Article

A Comparative Juridical Analysis of the Constitutional Advancement of Women's Matrimonial Property Rights in Swaziland and Kenya

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Abstract

The equalisation of women's and men's marital rights is still a challenge for certain countries on the African continent. Although most African countries have adopted supreme constitutions guaranteeing a host of justiciable human rights, the marginalisation and subjugation of women persists. In this article, we engage in a critical review and assessment of two divergent court decisions (one from Swaziland and the other from Kenya) which concern the matrimonial property rights of women. Those cases will be used as the foundation for investigating and evaluating the degree to which Swaziland and Kenya are either enhancing or constraining women's matrimonial rights. In this article, we also assess the extent to which national constitutional law is being harmonised with existing and recently promulgated legislation and whether the purported synthesis of enacted marriage laws has affected constitutional equality in those specific countries. Additionally, we contend that the promulgation of new legislation and/or the amendment or repeal of unconstitutional legislation is insufficient to advance true equality. The courts or the judiciary, must also perform their remedial and pre-emptive role in the protection, enforcement and promotion of constitutional rights and the facilitation of equality reform. In our opinion, the matrimonial property rights of women in Africa can be equalised and enhanced even in systems of law that remain rooted in traditionalism and which habitually treat women as inferior to men. Such a mammoth undertaking requires a dual commitment and concerted action from both the legislature and the judiciary.

Keywords: women; matrimonial property; equality; reform; human rights; judiciary

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Introduction

Equalising the marital rights of men and women in Africa remains a challenge for certain countries. Despite the adoption of supreme constitutions, which provide for a host of justiciable human rights, the marginalisation and subjugation of women linger. That status quo persists because 'the standing of African women is not only dictated by a deeply entrenched tradition of patriarchy'[1] but is also susceptible to 'barriers embedded in the legal framework that prevent females' from fully realising their rights.[2] While some African countries have gradually been effecting equality reform, other nations are lagging behind.

In this article, we engage in a review and assessment of two divergent court decisions (one from Swaziland[3] and the other from Kenya[4]) concerning women's matrimonial property rights. We have selected Swaziland and Kenya as our comparative case studies for this article for the following reasons. First, there is a discernible variance in the outcomes of the two jurisdictions, despite granting the fundamental freedom of equality to its citizens. Second, both societies exhibit a historical patriarchal nature. Third, the traditional limitations placed on the enjoyment of women's rights is often a result of embedded cultural norms.[5] Fourth, there is observable parallelism between the injurious political, economic and social plight of women[6] in both countries. Fifth, both countries

1 Thomas Bennett, *Human Rights and African Customary Law* (Juta 1995) 80.

2 Tholoana Mofolo, 'Investigating the Factors Contributing to the Disempowerment of Women in Swaziland: Perceptions of Swazi Women and Non-governmental Organisations Operating in Swaziland' (2011) 41(2) Africa Insight 121.

3 *Makhosazane Eunice Sacolo (née Dlamini) and Another v Jukhi Justice Sacolo and 2 Others* [2019] SZHC 166 (hereinafter 'the *Sacolo* case'). In 2018, the Swazi king announced a name change to the former Kingdom of Swaziland. Swaziland is now referred to as the Kingdom of eSwatini (meaning 'place of the Swazi'), to mark fifty years of independence from British colonial rule. We have decided to use the previous colloquial 'Swaziland' or 'Kingdom of Swaziland' throughout this article for ease of reference as all legal documents still refer to the Kingdom of Swaziland.

4 *Federation of Women Lawyers Kenya (FIDA) v Attorney General and Another* [2018] eKLR (hereinafter 'the *FIDA* case').

5 OXFAM, 'Women's Rights' <https://kenya.oxfam.org/what-we-do/womens-rights> accessed 31 July 2020.

6 Action for Southern Africa, 'Women's Rights in Swaziland' <https://actsa.org/wpcontent/uploads/2017/12/ACTSA_WR_Brief_-9-June_Final.pdf> accessed 31 July 2020. Both eSwatini and Kenya still recognise the application of customary law as an integral source of law (see ss 252(2) of the Constitution of the Kingdom of Swaziland Act 1 of 2005 (hereinafter referred to as 'the Swazi Constitution') and 2(4) and 44 of the Constitution of Kenya, 2010 (hereinafter 'the Kenyan Constitution'). Both States also utilise traditional dispute mechanisms (which often exclude women from participation) for resolving customary matters (see B Dube and A Magagula, 'The Law and Legal Research in Swaziland' <https://www.nyulawglobal.org/globalex/Swaziland.html#:~:text=Swaziland%20also%20applies%20the%20common,but%20excludes%20Swazi%20customary%20law.&text=The%20Common%20Law%20of%20Swaziland,Transvaal%20in%2022nd%20February%201907> accessed 3 August 2020; and ss 169(1)(d) and 170 of the Kenyan Constitution which provides for local tribunals and Kadhi's courts. Local tribunals are limited to hearing matters pertaining to 'employment and labour

have recently enacted supreme constitutions[7] and boast heterogenous legal systems (a stark reality often overlooked by the law of Swaziland). Sixth, both countries were in some or other way governed by the British;[8] and in the final instance, despite striking differences in the systems of law, the judiciary in both jurisdictions claim to be independent,[9] subject to their respective constitutions,[10] and have authority to uphold and enforce the Bill of Rights.[11]

In this article, it is our intent to investigate the extent to which national constitutional law is being harmonised with existing and/or recently promulgated legislation in these two countries and to evaluate the degree to which Swaziland and Kenya are either enhancing or constraining women's matrimonial property rights. This article is organised into four parts. In Part II, we critically analyse the *Sacolo* case, where the Swazi High Court augmented the matrimonial property rights of women by successfully reconciling a statute with constitutional law. In that part of the article, we also assess Swaziland's efforts to broaden the marital rights of women generally and recommend ways in which Swaziland can effect change in that regard sooner. In Part III, we critically consider the *FIDA* case, where the High Court of Kenya declined to advance women's constitutional and/or matrimonial property rights by engaging in an exercise

relations and the environment and the use and occupation of, and title to, land' and Kadhi's courts are restricted to the determination of questions of Muslim law).

