gone into the kind of analysis that would have been called for in a matter as contested as the one before him . . . We have perused the various exhibits that evidence that transaction and are left in no doubt whatsoever that the half share belonged to the appellant absolutely. The upshot of our consideration of this appeal is that it succeeds. We think that had the learned Judge gone into a closer analysis of the viva voce and documentary evidence placed before him and also considered the various authorities on the subject, he would in all likelihood have arrived at a different conclusion." *Id.*

transferred ownership of marital property to a limited company in order to hide assets from his wife during their divorce proceedings.²⁶⁰

These trends demonstrate that courts are reluctant to adopt a partnership approach to marriage when dividing marital property on divorce. Many courts in Kenya have determined that, in interpreting the principle of equality in marriage, the partnership approach may arise in different aspects of marriage, such as decision-making, but not spousal contribution.²⁶¹ A concurring judge in *P.N.N. v. Z.W.N.* (2017) stated, “The reality remains that when the ship of marriage hits the rocks . . . business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra.”²⁶² Thus, for the Court of Appeal, marital property division is not a system of distributing the property; rather, it is a process of determining who owns the property.²⁶³ The Kenyan system thus represents a discretionary distribution approach, rather than the equitable distribution approach dictated by the partnership model. The approach taken by the Court of Appeal betrays the values of joint spousal contribution and equality. While Article 45 of the Constitution guarantees spousal equality, courts have made decisions inconsistent with this principle.²⁶⁴

In contrast, at times, the courts have recognized the equality of spousal contribution. For example, the court in *M.W.G. v. T.K.G.* (2015) took a different approach than most. The court held that the weight of the homemaker contribution was equivalent to financial contribution.²⁶⁵ The court relied on Article 45 of the Constitution and Sec-

260. See *M.S.K. v. S.N.K.* (2005) Divorce Cause 6 of 1997, e.K.L.R. (H.C.K.) (Kenya).

261. *P.N.N. v. Z.W.N.* (2017) Civil Appeal No. 128 of 2014, e.K.L.R. (C.A.K.) (Kenya).

262. *P.N.N.*, Civil Appeal No. 128 of 2014, e.K.L.R.

263. *P.N.N.*, Civil Appeal No. 128 of 2014, e.K.L.R.

264. See *F.S. v. E.Z.* (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya) (arguing that Article 45 of the Constitution does not call for an equal share of matrimonial property and determining that the bigger the monetary contribution, the bigger the entitlement); *U.M.M. v. I.M.M.* (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya) (arguing that Article 45 does not confer an automatic 50:50 share of matrimonial property and disregarding the woman’s non-monetary contribution based on a technicality); *M.W.M. v. H.M.M.* (2017) Civil Suit No. 75 of 2014, e.K.L.R. (H.C.K.) (Kenya) (explaining that Article 45 forms the basis of division of matrimonial property in cases where the court cannot determine the evidence of actual contribution); *M.W.G. v. T.K.G.* (2016) Civil Case No. 15 of 2014, e.K.L.R. (H.C.K.) (Kenya) (explaining that it would be impossible to attach any value to non-monetary contributions such as companionship, parental child care, and management of a matrimonial home because “these tasks are simply priceless.”).

265. *M.W.G.*, Civil Case No. 15 of 2014, e.K.L.R.

tion 7 of the MPA.²⁶⁶ The couple's marriage lasted close to 28 years, and the wife sought an equal share of marital properties.²⁶⁷ In determining spousal contribution, the court noted that Section 7 of the MPA did not provide for monetary assessment of uncompensated domestic work.²⁶⁸ Nonetheless, the court relied on the Constitution and recognized equal spousal rights to marital property.²⁶⁹ Similarly, in upholding equality of spousal contribution, the court in *M.B.O. v. J.O.O.* (2018) held that the wife deserved half of the marital properties for her contribution.²⁷⁰ The decisions in these cases displayed a strong deference to women's uncompensated domestic work and attached equal importance to both monetary and non-monetary contribution.²⁷¹

D. *The Underlying Influences of the Court's Approach*

Out of more than 15 sample cases post-2010, only two cases recognized the equal weight of non-monetary and monetary contribution.²⁷² Looking at the recent decisions and the differing schools of thought on the weight of non-monetary contribution, it shows that economic theories of marriage, private values, and biases have influenced most decisions on property division. For example, the decisions in *F.S. v. E.Z.*, *U.M.M. v. I.M.M.*, *S.A.O. v. F.O.M.*, and *M.A.A. v. I.R.* point to courts' general attitude on the weight of non-monetary contribution.²⁷³ These cases are evidence of the existing loopholes in Kenya's matrimonial property law. In dividing matrimonial

266. *M.W.G.*, Civil Case No. 15 of 2014, e.K.L.R.

267. *M.W.G.*, Civil Case No. 15 of 2014, e.K.L.R.

268. *M.W.G.*, Civil Case No. 15 of 2014, e.K.L.R.

269. *M.W.G.*, Civil Case No. 15 of 2014, e.K.L.R.

270. *M.B.O. v. J.O.O.* (2018) Civil Appeal No. 81 of 2017, e.K.L.R. (C.A.K.) (Kenya).

271. *M.W.G.*, Civil Case No. 15 of 2014, e.K.L.R.

272. See *M.W.G. v. T.K.G.* (2015) Civil Case No. 15 of 2014, e.K.L.R. (H.C.K.) (Kenya); *M.W.G. v. W.P.G.* (2016) H.C.C.C. No. 50 of 2011, e.K.L.R. (H.C.K.) (Kenya).