7 The Swazi Constitution and the Constitution of Kenya.

8 A charter granted to the British East African Company paved the way for the colonisation of Kenya. The Colony and the Protectorate of Kenya was established in 1920 and Kenya declared its independence from Britain in 1963 (B:M 2021) <https://www.blackhistorymonth.org.uk/article/section/african-history/thecolonisation-of-kenya/> accessed 28 July 2021. On the other side of the scale, Swaziland was a British Protectorate from 1903 until it gained independence in 1968 (see Shokahle R Dlamini, 'The Colonial State and the Church of the Nazarene in Medical Evangelisation and the Consolidation of Colonial Presence in Swaziland, 1903-1968' (2018) 70(2) South African Hist J 370–382; and Linda Piknerová, 'British Colonial Policy Toward Bechuanaland, Basutoland and Swaziland: Real Periphery of Peripheries or the Suez of the South?' in Jan Záhořik and Linda Piknerová (eds), *Colonialism on the Margins of Africa* (Routledge 2017) 77–96. In international law, a colony may be described as 'a region that is owned by a country but does not form part of the country.' A protectorate can be defined as 'a nation that is autonomous and is governed by a government but relies exclusively on another country for protection against invasion from another country' (Differencebetween.com <https://www.differencebetween.com/difference-between-protectorate-and-colony/#:~:text=A%20colony%20is%20a%20region,invasion%20from%20some%20other%20country> accessed 28 July 2021.

9 That is not often the case in Swaziland. In fact, many legal commentators have criticised the lack of independence of the judiciary in the Kingdom of Swaziland. In that regard see Maxine Langwenya, 'The Judiciary Under Siege in Swaziland: Re-engendering a Unique Democracy' (2012) 14 Univ of Botswana LJ 95–122, John Hatchard, 'Some Thoughts on Judicial Integrity, Corruption and Accountability in Small Commonwealth African States' (2016) 3 JICL 55–72 and Oagile BK Dingake, Najla Hasic, Tomei Peppard and Stephen Hayden, 'Appointment of Judges and the Threat to Judicial Independence: Case Studies from Botswana, Swaziland, South Africa and Kenya' (2020) 44(3) Southern Illinois Univ LJ 407–432.

10 See ss 138 of the Swazi Constitution and 160(1) of the Kenyan Constitution.

11 See ss 14(2) of the Swazi Constitution and 23 of the Kenyan Constitution.

of strict adherence to the literal meaning of the law. There, we also provide our suggestions on how Kenya can effectively manage the matrimonial property rights of men and women in the future. In Part IV, we impart our concluding remarks *vis-à-vis* the polemical matter of the attainment of equitable matrimonial property rights. Additionally, using other countries in Africa, namely South Africa and Namibia as illustrations, we show that women's matrimonial property rights can be equalised and enhanced even in systems of law that remain rooted in traditionalism and which habitually treat women as inferior to men.

The Swazi *Sacolo* Case

The Legal Framework Governing the Matter, Background to the Legal Action and the Court's Ruling

The Swazi Constitution embraces a dual legal system in that it recognises both Roman-Dutch common law (as influenced by English law) and Swazi customary law.[12] Dual legal systems exist and operate alongside one another and are commonplace in most Southern African countries that were colonised by either the British or the Dutch.[13] However, in saying that, Swaziland's characterisation of itself as a dualistic legal system is erroneous.[14] Dube and Nhlabatsi[15] argue that Swaziland embraces a pluralistic legal tradition because one can easily identify more than one system of operational customary law on the ground. Legal pluralism can be defined as 'the plurality of normative orders and institutions that enforce order within a political organisation'[16] or simply as 'the co-existence of two or more legal systems in the same social field.'[17] Swaziland falls within the domain of that delineation as there are other races and ethnic groups like the Shangaan, Sotho and Zulu, practising their own customary law and residing in and possessing citizenship in the Kingdom of Swaziland.[18]

Legal dualism does, however, exist in Swaziland's judicial system[19] in that there are separate traditional courts adjudicating on matters pertaining solely to customary law

12 Section 252.

13 See Gardiol van Niekerk, 'Constitutional Protection of Common Law: The Endurance of the Civilian Tradition in Southern Africa' (2012) 18(1) Fundamina 115.

14 Angelo Dube, 'Does SADC Provide a Remedy for Environmental Rights Violations in Weak Legal Regimes? A Case Study of Iron Ore Mining in Swaziland' (2013) 3(1) SADC LJ 270.

15 Angelo Dube and Sibusiso Nhlabatsi, 'The King can do no Wrong: The Impact of *The Law Society of Swaziland v Simelane NO & Others* on Constitutionalism' (2016) 16 AHRLJ 272.

16 Helene Kyed, 'Legal Pluralism and International Development Interventions' (2011) 63 J of Legal Pluralism and Unofficial L 1.

17 Geoffrey Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20(2) International Studies Rev 438.

18 Dube and Nhlabatsi (n 15) 270. Also see Charles Fombad, 'Mixed Systems in Southern Africa: Divergences and Convergences' (2010) 25(1) Tulane European and Civ L Forum 1–21.

19 International Commission of Jurists <https://www.icj.org/cijlcountryprofiles/swaziland/swaziland-introduction/swaziland-court-structure/> accessed 29 July 2021. See also *Maseko v The Chairman of*

and common law courts adjudicating on matters pertaining to Roman-Dutch Law.[20] Legal dualism within Swaziland's court structure has given rise to a situation whereby the general law of the land applies to all citizens, whilst customary law applies only to citizens who are ethnically Swazi.[21] That state of affairs is further exacerbated by the vagueness of the enabling legislation that creates customary courts,[22] which merely refers to 'members of the Swazi nation' without offering any definition therefore. Such an omission produces a chasm in the law in that 'members of the Swazi nation' could denote citizens of the Kingdom of Swaziland as well, who could then be unfairly subjected to the erroneous application of customary law. The dual court structure of Swaziland requires urgent review as customary law has frequently proven to be the principal hindrance to the absolute realisation of women's rights.[23]

In the *Sacolo* case, a wife[24] who had concluded a common law marriage, in community of property, with her husband challenged the constitutionality of sections 24 and 25 of the Swazi Marriage Act.[25] The Swazi Marriage Act regulates common law and customary marriages, and contracting parties can elect to enter into either of those unions. All marriages concluded in terms of civil rites, are marriages in community of property and profit and loss, where both spouses administer and control the joint estate equally.[26] Sections 24 and 25 of the Swazi Marriage Act, however, contain a patent legal anomaly in that the consequences flowing from a civil union are different if the parties are African.[27] In such instances, the marital power of the husband comes into play, and the proprietary rights of the spouses are regulated by Swazi law and custom.[28] In most African nations, including Swaziland, gender plays a definitive role in the determination

the Liquor Licensing Board and Another [2018] SZHC 6 para 5.9; *Hlophe v African Methodist Episcopal Church* [2013] SZHC 31 para 29 and *Dlamini v Dlamini* [2017] SZSC 58 para 38.

20 Alfred Magagula, Sibusiso Nhlabatsi and Buhle Dube, 'Update: The Law and Legal Research in Swaziland' <https://www.nyulawglobal.org/globalex/Swaziland1.html#ANewConstitutionalDispensation> accessed 29 July 2021.

21 Frans P van R Whelpton, 'The Indigenous Swazi Law of Succession: A Restatement' (2005) 4 J of South African L 828.

22 Swazi Courts Act 80 of 1950.

23 See Mdluli Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18(1) Indiana Journal of Global Legal Studies 87–120, Gardiol van Niekerk, 'Reflections on the Interplay of African Customary Law and State Law in South Africa' (2012) 57(3) Studia Universitatis Babes-Bolyai 5–20; and Tamar Ezer, 'Forging a Path for Women's Rights in Customary Law' (2016) 27 Hasting's Women's LJ 65–86.

24 Hereinafter 'the Applicant'.

25 47 of 1964 (hereinafter 'the Swazi Marriage Act').

26 See *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane & Another* [2013] SZHC 262 para 15. Both contracting parties may however choose to jettison that effect by concluding an antenuptial contract prior to the solemnisation of the marriage (see ss 24 and 25 of the Swazi Marriage Act).

27 The term 'African' can be construed to signify 'people of African origin to distinguish them from people of other races living in Swaziland, who are not amenable to Swazi customary law' (RS Bhalla, 'Some Reflections on the Swaziland Marriage Act 1964' (1994) 111 SALJ 548).

28 Neville Rubin, 'Swaziland: The Marriage Proclamation, 1964' (1965) 9(1) J of African L 61–62.

of a person's status.[29] Swazi customary law regarded women as perpetual minors[30] because 'they are morally and intellectually less capable than men and are to be under male control.'[31] Perpetual minority status limited women's powers to litigate,[32] exert guardianship and custody over their children and contract marriage on equal terms.[33] It deemed women as children who were incapable of managing their own affairs and who needed to be under the constant guardianship of either their father (when they are single), their husbands (when they marry),[34] or the male successor (if they are widows).[35] To exacerbate matters further, the exertion of the husband's marital power meant that the ownership and control of joint property vested exclusively in him.[36] The common law doctrine of marital power imposed irregular constraints on the wife, which were not imposed on husbands and although the husband's marital power was limited in *Sihlongonyane*[37] and *Aphane*[38] it had not been abolished.

The Applicant contested the constitutional legitimacy of the common law doctrine of marital power on three counts: (1) it infringed on a woman's right of equal treatment before the law[39] and was discriminatory because it ensured that a woman remains a minor for purposes of managing the joint estate, despite attaining majority;[40] (2) it

29 Isaac Scapera, *The Tswana* (Routledge 1962) 37–38.

30 Mary van Hook and Barbara Ngwenya, 'The Majority Legal Status of Women in Southern Africa: Implications for Women and Families' (1996) 17(2) J of Family and Economic Issues 176–181.

31 Maxwell Mthembu, 'Participation of Swazi Women in the Traditional Public Sphere, Sibaya, in The Kingdom of Swaziland' (2018) 37(1) Communicare: J for Comm Sciences in Southern Africa 77. See also Neville Curle, 'A Critique of the Patriarchalistic Paradigm as Practiced in the Kingdom of Swaziland' (2017) 23(1) Conspectus: The J of the South African Theological Seminary 80.

32 See *Victor Tsela v Zeemans Bus Service (Pty) Ltd and Royal Swaziland Insurance Corporation* High Court Case No 779/1988 (unreported) where the High Court ruled that the applicant's wife was prohibited from claiming damages (for injuries she sustained in a bus accident) from a bus company or its insurer because she lacked *locus standi in judicio*. See also *Jane Dlamini v Universal Panelbeaters (Pty) Ltd and 2 Others* Civil case no 821/2003 (unreported) 4, *Gugu and Senzeko Fakudze v The Principal Secretary: Ministry of Enterpise and Employment and 3 Others* Civil case no 2485/08 (unreported) 11, *Joao Alves Pita v Registrar of Deeds and Another* Civil case no 2466/1998 (unreported) 2.

33 Christa Rautenbach (ed), *Introduction to Legal Pluralism in South Africa* (Lexis Nexis 2018) 117–144 and 177–206.

34 Jan Bekker, *Seymour's Customary Law in Southern Africa* (Juta 1989) 110.

35 Nicolaas Olivier, Nicolaas Olivier (jnr) and WH Olivier, *Die Privaatreg van die Suid-Afrikaanse Bantoetaal-sprekendes* (Butterworths 1981) 85.

36 Alice Armstrong, Chaloka Beyani, Chuma Himonga and others, 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 Intl J of L and the Family 342–346.

37 *Sihlongonyane v Sihlongonyane* [2013] SZHC 144 where the Court declared that the husband's marital power relating to the denial of *locus standi* to married women was void because it was inconsistent with the constitutional right to equality.

38 *Aphane v Registrar of Deeds and Others* [2010] SZHC 29 where the Court ruled that the prohibition on women married in community of property to register immovable property in their own names in terms of s 16(3) of the Deeds Registry Act was discriminatory against married women and a violation of their right to equality.