273. *M.A.A. v. A.R.* (2018) Matrimonial Cause No. 1 of 2017, e.K.L.R. (H.C.K.) (Kenya) (finding plaintiff's efforts in taking care of mother-in-law relevant to disposition of property); *S.A.O. v. F.O.M.* (2018) Civil Suit No. 1 of 2016, e.K.L.R. (H.C.K.) (Kenya) (recognizing child care and care of the marital home as non-monetary contributions to the acquisition of property); *F.S. v. E.Z.* (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya) (taking into account applicant spouse's work in overseeing the purchase of property when distributing the property after divorce); *U.M.M. v. I.M.M.* (2014) Civil Suit No. 39 of 2012, e.K.L.R. (H.C.K.) (Kenya) (recognizing non-monetary contributions of spouse towards development of shared property).

property, the MPA only explicitly provides for the fact of contribution (both monetary and non-monetary).²⁷⁴ It does tell courts which factors to assess—such as the duration of marriage, custodial parent, or unfair transfer of property—to make these determinations. Altogether, consideration of such factors could help courts reach equitable and fair decisions.

As a result, courts in Kenya must grapple with the weight to afford non-monetary contribution. Some of the courts state that the homemaker contribution is priceless, while others state that it is not quantifiable, and therefore it is assessed on a lower scale.²⁷⁵ Additionally, this leaves potential litigants in a state of confusion.²⁷⁶ The end result is that the vague approach of spousal contribution under the MPA and the subjective interpretation of Article 45 of the Constitution by the courts strongly undermine the principle of spousal equality.

V. GUIDES FOR MARITAL PROPERTY LAW REFORM

Marital property distribution systems are highly divergent around the world. The United States has multiple schemes for property division.²⁷⁷ Most countries within the European Union have a scheme of property division with deferred property being the most common, especially those in the Scandinavian region, such as Denmark, Iceland, Sweden, Norway, and Finland.²⁷⁸ Such a regime ensures the protection of the economically dependent spouse.²⁷⁹ In Scandinavian countries, spouses have separate property during marriage, but an equal division takes place upon divorce.²⁸⁰ In this Section, I first explore different regimes of property division in the United States; then I examine the Scandinavian model of property division; and lastly, I propose further

274. The Matrimonial Property Act, No. 49 § 2 (2013) (Kenya).

275. *See, e.g.*, Echaria v. Echaria (2007) Civil Suit No. 663 of 2007, e.K.L.R. (H.C.K.) (Kenya), (awarding a diplomat's wife, after over 30 years of marriage, only 25 percent of the marital estate, despite the fact that she could not work while her husband was a diplomat).

276. *Compare* F.S. v. E.Z. (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya) (rejecting the equality of spousal contribution), *with* M.W.G. v. T.K. (2015), Civil Case No. 15 of 2014, e.K.L.R. (H.C.K.) (Kenya) (upholding the equality of spousal contribution).

277. *How Do Judges Decide*, *supra* note 200, at 410.

278. Branka Rešetar, *Matrimonial Property in Europe: A Link Between Sociology and Family Law*, 12.3 ELECTRONIC J. COMP. L., 1, 4–5 (2008).

279. *Id.* at 1.

280. *Id.* at 4.

legislative action for added regulations to Kenya's matrimonial property law.

A. *Marital Property Division in the United States*

Because of the varied property division systems in the United States, spouses might receive different property awards depending on the jurisdiction.²⁸¹ The United States does not have a consolidated regime on division of marital property. Each of the 50 States has a unique marital property regime.²⁸² From New York to California to South Dakota, state statutes grant courts nearly unlimited discretion in divorce cases.²⁸³ Currently, seven states mandate equal division of marital property or have adopted a presumption in favor of equal division.²⁸⁴ The remaining 43 dictate equitable division.²⁸⁵ The equitable division in the 43 states is usually based on a lengthy factor list, such as duration of marriage, contribution of each party, custody of children, wasteful dissipation of marital assets, encumbrances on marital property, economic circumstance of each spouse, age and health of the parties, reasonable opportunity for future acquisition of capital assets and income, and loss of career opportunities, among others.²⁸⁶

At times, trial courts experience difficulties based on the multifactor lists considered during property division.²⁸⁷ The trial court has the challenging task of "quantifying the value of the supporting spouse's and [economically dependent] spouse's contributions to the marriage and determining the rights and responsibilities of parties on divorce."²⁸⁸ Still, most states grant trial courts discretionary authority to deal with issues surrounding property division.²⁸⁹ In most American jurisdictions, the courts evaluate each party's past conduct, present needs, and future needs.²⁹⁰ On alimony, 45 states provide statutory factors for the courts

281. Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL'Y 119, 120 (2001) [hereinafter *The Economic Consequences*].

282. *Id.*

283. *How Do Judges Decide*, *supra* note 200, at 409.

284. *Id.* at 410–11.

285. *Id.*

286. *Id.*

287. Morris, *supra* note 5, at 82.

288. Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 217 (1991).

289. Morris, *supra* note 5, at 82.

290. *How Do Judges Decide*, *supra* note 200, at 410.

to consider.²⁹¹ The remaining states adopted statutory formulas in alimony determinations.²⁹²

In the United States, judicial decisions adopt different models of property division. The models include equitable distribution, equal distribution, and states that have adopted a presumption toward equal distribution.²⁹³ Depending on the state jurisdiction, courts assess the dependent spouse's role as homemaker and caretaker as supporting the independent spouse to accumulate the material wealth.²⁹⁴ In *In re Marriage of Polsky*,²⁹⁵ an Illinois court divided a \$368 million estate in half, noting that the wife's contributions as homemaker and mother allowed the husband to accumulate the marital assets.²⁹⁶ On appeal, the Illinois Court of Appeals stated that "the award constituted a just division of the marital property that adequately reflected the relevant statutory factors, including the relative contributions of each party to the acquisition, preservation, or increase in the value of the marital property and the duration of the marriage."²⁹⁷ The court acknowledged the role of the wife as a homemaker and primary caregiver of the couple's two children during the couple's 30-year marriage.²⁹⁸

Likewise, in *Adams v. Adams* (2011), a Massachusetts court divided an \$80 million marital estate equally following a 12-year marriage.²⁹⁹ Unlike Kenya's approach, the court ruled that the wife's contributions as homemaker and primary caregiver for the parties' young children meant that an equal division of the estate was the most equitable of possible divisions.³⁰⁰

However, homemaker contributions do not always result in an equal division of the marital estate.³⁰¹ In marital estates running into millions of dollars, some courts like in *Mathews v. Mathews* (1998) and *Fonzi v. Fonzi* (1993) observed that the non-monetary contribution has to be extraordinary.³⁰² In cases of millions of dollars where the contribu-

291. Morris, *supra* note 5, at 83.

292. *Id.*

293. *How Do Judges Decide*, *supra* note 200, at 424 n.87.