39 *Sacolo* (n 3) para 7

40 *Sacolo* (n 3) para 13.

imposed a superfluous burden on women in that they had to engage in an additional legal step if they wished to exclude the marital power to attain equality;[41] and (3) subjection to marital power reduced the status of women to a perpetual minority within the marital regime and denied them the right to human dignity.[42] Grounding its arguments in the unequal pitfalls of marital power and relying exclusively on American jurisprudence,[43] the Court held that the common law doctrine of marital power was discriminatory[44] and constituted an affront to a married woman's constitutional rights to equality before the law because it treated women differently to men, attributable only to the immutable ground of gender. The differing consequences emanating from the implicit distinction between 'African' and 'non-African' and the arbitrary manner in which the marital power was applied in sections 24 and 25 of the Swazi Marriage Act triggered the discrimination. Additionally, the Court resolved that marital power also violated sections 20(1)[45] and 28(1) of the Swazi Constitution, because the husband's marital power could only be eliminated if a wife concluded an antenuptial contract to mitigate her plight and preserve her constitutional rights.[46] In the Court's opinion, it was unfair that women had to initiate an auxiliary step in order to attain equality.[47] The Court found further that subjection to marital power also impacted negatively on married women because it deprived them of human value and respect, which are integral components of human dignity.[48] The Court noted that to alleviate the impediments created by sections 24 and 25 of the Swazi Marriage Act, the matrimonial rights of civil and customary wives and the divergent treatment of men and women needed to be reconciled with the Swazi Constitution, to ensure equal capacity and authority within the marriage.[49] It was on that basis that the Court decided to pronounce the common law doctrine of marital power to be invalid and unconstitutional.[50] The Applicant also contended that sections 24 and 25 of the Swazi Marriage Act were discriminatory on the grounds of race. The Court concurred that sections 24 and 25 gave rise to differing nuptial consequences for Africans and non-Africans even though both groups had concluded common-law marriages.[51] In other words, the relevant sections 'imposed upon African spouses the customary consequences of marriage while non-African

41 *Sacolo* (n 3) paras 14–15. See also s 20(1) of the Swazi Constitution.

42 *Sacolo* (n 3) para 17. Section 18(1) of the Swazi Constitution provides that 'the dignity of every person is inviolable.'

43 See *Kirchberg v Feenstra* 450 US 455 at 461.

44 Section 20(5) of the Swazi Constitution defines discrimination as: 'to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.'

45 Section 201(1) provides that: 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other aspect and shall enjoy equal protection of the law.'

46 *Sacolo* (n 3) paras 14–15.

47 *Sacolo* (n 3) para 15.

48 *Sacolo* (n 3) paras 16–17.

49 *Sacolo* (n 3) para 30.2.

50 *Sacolo* (n 3) para 30.1.

51 *Sacolo* (n 3) paras 21–22.

spouses automatically had the benefit of common law consequences.'[52] The Court declared sections 24 and 25 of the Swazi Marriage Act to be invalid, and both provisions were struck down albeit divergently.[53]

A Brief Analysis of the Court's Judgment and an Evaluation of Swaziland's Efforts to Broaden the Marital Rights of Women

Although the judgment in *Sacolo* must be welcomed, it evokes several observable critiques.

The Judgment Neglects to Enhance the Swazi Courts' Interpretive Jurisprudence on the Constitutional Rights to Equality, Non-discrimination and Human Dignity

Swazi Courts are endowed with the responsibility of interpreting the Constitution[54] and are obliged to 'breathe growth and development'[55] into it. Unfortunately, the way in which the Swazi courts inexorably approach matters pertaining to the enhancement of equality, non-discrimination, and human dignity is to merely define discrimination and restate the applicable provisions in the Swazi Constitution. That approach seems to be enough to evoke a scholarly juridical finding.[56] We submit that the reason therefore could be attributable to the fact that Swaziland's Constitution does not contain a standard interpretive or limitations clause[57] like other African constitutions.[58] The Swazi Constitution relies ostensibly on internal limitations contained within a particular provision sanctioning each right. We propose an amendment to the Swaziland Constitution in that regard, as courts rely on general interpretive and limitation provisions to guide them when they interpret constitutional rights. Further, the development of a robust constitutional rights jurisprudence and the generation of much-needed precedent is crucial for the maximum realisation of women's rights to equality and the fulfilment of Swaziland's aspirations to becoming a fully-fledged constitutional democracy.

52 *Sacolo* (n 3) para 26.

53 Section 25 was struck down in its entirety whilst s 24 was struck down in part ie only the first portion of the provision was retained (see *Sacolo* (n 3) paras 30.3 and 30.4).

54 See ss 139(2) and 151(2) of the Swazi Constitution and Lomcebo S Dlamini, *Swaziland: Democracy and Political Participation* (The Open Society Initiative for Southern Africa 2013) 43.

55 *Attorney-General v Dow* [1992] BLR 119 (CA) para 166 A.

56 That was also the modus operandi of the courts in *Sihlongonyane v Sihlongonyane* [2013] SZHC 144 and *Attorney-General v Doo-Aphane* [2010] SZSC 32. The only exception we could find to this general methodology was *Attorney-General v Titselo Dzadze Ndzimandze (née Hlophe) & 27 Others* [2014] SZSC 78, where the Court attempted to interpret the equality right in s 20 of the Swaziland Constitution.

57 Angelo Dube and Sibusiso Nhlabatsi, 'The (mis) Application of the Limitation Analysis in *Maseko and Others v Prime Minister of Swaziland and Others*' (2018) 22(1) LDD 13.

58 For example, see ss 36 and 39 of the Constitution of the Republic of South Africa, 1996 (hereinafter 'the South African Constitution') Arts 20(3) and (4) of the Kenyan Constitution, and s 11 of the Constitution of the Republic of Malawi, 1994.

The Expansion of the Matrimonial Rights of Women has been Limited to Judicial Adjudication and Intervention Alone

To the casual observer, it appears that Swaziland is making significant strides in furthering the matrimonial rights of women. That could not be further from the truth because the expansion of the matrimonial rights of women has largely been limited to judicial adjudication and intervention alone. Although Parliament has been empowered to enact legislation regulating the property rights of spouses[59] and redressing social, economic, educational or other imbalances in society[60]—no such laws have been promulgated to date. Legal commentators,[61] the Supreme Court of Swaziland,[62] and research projects conducted by various entities[63] have for years been calling for legislative reform in that regard—but none has been imminent. Furthermore, Swaziland aligns itself with several regional and international instruments promoting gender equality.[64] These instruments oblige the Swaziland government to generate policy that will induce 'the overall mainstreaming of gender into all policies, programmes and projects of national development.'[65] A National Gender Policy[66] was drafted over ten years ago and provides the desirable framework for transformation, but it is doubtful whether that Policy will ever see the light of day. Several rationales have been put

59 Section 34(2) of the Swazi Constitution.

60 Section 20(5) of the Swazi Constitution.

61 See Nonhlanhla Dlamini-Ndwandwe, 'The Constitution and Women's Property Rights in Swaziland' (2011) 26(2) SAPL 424–428 and John Daly, 'Gender Equality Rights versus Traditional Practices: Struggles for Control and Change in Swaziland' (2001) 18(1) Development South Africa 18/54.

62 See *Attorney-General v The Master of the High Court* [2014] SZSC 10 para 63 and *Attorney-General v Doo-Aphane* (n 56) paras 43–53.

63 As far back as 2006, the Swaziland Action Group Against Abuse (SWAGAA), Women and the Law in Southern Africa – Swaziland (WLSA), and Georgetown's International Women's Human Rights Clinic investigated existing marriage and divorce laws in Swaziland, and recommended the promulgation of new legislation (Tamar Ezer, Aisha Glasford, Elizabeth Hollander and Lakeisha Poole, 'Divorce Reform: Rights Protections in the New Swaziland' (2007) 8(3) The Georgetown J of Gender and the L 888). The WLSA has also undertaken considerable individual research spanning years, on a number of issues affecting the rights of women. That research and its findings have been made available to government institutions, but no legislative reform has materialised.

64 In June 2004, Swaziland ratified the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and in 1997 the Swaziland government signed the Southern African Development Community (SADC), 'Declaration on Gender and Development' <128_SADCDeclarationonGenderandDevelopment.pdf(internationaldemocracywatch.org)> accessed 3 April 2020. For further information in this regard see also Human Rights Watch, 'Swaziland World Report 2020' <https://www.hrw.org/world-report/2020/country-chapters/eswatini-formerly-swaziland> accessed 3 April 2020.

65 Phumelele Twala, 'Gender Mainstreaming in Swaziland: Issues and Lessons Learnt' in Matebu Tadesse and Abiye Daniel (eds), *Gender Mainstreaming Experiences from Eastern and Southern Africa* (African Books Collective 2010) 159.

66 See Swaziland Government, 'National Gender Policy 2010' <https://www.undp.org/content/dam/swaziland/docs/publications/UNDP_SZ_Gender_SwazilandNationalGenderPolicy2010.pdf> accessed 3 April 2020.

forward for why legislative reform has not occurred.[67] In this article, we merely wish to supplement that discourse by highlighting two additional stumbling blocks very briefly, namely: (a) the non-existence of an established ethos of democracy in Swaziland;[68] and (b) the preservation of facets of Swazi customary law in statute and constitutional law.

The Non-existence of an Established Ethos of Democracy in Swaziland

The Swazi Constitution[69] purportedly embraces a democratic, participatory based system of government. In our opinion, that is misleading, because Swaziland's governance structure lacks crucial features of democracy.[70] Democracy entails 'a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.'[71] In other words, a government that is based on 'the will of the people'.[72] Swaziland cannot be categorised as a democracy for a number of reasons. First, its political system is based on the *tinkhundla* system of government.[73] The *tinkhundla* system of local government allows the King of Swaziland to appoint local representatives designated in specified administrative sub-divided areas, to be appointed to public office in the national parliament,[74] with no participation of political parties. The participation of political parties is a fundamental tenet of democracy and the failure of the Swazi government to recognise and allow the effective participation of political parties constitutes an impediment to the enjoyment of freedom of political association.[75]

Second, Swaziland cannot rightly be regarded as a democracy because its king wields considerable constitutional, legislative, judicial[76] and political power which unreasonably intersects with and/or overrules the authority of the democratically elected institutions of the executive, the judiciary and the legislature.[77] Further in democracies,

67 For example, see Dlamini-Ndwandwe (n 61) 425–427 who lists the lack of provision for a Law Reform Commission in the Swazi Constitution as one of the reasons for a lack of legislative reform in Swaziland.

68 Twala (n 65) 159.

69 Section 79.

70 Konrad-Adenauer Foundation *Media Law Handbook for Southern Africa Vol. 1* (Konrad-Adenauer-Stiftung Media Programme, 2011) 281.

71 Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/democracy> accessed 1 April 2020.

72 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta & Co Ltd 2015) 15.

73 Section 78 of the Swazi Constitution.

74 See Sabelo Gumedze, *Report on Citizenship Law: Eswatini* (European University Institute 2021) 1; Ntombini Marrengane, 'Local Governance, and Traditional Authority in the Kingdom of eSwatini: The Evolving *Tinkhundla* Regime' (2021) 80(1) African Studies 1 and Teresa Debly, 'Çulture and Resistance in Swaziland' (2014) 32(3) Journal of Contemporary African Studies 284.

75 Sabelo Gumedze, 'Human Rights and the Rule of Law in Swaziland' (2005) 5 African Human Rights Law Journal 268.

76 Executive authority vests in the King as Head of State (s 64(1) of the Swaziland Constitution) and by virtue of that office he has the sole authority to appoint judges.

77 For example, according to the Swazi Constitution, the King of Swaziland is not just the absolute monarch (s 4(1)) but is also the Head of State (s 64(1)) and is entrusted for instance with assenting

heads of state are elected to power by the people. In Swaziland the King occupies his office by virtue of succession.[78]

Third, the fact that Swaziland has adopted a supreme constitution neither makes it a constitutional nor a democratic state. Democracy requires that a process of transition must have occurred to bring about a new social order.[79] Such transition has yet to take place in Swaziland because it is evident that the pre-constitutional dispensation still dominates Swazi society. Constitutionalism demands that 'constitutions are crafted in such a way that they promote the rule of law and democracy and do not merely constitute endemic charlatans or cosmetic documents that could easily be engineered by politicians to further their own interests.'[80] Constitutionalism also requires that checks and balances be put into place to limit governmental power and that the fundamental rights and freedoms of the individual are always protected.[81] Swaziland errs on this front in several concrete ways. For example, the King and *Ingwenyama* is immune from suit or legal process in any cause in respect of all things done or omitted to be done by him and being summoned to appear as a witness in any civil or criminal proceeding.[82] This means that the King cannot be prosecuted for or litigated against for acts or omissions that constitute human rights violations.[83] The inclusion of such a provision in Swaziland's constitution does not advance, but encumbers, the rule of law.[84]

Further, section 14(2) of the Swazi Constitution is silent on whether the King is bound by the Bill of Rights. It is clear that the King has the right and duty to uphold and defend the Constitution at all times,[85] and we can infer that the King is bound by section 14(2) as far as his executive functions as Head of State[86] are concerned, but the lines become blurred when he exercises his customary powers as *Ingwenyama*. This is alarming as

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to and signing bills and summoning and dissolving Parliament (s 64(4)(a) and (b)). That clearly undermines the democratic notion of separation of powers.