294. David N. Hofstein et al., *Equitable Distribution Involving Large Marital Estates*, 26 J. AM. ACAD. MATRIM. L. 311, 320 (2014).

295. *In re Marriage of Polsky*, 899 N.E.2d 454 (Ill. App. Ct. 2008).

296. Hofstein, *supra* note 294, at 320.

297. *In re Marriage of Polsky*, 899 N.E.2d at 469.

298. *In re Marriage of Polsky*, 899 N.E.2d at 464.

299. *See Adams v. Adams*, 945 N.E.2d 844 (Mass. 2011).

300. *Adams*, 945 N.E.2d at 871.

301. Hofstein, *supra* note 294, at 320.

302. *See Mathews v. Mathews*, 496 S.E.2d 126 (Va. Ct. App. 1998). The court ruled that it was Mrs. Mathews' hard work that in part formed the basis of the husband's suc-

tion is not extraordinary, the courts do not deprive the homemaker spouse the accustomed standard of living.³⁰³ In both cases, the courts divided the marital estate worth millions of dollars equally between the husband and wife.³⁰⁴

1. Equitable Distribution

The equitable distribution approach to property distribution relies heavily on judicial discretion to achieve a fair outcome.³⁰⁵ Equitable distribution states grant trial courts the capacity to award a spouse any portion of the pool of distributable marital assets.³⁰⁶ For example, New York's statutory scheme requires the court to distribute assets equitably between the parties, considering the circumstances of the case and of the respective parties.³⁰⁷ Equity is to be determined based on judicial consideration of 12 statutory factors.³⁰⁸ The legislation also views marriage as an economic partnership.³⁰⁹ The New York Domestic Relations Law defines marital property as:

All property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided

cess in later years. *Id.* at 127. The trial court agreed, awarding the wife nearly fifty percent of the marital estate of over 50 million dollars. *Id.* at 128; *see also* *Fonzi v. Fonzi*, 633 A.2d 634 (Pa. Super. Ct. 1993). The court noted the wife's significant contributions as both a corporate spouse and a homemaker. *Id.* In analyzing the wife's homemaker contributions, the court noted that, while the husband worked hard to develop and succeed at his own business during the 30-year marriage, the wife raised four children virtually alone, including one daughter who died at age 16. *Id.* The trial court divided the 3.8 million dollar estate equally between the parties. *Id.*; *see also* *Avramis v. Avramis*, 664 N.Y.S.2d 885 (N.Y. App. Div. 1997). There, in a nine million dollar estate, the trial court awarded the wife four million dollars. *Id.* The court noted the wife's active role in managing the parties' real estate holdings, making offers on parcels, attending closings, executing notes and mortgages, renting apartments, collecting security deposits and rents and maintaining the books. *Id.* David N. Hofstein et al. concludes that the dependent spouse's contribution has to be extraordinary in large marital estates. *See* Hofstein, *supra* note 294, at 320.

303. Hofstein, *supra* note 294, at 321.

304. *See Matthews*, 496 S.E.2d at 126; *Fonzi*, 633 A.2d at 634.

305. *How Do Judges Decide*, *supra* note 200, at 452–55.

306. *Id.*

307. N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 2016).

308. *How Do Judges Decide*, *supra* note 200, at 410.

309. *Id.* at 427.

in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.³¹⁰

Although the New York Court of Appeals (New York's highest court) has expansively defined marital property to include a professional degree or license, it has ruled that the homemaking contribution does not call for an equal share of marital assets as in the case of *Arvantides v. Arvantides* (1985).³¹¹ In that case, the court upheld a reduction of the wife's share of the husband's dental practice from 50 percent to 25 percent.³¹²

In the case of *O'Brien v. O'Brien* (1985), the New York Court of Appeals defined matrimonial property to include a professional degree acquired during marriage.³¹³ Some states, such as South Dakota, provide that all property be subject for division, including the spouses' retirement plans.³¹⁴ In some instances, "[b]ased on a multifactor analysis, an equitable division of property will not always result in a fifty-fifty split."³¹⁵ The equitable distribution applies a modern divorce outlook to marital property division. In effect, the approach allays the fears of the opponents of the equitable approach. The courts may be guided by additional statutory factors such as duration of marriage, custody of children, and loss of economic opportunities to achieve fair divorce outcomes.

2. Equal Distribution

In the United States, only seven states currently employ an equal division or presumption-of-equal-division approach. California is one such state.³¹⁶ California adopted an equal marital property division rule moving from an equitable distribution regime.³¹⁷

Scholars have stated that "[e]qual division offers a rough compromise between the competing claims of contribution and need."³¹⁸ For

310. N.Y. Dom. Rel. Law § 236(B)(1)(c).

311. See *Arvantides v. Arvantides*, 478 N.E.2d 199, 200 (N.Y. 1985).

312. *Arvantides*, 478 N.E.2d at 200.

313. *O'Brien v. O'Brien*, 489 N.E.2d 712, 713 (N.Y. 1985).

314. *Morris*, *supra* note 5, at 86.

315. *Id.* at 87.