78 Section 4(1) of the Swazi Constitution.

79 Joshua B Msizi, 'The Dominance of the Swazi Monarchy and the Moral Dynamics of Democratisation of the Swazi State' (2004) 3(1) Journal of African Elections 96.

80 Charles M Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the enabling role of political parties: Lessons and Perspectives from Southern Africa' (2007) 55 American J of Comp L 8.

81 Thulani Maseko, 'The Drafting of the Constitution of Swaziland, 2005' (2008) 8 African Human Rights Law Journal 316; T Evans, 'If Democracy, then Human Rights?' (2001) 22(4) Third World Quarterly 623; John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004) 1; and John Baloro, 'The Human Right to Free Association and Assembly and Multi-Party Democracy: A study of the Law and Practice in Swaziland' (1992) 22(3) Africa Insight 206.

82 Section 11 of the Swazi Constitution.

83 Christa Rautenbach, 'Comments on the Constitutional Protection of Religion in Swaziland' (2008) 8 African Human Rights Law Journal 440.

84 Dube and Nhlabatsi (n 15) 276–277.

85 Section 2(2) of the Swaziland Constitution.

86 Section 4(1) of the Swaziland Constitution.

history denotes that the King has posed the greatest encumbrance to the realisation of human rights and freedoms for the people of Swaziland.

Another affront to democracy is the fact that although the Swazi Constitution includes a set of albeit limited civil and political rights, economic, social and cultural rights are not explicitly provided for but are indirectly alluded to in Chapter 5. The role of the judiciary is expanded when socio-economic and cultural rights are constitutionally entrenched and proclaimed as legally enforceable because:

> it is *(then)* possible to bring an action against the state either on the grounds that the measures taken are insufficient or simply that the state has unreasonably omitted to perform (its) positive obligation within the limited resources available to it. This raises the possibility of an action for unconstitutionality for omission to perform a constitutional duty, which is a unique remedy with huge potential for use in cajoling or forcing the executive and legislature to fulfil their constitutional obligations. [87]

In the final instance, constitutionalism, democracy, and the rule of law are regarded as interlinked, interdependent and interconnected.[88] This symbiotic relationship was captured by Fombad[89] who states that:

> Although the rule of law is limited in scope and content to constitutionalism, constitutionalism is safeguarded by the rule of law, and without the rule of law, there can be no constitutionalism … For a democracy to be stable and function properly, it needs a constitutional framework; for constitutionalism to thrive, it needs a democratic pedigree. Democracy is, therefore an essential pre-requisite for constitutionalism.

Although the Swazi Constitution provides for several fundamental rights and freedoms, such rights are often disregarded and/or denied.[90] Internationally, the Swazi government has gained a reputation for impinging on the civil and political liberties of its citizenry.[91]

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87 Charles M Fombad, 'The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism' (2007) 22 South African Journal on Human Rights 101.

88 Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) 4(1) Ethics & Global Politics 21.

89 Fombad (n 80) 8–10.

90 For example, although the Constitution includes a right to peaceful assembly and association (s 25), the government has placed an embargo on organising as political parties (see the King's Proclamation of 1973 which remains on the statute books and has yet to be repealed) and has issued constraints on the dissemination of political information. Such controls undermine 'the competitive democratic space in which the people of Swaziland can participate meaningfully in organised politics' (Vuyisile Hlatshwayo, 'Unpacking Swaziland's monarchical democracy' <https://africacheck.org/2014/02/21/unpacking-swazilands-monarchical-democracy/> accessed 1 April 2020. Additionally, the Public Order Act, 1963 which was amended in 2017, grants far-reaching powers to the national commissioner of police to arbitrarily stop pro-democracy meetings and protests and places a ban on any criticism of the government. Government criticism amounts to an act of terrorism according to the Suppression of Terrorism Act 3 of 2008.

91 See Human Rights Watch 'World Report on Swaziland 2018' <https://www.hrw.org/world-report/2018/country-chapters/swaziland> accessed 3 April 2020; and J Sarkin, 'The Need to Reform

The far-reaching powers bestowed on Swaziland's monarch coupled with the unwarranted encroachment of basic human rights are clearly apposite to the ingrained principles of democracy, constitutionalism and the rule of law, and requires remediation. We advocate that Swaziland urgently synchronise its governance configuration and constitutional prescripts with African and international standards for democracy. Until that occurs, it is improbable that any progress would be made towards the legislative embodiment of equal rights for women.

The Preservation of Facets of Swazi Customary Law in Statute and Constitutional Law

The *Sacolo* case is an apt illustration that rules emanating from Swazi law and custom are often the stoutest influence contributing to the discrimination and sidelining of women.[92] In seeking to become more democratic and constitutional, Swaziland has effectively carved out an unorthodox form of government that consists of both the traditional and the modern.[93] In other words, the Swazi Constitution attempts to create an infused legal system comprising of Swazi customary law and liberal constitutionalism.[94] On the one hand, the Swazi Constitution affirms the enforceability of the application, recognition and adoption of the principles of Swazi law and custom,[95] subject to the qualifier that customs that are inconsistent with a provision of the Constitution or a statute are voidable. On the other hand, the Swazi Constitution expressly guarantees women equal rights under both national and customary law but then successively limits those rights, for example, by excluding bills which, in the opinion of the presiding officer, would, if enacted, alter or affect '(a) the status, powers or privileges, designation or recognition of the *Ngwenyama*, *Ndlovukazi* or *Umntfwanenkhosi Lomkhulu*; (b) the designation, recognition, removal, powers, of chief or other traditional authority; (c) the organisation, powers or administration of Swazi (customary) courts or chiefs' courts; (d) Swazi law and custom, or the ascertainment or recording of Swazi law and custom; (e) Swazi nation land; (f) or *Incwala Umhlanga*

the Political Role of the African Union in Promoting Democracy and Human Rights in Domestic States: Making States More Accountable and Less Able to Avoid Scrutiny at the United Nations and at the African Union, Using Swaziland to Spotlight the Issues' (2018) 26(1) AJICL 87–89.