316. *How Do Judges Decide*, *supra* note 200, at 410.

317. See Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 70 (2011) [hereinafter *What's Fair*].

318. *The Economic Consequences of Divorce*, *supra* note 281, at 124.

the most part, the rule awards more financial compensation as opposed to a need-based award.³¹⁹ “The equal-division rule typically provides [the homemaker spouse] more than he or she contributed financially, but less than a need-based rule might provide, depending upon the definition of need.”³²⁰ Only seven states have adopted the approach, which suggests that it remains a relatively unpopular rule of property division.

3. The American Law Institute Principles

In Kenya, judicial decisions on marital property are highly unpredictable and inconsistent. In the United States, the American Law Institute (“ALI”) attempted family law reform because of the unpredictability of court decisions due to wide judicial discretion.³²¹ The ALI Principles propose interstate uniformity to determine the economic consequences of divorce. Additionally, the Principles call for a limited attempt on reigning in judicial discretion. Widely acclaimed scholar and former Harvard Law Professor David Westfall has highlighted the Principles’ inconsistency, inaccurate assumptions, and incomplete treatment of economic and business matters.³²² Most states have judicial standards that establish an equal division as an analytical starting point.

Several approaches to marriage are important in examining the ALI Principles. The partnership approach proposes a combination of the marital model and universal model.³²³ The marital model resembles a separate property scheme excluding assets acquired before marriage and gifts and inheritance received during marriage.³²⁴ The universal model calls for the division of all assets acquired and owned by either spouse, regardless of method of acquiring.³²⁵ The ALI Principles add a varying percentage of non-marital assets to the pool of distributable marital assets during the marriage.³²⁶ Thus, at the beginning of a marriage, “the ALI approach requires use of the marital model, while in a long

319. See *What’s Fair*, *supra* note 317, at 70.

320. *Id.*

321. See Westfall, *supra* note 87, at 920.

322. See *id.* at 924–25 (stating that the Principles “are internally inconsistent, at times to the point of incoherence; they rely on the comforting but inaccurate assumption that no-fault divorce is freely available to spouses everywhere; and the treatment of business and economic matters and income tax considerations is surprisingly uninformed and incomplete”).

323. See *What’s Fair*, *supra* note 317, at 66; Parkinson, *supra* note 119, at 11.

324. *What’s Fair*, *supra* note 317, at 66.

325. *Id.*

326. *Id.* at 61.

marriage it requires use of the universal approach.”³²⁷ Because of the unfair decisions on long-term marriages, a universal model approach can remedy the injustice faced by women in such marriages in Kenya. The universal model presupposes that in a long-term marriage, a court can divide property without regard to the mode and time of acquisition.³²⁸ “Although no state has adopted the ALI proposal, there are a number of jurisdictions that authorize a court to divide some or all non-marital assets in special circumstances.”³²⁹ Today, spousal relations display an equality ideal. The principle of equality in marriage represents a partnership that promotes an equal spousal role in household decision-making and organization.³³⁰

4. The American Academy of Matrimonial Property Lawyers Guidelines

In determining alimony awards, the American Academy of Matrimonial Property Lawyers (“AAML”) rejected the proposed ALI Principles.³³¹ The AAML “offered another model” and cautioned “against the formulaic model by referring to numerous factors.”³³² Since most states considered the factors of “income of the parties” and the “length of the marriage” during alimony, the AAML proposed a formula to calculate a suggested amount of alimony.³³³ The AAML formula calculates “30% of the payor’s gross income minus 20% of the payee’s gross income.”³³⁴ The formulaic amount should not exceed 40 percent of the parties’ combined gross income.³³⁵ This formula only considers the incomes of the parties, not the duration of the marriage.³³⁶

327. *Id.*

328. *See id.* at 60.

329. *Id.* at 61. Despite their shortcomings, the ALI Principles propose factors useful in valuing the homemaker contribution. Courts in Kenya that grapple with the value of the homemaker contribution could borrow from the factors enumerated by the ALI Principles. *See Westfall, supra* note 87, at 920.

330. *What’s Fair, supra* note 317, at 66.

331. Morris, *supra* note 5, at 94.

332. *Id.*

333. Marshal S. Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. AM. ACAD. MATRIM. L. 153, 197 (2014) (internal quotation marks omitted).

334. *Id.*

335. *Id.*

336. *Id.*

The AAML has proposed additional factors such as duration of marriage, age of parties, financial needs, and spousal contribution.³³⁷ Looking at the equitable distribution approach in New York, the courts use statutory factors similar to proposed AAML factors to divide marital assets.³³⁸

B. *The Scandinavian Model of Marital Property Division*

The Scandinavian model of marital economy is based on the idea of “deferred community.”³³⁹ Deferred community is defined as property acquired by the spouses after their marriage, whether individually or together, and forms part of the community property.³⁴⁰ The definition provides an exception of personal property and property which falls into the deferred community of property.³⁴¹

Scandinavian law recognizes a no-fault divorce as well as post-divorce consequences.³⁴² Marriage reform in Scandinavian countries presents a modified dual breadwinner model.³⁴³ A spouse’s contribution through unpaid work is recognized as family support and therefore equal to the other spouse’s economic contribution.³⁴⁴ As a rule, the marital property regime adopts an equal distribution between the parties.³⁴⁵ Under Norwegian law, the rule of unequal division is only a general principle, which may be set aside if it leads to an obviously unfair result.³⁴⁶ Under the marital regime, a wife’s indirect contribution, in the form of uncompensated domestic work, achieves the sufficiency of co-ownership of a house purchased by the husband.³⁴⁷

Danish law determines the deferred community under equal property division.³⁴⁸ The exception to the rule arises during short duration marriages where an equal division would be unjust.³⁴⁹ Where

337. *Id.* at 197–98.

338. Morris, *supra* note 5, at 95.

339. Kari Melby et al., *The Scandinavian Model of Marriage*, 15 WOMEN’S HIST. REV. 651, 654 (2006).

340. *See id.* at 654.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. Rešetar, *supra* note 278, at 4.

347. *Id.* at 4.

348. *Id.*

349. *Id.*

partners own property separately and in special circumstances, the court has the option to take into consideration the duration of the marriage and the economic circumstances of the spouses. The court will also take into account the economically challenged spouse's need to obtain a different residence and any direct or indirect contribution made towards acquiring the property.³⁵⁰

The presumption of indirect contribution advances the equality of spouses with regard to the economic consequences of the marriage.³⁵¹ The systems equalize the value of indirect and direct contributions while correcting the de facto inequality between spouses.³⁵² Like in Norway, the Constitution of Kenya provides for the principle of equality in marriage.³⁵³ The Constitution sought to correct the de facto inequality between spouses.³⁵⁴ The equalizing value of spousal contributions to marital assets remains the common element in most European marital property regimes.³⁵⁵

In Sweden, once parties marry, each spouse's property becomes part of the marital property forming a part of the deferred community property regime.³⁵⁶ "The Swedish Marriage Code states that each spouse's property will become marital property, which means that each spouse will continue to 'alone own all of his or property' and 'administer it alone.'" ³⁵⁷ However, "the system gives each spouse a special claim called 'right in deferred community property.'" ³⁵⁸ This right implies that after dissolving the marriage and deduction of debts, a spouse has a

350. *Id.*

351. *Id.* at 8 (providing an analysis on Norway, Denmark, Sweden, Germany, Italy, Spain, and Croatia's spousal equality).

352. Rešetar, *supra* note 278, at 6 (noting that in France, both spouses jointly administer the community of property in equal terms, and that "[t]he particularity of the French system is compensatory transfers (*prestation compensatoire*), a combination of matrimonial property law and maintenance. In most cases, the court makes compensatory orders, compensating any disparity in the standard of living of the spouses. The purpose of this order is to maintain the financially weaker party. The courts also consider the economic circumstances of the parties with the economically weaker spouse needs.").

353. CONSTITUTION art. 45(3) (2010) (Kenya); *see also* Melby et al., *supra* note 339, at 654.

354. *See* Odhiambo & Oduor, *supra* note 8, at 123.

355. Rešetar, *supra* note 278, at 17.

356. Maarit Jänterä et al., *Property Relationship Between Spouses-Sweden*, NATIONAL REPORT: SWEDEN 1, 2 (2008).

357. *Id.*

358. *Id.* at 11.

“right to half of the value of both spouses’ marital property, meaning equal shares of the property.”³⁵⁹

In all Scandinavian legal systems, except that of Norway, the court may refrain from an equal division between the spouses for equitable reasons; for instance, in the case of a marriage of short duration.³⁶⁰ Under Norway’s system, the court can exercise discretion and award the economically disadvantaged spouse a part of the reserved property (gifts, legacies, personal assets, and rights) to achieve fairer divorce outcomes.³⁶¹

C. *Judicial Approach to Non-Monetary Contribution in England*

In a similar jurisdiction to Kenya, the former colonial power England, the courts have declared that it is unacceptable to place greater value on the contribution of a breadwinner than that of the homemaker.³⁶² As part of the British Commonwealth, Kenya’s legal jurisdiction bears a striking resemblance to England.³⁶³ Kenya is part of the group of countries previously colonized by England, and Kenya’s system of law borrowed heavily from England. It is commonly accepted that the breadwinner is viewed as the person who makes the monetary contribution while the homemaker is seen as the person who spends more time undertaking non-monetary work within the marital unit.³⁶⁴

In comparison to Kenya’s judicial approach on equality of spousal contribution, the House of Lords in *White v. White* (2001) and *McFarlane v. McFarlane* (2006) affirmed that financial and non-financial contributions apply in equal measure.³⁶⁵ Section 25 of the English Matrimonial Causes Act enumerates factors governing the

359. *Id.* at 2.

360. Magdelene de Jong & Walter Pintens, *Default Matrimonial Property Regimes and the Principles of European Family Law—A European -South African Comparison (Part 1)*, J. S. AFR. L. 363, 366–69 (2015).

361. *Id.* at 369.

362. *Lambert v. Lambert* [2003] EWCA (Civ) 1685 [38], [2003] Fam 103 (Eng.).

363. *See Member Countries*, COMMONWEALTH, <http://thecommonwealth.org/member-countries> (last visited Feb. 2, 2019).

364. Parkinson, *supra* note 119, at 18–19.

365. *White v. White* [2000] UKHL 54, [2001] 1 AC 596 (Eng.); *McFarlane v. McFarlane* [2006] UKHL 24, [2006] 2 AC 618 (Eng.). Both cases affirm that in determining the parties’ contributions to the matrimonial estate, there should be no bias in favor of the wage-earner against non-economic contributions such as managing the domestic household or caregiving. In the cases, the judges acknowledged that this is a principle of universal application, applicable to all marriages.

exercise of the court's discretion with regard to spousal contribution.³⁶⁶ Coincidentally, the language of Section 25(2)(f) of the statute has similar language to Section 7 of Kenya's MPA.³⁶⁷ Unlike Kenya's MPA, Section 25 of the English Matrimonial Causes Act also provides other statutory factors for the courts to consider in dividing marital assets, like duration of marriage, custodial parent, and wasteful dispensation of assets.³⁶⁸ In considering the value of non-monetary contributions, the courts in England focus on the economic impact of the relinquished opportunities, because they reduce the earning potential of the homemaker spouse.³⁶⁹

VI. PROPOSED LAW REFORMS IN KENYA TO ACCOUNT FOR SPOUSAL CONTRIBUTIONS

In Kenya, the courts have failed to justify why non-monetary and monetary contributions should not be accorded similar weight. I recommend that courts recognize the role of uncompensated domestic work to the economy and interpret the law to give effect to the constitutional principle of spousal equality.