92 Twala (n 65) 159.

93 Gumedze (n 74) 268.

94 Hoolo Nyane, 'A Critique of the Swazi Constitutional Rules on Succession to Kingship' (2019) 52(1) De Jure 65. 'Liberal constitutionalism' aims 'to provide institutional safeguards of individual freedom' and 'to secure individual liberty by constitutions' (FA Hayek, 'Rules and Order' Vol 1 of *Law, Legislation and Liberty* (Routledge and Kegan Paul 1973). The crucial features of liberal constitutionalism are: (1) a government with limits as to the exercise of its powers; (2) the existence of procedural and substantive limits to the exercise of all power; (3) the rejection of arbitrary government; (4) the notion of constitutional supremacy; (5) some form of judicial enforcement of constitutional norms; (6) the recognition of basic rights; (7) the idea of written-ness; and (8) some sort of democratic self-rule mechanism (JM Faranacci-Fernós, 'Post-liberal Constitutionalism' (2018) 54(1) Tulsa LR 8).

95 Section 252(1)(c).

(Reed Dance), *Libutfo* (Regimental system) or similar cultural activity or organisation.'[96]

In African customary law, the friction between cultural rights and protecting the rights of women is immediately discernible, especially with regards to marriage, succession to positions of leadership and ownership of land and/or property[97] which is almost always disparately inclined towards men. Whether Swazi customary law can be reconciled with liberal constitutionalism remains to be seen. If the rights of women in Swaziland are to be promoted satisfactorily, all laws that impede women's rights, including laws relating to Swazi law and custom, need a comprehensive legislative overhaul. It is wholly inequitable for women to be exclusively reliant on the general judicial system (like the High Court and the Supreme Court) to pursue and demand their rights. In that regard, Swaziland can draw on a few African exemplars like South Africa and Namibia who have been instrumentally progressive in amalgamating existing law or creating new law to improve the rights of its local women. It is high time that Swaziland follow suit.

The *FIDA* Case

The Legal Framework Governing the Issue, Background to the Lawsuit and the Court's Decision

The Kenyan legal system is pluralistic in nature.[98] Laws and practices are derived from English, Hindu, Islamic and customary law.[99] In terms of the British common law, which Kenya endorsed, a wife was regarded as a 'feme covert' or was subjected to the legal doctrine of coverture with regards to matrimonial property. Coverture meant that when a woman married, she was divested of all her property rights (including those in land) which were transferred to her husband and came directly under his control.[100] Under the principle of coverture, a women's legal status was not autonomous but was interlaced with that of her husband.[101] She could not sue or be sued or conclude contracts

96 Section 115(6) of the Swazi Constitution.

97 Tenille Brown, 'Locating the Women: A Note on Customary Law and the Utility of Real Property in the Kingdom of Eswatini (Formerly the Kingdom of Swaziland)' in Angela Cameron, Sari Graben and Val Napolean, *Creating Indigenous Property* (University of Toronto Press 2020) 347.

98 Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems <http://kmco.co.ke/wp-content/uploads/2018/08/TDRM-and-Jurisprudence.pdf> accessed 31 March 2020.

99 Patricia G Kameri-Mbote, 'Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' (2002) 35(3) Law and Politics in Africa, Asia and Latin-America 373.

100 Tim Stretton and Krista J Kesselring (eds), *Married Women and the Law: Coverture in England and the Common Law World* (McGill-Queen's University Press 2013) 282.

101 Karen Weyler, 'Marriage, Coverture and the Compassionate Ideal in the Coquette and Dorval' (2009) 26(1) Legacy 2.

or purchase or alienate property without the assistance of her husband.[102] The English Married Women's Property Act of 1882 altered the common law doctrine of coverture to reduce the legal imbalances between women and men and attempted to standardise the property rights of single and married women.[103] The 1882 Act gave spouses equal rights to litigate, own, alienate and purchase property, to be liable for their own debts and hold stock in their own names.[104] Although the Act balanced the playing field between men and women, Kenya never really made any inroads into developing or enacting its own laws pertaining to the equalisation of women's matrimonial property rights. In fact, during the colonial and post-colonial periods, Kenya lacked a definable statute outlining the principles regulating the division of matrimonial property and oftentimes relied exclusively on the contradictory decisions of its judiciary to devise some form of directives on how matrimonial property was to be divided between spouses upon divorce.[105]

Kenya now boasts a supreme Constitution[106] steeped in the foundational values of respect for human rights, equality, freedom, democracy, social justice and the rule of law.[107] The Kenyan Constitution contains a Bill of Rights providing for a number of justiciable rights including rights to equality and freedom from discrimination,[108] human dignity,[109] protection of the right to property,[110] equitable access to land,[111] the elimination of gender discrimination in law, customs and practices related to land and property in land;[112] and rights for minorities and marginalised groups.[113] The rights in the Bill of Rights are not absolute but are subject to limitation,[114] and like Swaziland, all law must be consonant with the Constitution or else confront illegality.[115] Following the adoption of a supreme Constitution, Kenya immediately embarked on a wide-spread process of law reform to harmonise existing legislation with the Constitutional

102 Allison Tait, 'The Return of Coverture' (2015) 114 Michigan LR 99.

103 Federation of Women Lawyer's, Kenya 'Women's Land and Property Rights in Kenya: A Training Handbook' <https://www.google.com/search?q=women%27s+land+and+property+rights+in+kenya&rlz=1C1JZAP_enZA873ZA874&oq=women%27s+land+and+property+rights+&aqs=chrome.2.69i57j0i512l2j0i10i22i30j0i390l3.8816j1j7&sourceid=chrome&ie=UTF-8#> accessed 2 August 2021.

104 Freyda Konno Owino, 'The Division of Matrimonial Property in Kenya: A Feminist Approach' (LLB Thesis, Strathmore University Law School 2017) 15–16.

105 ibid 13.

106 Article 2 of the Kenyan Constitution.

107 See the preamble to the Kenyan Constitution.

108 Article 27.

109 Article 28.

110 Article 40.

111 Article 60(1)(a).

112 Article 60(1)(f).

113 Article 56.

114 Article 24. The following rights are however exempt from any limitation: The rights to freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*.

115 Article 2(4) of the Kenyan Constitution.

provisions.[116] Two vital pieces of legislation emerged out of that enterprise, namely the Kenyan Marriage Act (KMA)[117] and the Kenyan Matrimonial Property Act (KMPA)[118] and it is a provision in the latter legislation that comprised the epicentre of the dispute in *FIDA.*

Before providing any additional background to the case, we need to first sketch out the intricate Kenyan legal framework governing the matter. In Kenya, dissimilar to other African legal systems, the division of matrimonial property upon divorce is not governed by property regimes.[119] The apportionment of matrimonial property between the spouses is spelt out in the KMPA, and the courts are final arbiters in such affairs. Section 7 of the KMPA states that: 'ownership of matrimonial property[120] vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.' The term 'contribution' comprises both monetary and non-monetary contributions,[121] and in order to claim a stake in that regard, the claimant must provide confirmatory evidence to a court of their contribution,[122] following which, a just and equitable order about the proportion or share each spouse should be awarded, will be made. The only option available to prospective spouses to eschew the afore-mentioned consequences is to conclude an antenuptial agreement determining their property rights.[123] The Kenyan Constitution[124] and the KMA[125] additionally stipulate that: 'parties to a marriage are entitled to equal rights (and obligations)[126] at the time of the marriage, during the marriage and at the dissolution of the marriage.'