A. *Application of Various Models in Kenya*

Models accounting for spousal contribution remain different around the world. In continental Europe, the Scandinavian Model of property division recognizes a modified dual breadwinner regime, wherein the marriage equalizes the value of indirect and direct contributions while correcting *de facto* inequality between spouses.³⁷⁰ Thus, using models of property division based on the equality of spouses and equality of spousal contribution, such as the Scandinavian Model, would lead to fair outcomes.³⁷¹ The Scandinavian Model adopts a liberal approach

366. The Matrimonial Causes Act 1973, c. 18 § 25(2) (Eng.), <https://www.legislation.gov.uk/ukpga/1973/18> (providing that the court shall look to “the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family”).

367. *Id.*

368. The Matrimonial Causes Act 1973, c. 18, § 25 (Eng.), <https://www.legislation.gov.uk/ukpga/1973/18>.

369. See *What's Fair*, *supra* note 317, at 66; Parkinson, *supra* note 119, at 11.

370. Rešetar, *supra* note 278, at 4.

371. See *id.* at 16.

to the judicial consequences of divorce and presupposes that women receive an equal share of the property after divorce.³⁷² The Scandinavian model demonstrates that recognizing spousal equality in contribution does not diminish the court's capacity to distribute marital property.³⁷³ Rather, the recognition of spousal equality provides a starting point for property division. The use of explicit statutory factors ensures that courts achieve a fair or just outcome in a long-term or short-term marriage. For example, in the Scandinavian approach, contribution is one among the numerous factors courts consider in dividing marital assets.³⁷⁴

The case of *P.N.N. v. Z.W.N.* (2017) is instructive to show how application of the Scandinavian Model would have changed the outcome. In that case, the court missed the mark when it stated that division of marital property is not about distribution of property but is a process of determining who among the spouses owns which property.³⁷⁵ Adopting the principle of equality in marriage under Article 45 of the Constitution can correct the existing issues identified by the court.³⁷⁶ In line with the modern approach to divorce law, the MPA did not alter the constitutional provision on spousal equality; rather, it sought to broaden the approach the courts should take in assessing claims to marital property.³⁷⁷ Under the principle of equal spousal contributions, spouses share an equitable claim to the marital estate.³⁷⁸ The system guarantees the homemaker compensation for the contributions undertaken during the marriage and recognizes marriage as a joint venture.³⁷⁹

The English approach takes account of the economic impact of lost opportunities and appreciates women's economic contribution to the family and home through non-monetary activities.³⁸⁰ In Kenya, the courts fail to consider the economic impact of the lost opportunities.³⁸¹ Consequently, the approach undervalues non-monetary contributions while dividing marital assets and disadvantaging the women.³⁸² In determining the economic impact of lost opportunities, the courts should consider loss of career opportunities, support to the other

372. *See id.*

373. *See id.*

374. *Id.*

375. *P.N.N. v. Z.W.N.* (2017), Civil Appeal No. 128 of 2014, e.K.L.R. (C.A.K.) (Kenya).

376. CONSTITUTION art. 45 (2010) (Kenya).

377. The Matrimonial Property Act, No. 49 §2 (2013) (Kenya).

378. Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1037 (2015).

379. *Id.*

380. Baraza, *supra* note 10, at 9.

381. *Id.*

382. *Id.*

spouse's career advancement, spousal needs, and future earning capacity.³⁸³ The economic impact stems from role separation and specialization within the marital partnership.³⁸⁴ Kenyan women perform most of the duties that qualify as non-monetary contribution.³⁸⁵

The English approach and the Scandinavian Model both recognize the participation of women in the labor force and in household work using a modified dual breadwinner system. In Kenya, the courts have a duty to uphold equality of spouses and the exceptional behavior in homemaking contributions of either spouse. Adopting a modified dual breadwinner system would accomplish this.³⁸⁶ The system appreciates women's economic contribution to the family and the support accorded to the household through non-monetary activities. The modified system recognizes the equality of spousal contribution and non-economic contribution as family support.³⁸⁷ Spouses have an equal share of family assets regardless of contribution or acquisition.³⁸⁸

Approaches from the United States, including the ALI Principles, are also instructive. Because of the unfair decisions on long-term marriages in Kenya, a universal model approach, such as that adopted by the ALI Principles for long-term marriages, would allow courts to divide marital property without regard to the mode and time of acquisition.³⁸⁹ However, an adaptation of the ALI model could face significant challenges as a guide for law reform in Kenya because the ALI model focuses on alimony.³⁹⁰ In Kenya, parties litigate issues of marital property and alimony separately.³⁹¹

In Kenya, the Court of Appeal in *P.N.N. v. Z.W.N.* (2017) faced a dilemma in interpreting the Constitution and the MPA with regard to short-term marriages.³⁹² The ALI Principles recommend a formulaic substitute in determining both the amount and duration of such claims.³⁹³ In particular, the ALI Principles propose "compensation for loss of marital standard of living" for the long-term homemaker.³⁹⁴ The "ALI guidelines include a calculation to determine the amount of com-

383. Parkinson, *supra* note 119, at 47.

384. *Id.* at 12–14

385. Chen, *supra* note 1.

386. Rešetar, *supra* note 278, at 16–17.

387. *Id.*

388. *Id.*

389. See *What's Fair*, *supra* note 317, at 61.

390. Westfall, *supra* note 87, at 920 n.10.

391. *Id.*

392. *P.N.N. v. Z.W.N.* (2017) Civil Appeal No. 128 of 2014, e.K.L.R. (C.A.K.) (Kenya).

393. See Westfall, *supra* note 87, at 933.

394. *Id.*

pensation a spouse should receive for” foregoing earning capacity to be a homemaker.³⁹⁵ The same approach applies to a short-term marriage. Despite shortcomings, the ALI Principles propose factors useful in valuing the homemaker contribution. Courts in Kenya that grapple with the value of the homemaker contribution could borrow from the factors enumerated by the ALI principles.³⁹⁶ Courts in Kenya can also look to the AAML Guidelines, which propose additional factors, such as duration of marriage, age of parties, financial needs, and spousal contribution to assist in dividing marital assets and achieving fair divorce outcomes.³⁹⁷

B. *Next Steps for Kenya*

In order to achieve desired results and cure the unfairness of broad judicial discretion in valuing non-monetary contribution, first, the MPA should include statutory factors to guide the courts’ decision-making. Second, in comparison with jurisdictions like the United States and the Scandinavian countries, the MPA provides a narrow definition of matrimonial property.³⁹⁸ In order to remedy the existing injustices propagated by this limiting definition, Kenya should consider revising the MPA to include intangible assets as part of matrimonial property. Third, Kenyan courts should consider Article 45(3) of the Constitution as the basis for spousal equality in determining the weight of economic and non-economic contributions of either spouse. Finally, Kenya should adopt social reforms to ease the burden of unpaid work on women.

First, the MPA should add additional factors for courts to consider in distribution of marital property on divorce. The MPA has omitted an important factor that relates to the lowering of human capital of homemakers in valuing spousal contribution. In deciding marital cases, the courts should consider the future financial circumstances of either spouse. As in *Wendt v. Wendt*, the rule is based on the future financial needs of the homemaker spouse.³⁹⁹ Family law scholars like Patrick Parkinson have argued that the homemaker contribution is not about the quality of contribution or who performed more housework; rather,

395. Morris, *supra* note 5, at 93.

396. See Westfall, *supra* note 87, at 920.

397. Willick, *supra* note 333, at 197–98.

398. See HUMAN RIGHTS WATCH, *supra* note 12; Kaddari & Freeman, *supra* note 173, at 335.

399. See generally *Wendt v. Wendt*, 757 A2d 1225 (2000).

the courts should recognize the division of roles in many marriages.⁴⁰⁰ In echoing the same point, the CEDAW Committee emphasized the need for state parties such as Kenya to recognize the contribution to marital property that development in the human capital provides.⁴⁰¹

The CEDAW Committee stated that this support increases the value of the marital estate.⁴⁰² As a rule, the courts need not get into the adjudication of who did more cleaning, cooking, or weeding, as it focuses more on relations other than finances.⁴⁰³ In Kenya, household services may cost anywhere from three dollars per day to 130 dollars per month; as such, it would be unconscionable for courts to equate years of emotional, psychological, and physical investment and support to a mere 130 dollars.⁴⁰⁴ If both parties participate full-time in the workforce, then allocation of household responsibilities has no discernible economic consequences.⁴⁰⁵ Therefore, the court would base the homemaker contribution on the development of human capital that contributed to the growth of the marital estate.

Additional factors that courts should consider include: the economic impact of lost career opportunities; support to the other spouse's career advancement; spousal needs, including future financial circumstances of both spouses; duration of marriage; age and health of the spouses; which spouse is the custodial parent; wasteful use of assets; and unfair transfer of property.

Second, Kenya should also revise the MPA to expand the definition of marital property to include intangible assets such as shareholding, trademarks, life insurance, and business goodwill. The modern model of partnership recognizes the equality of spousal contribution in property acquisition and division. However, in dividing marital property, the Kenyan courts have rejected the modern partnership approach. Post-2010, the law made it explicit that courts should consider non-monetary contributions.⁴⁰⁶ In spite of this, courts are not giving the law its intended effect, and as discussed, results can be quite arbitrary and unpredicta-

400. See Parkinson, *supra* note 119, at 29, 37.

401. See General Recommendation No. 21, *supra* note 153, ¶ 32.

402. See *id.*

403. See Parkinson, *supra* note 119, at 31.

404. See generally KENYA MINISTRY OF LABOR, LEGAL NOTICE ON WAGE INCREASE (2017), <https://www.taxkenya.com/wp-content/uploads/2017/08/Minimum-Wages-Order-Kenya-2017.pdf>.

405. Parkinson, *supra* note 119, at 11.

406. The Matrimonial Property Act, No. 49 § 2 (2013) (Kenya).

ble.⁴⁰⁷ Moreover, because the MPA failed to include the CEDAW recommendation on giving equal value to monetary and non-monetary contribution and failed to expand the meaning of matrimonial property to include intangible assets,⁴⁰⁸ Kenya should take the needed steps to rectify the inequality and enable courts achieve fairness and equity in property division.⁴⁰⁹

Third, Kenya's courts should give effect to the concept of spousal equality written into the Constitution. To do so, they should adopt the Scandinavian Model of property distribution. Across the world, the modern model of partnership recognizes the equality of spousal contribution in property acquisition and division.⁴¹⁰ Considering the Scandinavian model, and even the United States' equitable approach, an equitable distribution of marital assets achieves fairer divorce outcomes compared to those outcomes in Kenya.

Presently, the courts in Kenya struggle with the interpretation of Article 45 of the Constitution as it relates to Section 7 of the MPA. Gender remains the dominant and most important determinant of the division of housework.⁴¹¹ Family law practices continue to perpetuate the harsh reality of women's economic disadvantage and vulnerability within both families and the labor market.⁴¹² It could be argued that, in rejecting the previously established principle of spousal equality, the courts appear to state that the MPA supersedes the Constitution. However, in enacting the MPA, the legislature meant to give effect to Article 45, not to take away the property rights already gained.

The denial of the intent of Article 45 of the Constitution perpetuates an injustice and the existing *de facto* inequality between spouses. Denial of the true intent of the provision is a denial of women's rights. Because of the constitutional guarantee of equality, the courts must begin analysis of property division by assuming each spouse is entitled to half of the marital property.

407. See *F.S. v. E.Z.* (2016) Matrimonial Cause No. 16 of 2014, e.K.L.R. (H.C.K.) (Kenya); *M.G.N.K. v. A.G.M.* (2016) Civil Appeal No. 280 of 2012, e.K.L.R. (C.A.K.) (Kenya); *M.A.A. v. A.R.* (2018) Matrimonial Cause No. 1 of 2017, e.K.L.R. (H.C.K.) (Kenya).

408. Concluding Observations on Eighth Report, *supra* note 60, ¶ 45. The Committee noted that the requirement to prove contribution to marital property discriminates against women and recommended repeal of Section 7 of the Marital Property Act. *Id.*

409. *Id.*

410. Kelly, *supra* note 112, at 157.

411. See generally The Matrimonial Property Act, No. 49 § 2 (2013) (Kenya); CONSTITUTION art. 45 (2010) (Kenya).

412. Rešetar, *supra* note 291, at 17–18.

The Scandinavian Model can provide a constitutional basis for treating the homemaker spouse and the wage-earner spouse as beginning on equal footing with regard to division of marital property. From this starting point, the court can then evaluate other criteria to reach the right outcome. Indeed, most courts in Kenya have acknowledged equality of spouses in all other aspects of marriage except in contribution. Due to the influence of patriarchal, traditional, and private values, courts have disregarded the equality of spousal contribution. As a long-term solution to the influence of patriarchy and traditional values, and in adopting the Scandinavian Model, I recommend training courts to be more aware of their gender bias in making judgments.

Fourth, Kenya should modify its economic and social policies to address the inequalities between paid work and unpaid work.⁴¹³ In order to address the inequalities between paid and unpaid work, researcher economist Indira Hirway recommend recognizing, reorganizing, and redistributing (“the Triple R approach”) unpaid work.⁴¹⁴ By adopting the Triple R approach, the Kenyan government can assimilate unpaid work into the mainstream economy.⁴¹⁵ In effect, public programs will provide an equitable safety net for unpaid caregivers.⁴¹⁶ For example, Kenya can consider a social welfare system that supports divorced and economically disadvantaged women to care for their dependents.⁴¹⁷ In so doing, Kenya will ease the burden of unpaid work of women and ensure the moderation of post-divorce economic consequences on women.

Ultimately, it is essential to ensure that the statutory recognition of non-monetary contributions is not an illusory promise.⁴¹⁸ Courts in Kenya have noted that each case is determined on its own circumstances.⁴¹⁹ However, as demonstrated, there is a struggle within the courts to

413. See Hirway, *supra* note 76, at 11.

414. *Id.* at 13–16 (“[t]his approach attempts to integrate unpaid work into the mainstream economy by reducing it and by reorganizing it between paid and unpaid work”).

415. *Id.* at 13–22.

416. Lisa Philipps, *Helping Out in the Family Firm: The Legal Treatment of Unpaid Market Labor*, 23 WIS. J.L. GENDER, & SOC’Y 65, 99 (2008).

417. Concluding Observations on Eighth Report, *supra* note 60; Philip N. Cohen, *The Divorce Fairness Issue that Jeff and MacKenzie Bezos Don’t Have to Worry About*, CNN (Jan. 12, 2019), <https://edition.cnn.com/2019/01/11/opinions/divorce-unfair-bezos-opinion-cohen/index.html>. In the United States, “[t]he poverty rate for divorced women living with at least one child in 2018 was 19%, more than twice the rate for divorced men living with one or more children.” *Id.* Cohen argues that divorce could be made less damaging to women through stronger social safety nets. *Id.*

418. See Judith I. Avner, *Using the Connecticut Equal Rights Amendment at Divorce to Protect Homemakers’ Contributions to the Acquisition of Marital Property*, 4 U. BRIDGEPORT L. REV. 265, 269 (1983).

419. P.N.N. v. Z.W.N. (2017) Civil Appeal No. 128 of 2014, e.K.L.R. (C.A.K.) (Kenya).

shape a rule that will achieve wide public backing.⁴²⁰ In order to achieve judicial consistency and fairness in marital property division, the courts should shape standards that achieve predictable and consistent outcomes.⁴²¹ Because the courts have failed to equalize the weight of monetary and non-monetary contribution through the constitutional guarantee of spousal equality, they should look beyond their jurisdictions and take persuasive guidance through developments in divorce law across the world.

CONCLUSION

Since the enactment of the MPA, the courts show conflicting approaches on the interpretation of Section 7 as it relates to Article 45 of the Constitution. The courts have failed to provide a definitive approach on the weight of uncompensated domestic work as a form of spousal contribution. As it currently stands, the courts have failed to equalize the weight of non-monetary and monetary contributions because of apparent bias and the lack of further legislative direction. The approach offends Article 45 of the Constitution and international human rights standards on the weight of spousal contribution. In addition to leaving potential litigants in a muddled playing field, the approach alienates and disempowers women, leaving them to suffer severe post-divorce economic consequences. In addition, the approach hinders Kenya's strides towards gender equality.

As earlier discussed, the MPA fails to meet the CEDAW Committee standards in defining matrimonial property.⁴²² The burden of unpaid work on Kenyan women demonstrates why the country should aim for an improved matrimonial property law by revising the MPA.

The proposed directions on matrimonial property law reform will guide courts further in accounting for uncompensated domestic work during division of marital assets. Giving equal weight to monetary and non-monetary contributions is not only the right thing to do, but also the smart thing to do. This is one way of achieving the overriding objective of fairer divorce outcomes and advancing Kenya toward the ultimate goal of gender equality. ✎

420. *The Economic Consequences*, *supra* note 281, at 136.

421. *See* Parkinson, *supra* note 119, at 42.

422. *See* The Matrimonial Property Act, No. 49 § 6 (2013) (Kenya).