In the *FIDA* case, the Petitioners challenged the constitutionality of section 7 of the KMPA because they believed that the impugned provision contravened articles 27, 40,

116 Lucyline Murungi, 'Consolidating Family Law in Kenya' (2015) 2 European J of L Reform 317.

117 4 of 2014. The KMA, consolidates the personal rules and laws governing marriage and divorce for Christian, civil, customary, Hindu and Islamic marriages into one document.

118 49 of 2013. In general, the KMPA, provides for the rights and responsibilities of spouses in relation to matrimonial property and caters for a uniform set of consequences for each distinct category of marriage listed above. Only matters relating to the matrimonial property of marriages contracted by Islamic law are excluded from the general ambit of the KMPA (see s 3).

119 Marriage in Kenya is not regulated by whether the couple was married in community of property, out of community of property or subject to an antenuptial contract with or without accrual.

120 Matrimonial property in the KMPA is restricted to: (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 (s 6(1)) but excludes trust property, including property held in trust under customary law (s 6(2)).

121 Section 2. Non-monetary contribution includes: (a) domestic work and management of the matrimonial home; (b) child-care; (c) companionship; (d) management of family business or property; and (e) farm work.

122 See *AKM v NNN* [2019] EKLR (HC) para. 40.

123 Section 6(3) of the KMPA.

124 Article 45(3).

125 Section 3(2).

126 Only applicable to the KMA.

45(3), 60 and 68[127] of the Kenyan Constitution. FIDA requested that the Court declare section 7 to be invalid because any law that sanctioned the apportionment of matrimonial property on the basis of verified contributions alone was an affront to the principle of equality.[128] They further advocated for a preferred reading of section 7 (one which they asserted was congruent with the purpose and effect of the provision) where spouses would be awarded an equal share (ie a 50/50 division) in the matrimonial property at the time of divorce. The Petitioners posited that because spouses share equally in any liabilities and expenses incurred during the subsistence of the marriage and/or for the benefit of the marriage,[129] matrimonial property should be shared equally. In their estimation, although the courts[130] have accepted that a wife can make indirect contributions to a marriage—such contributions have been habitually undervalued and that has had a negative impact on the enjoyment of women's property rights.[131] The *Amicus Curiae* (the Initiative for Strategic Litigation in Africa (ISLA)) further asserted that although section 7 appears to be *prima facie* neutral, in application, it affects women's rights to ownership of matrimonial property more substantially,[132] as traditionally, divorce impacted women more materially than men.[133]

The Court found, with strict adherence to the doctrine of separation of powers,[134] and a persuasive (not binding) reliance on *stare decisis*,[135] that article 45(3) was plain and unambiguous[136] and did not allow for the matrimonial property to be divided equally upon divorce.[137] In the Court's opinion, all that article 45(3) asserts is that marriage is a partnership of equals—where no spouse is superior to the other, and both partners have equal dignity.[138] The Court rejected the Petitioner's viewpoint concerning the 50/50 split in the matrimonial property upon divorce because it gave credence to the idea that a party could enter a marriage and then walk out of it in the event of dissolution with more than they deserve.[139] In other words, such a state of affairs could give rise to fictitious marriages where one of the spouses would summarily enter into marriage in order to derive some financial reward. In the judge's view, section 7 did not permit a 50/50 separation of matrimonial property either, but such decisions were left in the hands of the courts, who were more than capable of determining both monetary and non-

127 Section 68(a) of the Kenyan Constitution affords Parliament the power to revise, consolidate and rationalise existing land laws.
128 *FIDA* (n 4) paras 9 and 16.
129 Section 10 of the KMPA.
130 See *Kivuitu v Kivuitu* {1990-1994} EA 27 and *Ndiritu v Ndiritu* {1995-1998} EA 235 where child-bearing was recognised as a marital contribution.
131 *FIDA* (n 4) para 14.
132 ibid para 15.
133 ibid.
134 ibid paras 28–29.
135 See *PNN v ZWN* [2017] eKLR (CA) paras 16–18 and *UMM v IMM* [2014] eKLR paras 19–21.
136 *FIDA* (n 4) paras 31–32.
137 ibid paras 46–54.
138 ibid.
139 ibid para 60.

monetary contributions and awarding spouses their respective shares.[140] In the Court's mind, when the legislature enacted section 7, it was cognisant that women were generally responsible for the upkeep of the home, for child-bearing and child-rearing and/or often expended their own monetary resources to provide for the daily subsistence requirements of the family home; that is why non-monetary contribution was included in the Act.[141]

The Court also rebuffed the Petitioner's contention regarding the equal sharing of liabilities incurred during the marriage and intimated that section 10 of the KMPA was included to curtail instances where one spouse would be left to discharge all the debts acquired during the subsistence of the marriage.[142] The Court concluded that the assertion that section 7 infringes the right to property could not triumph because: (1) the KMPA is clear on the recognition and characterisation of monetary and non-monetary contribution; and (2) it is not injurious to, but rather entrenches, marital equality in that each spouse leaves with his or her entitlement based on his or her contribution.[143] The Court also held that section 7 was not discriminatory because: (1) it did not differentiate between different persons—the phrase 'parties to a marriage' was inclusive and embraced both men and women; (2) the differentiation did not amount to discrimination—'non-monetary contribution' applies to either of the spouses, not just women; and (3) the discrimination was not unfair.[144] Finally, the Court held that section 7 of the KMPA was valid and did not encroach upon any provisions in the Kenyan Constitution.[145]

An Analysis of the Court's Judgment and an Assessment of Kenya's Efforts to Broaden the Matrimonial Property Rights of Women

Constitutional rights and statutes do not in and of themselves generate equality. Constitutions 'create a standard against which laws and the treatment of citizens by their government (and private individuals) can be measured.'[146] The object of the legislation is to regulate some aspect of the law or harmonise extant law with constitutional principles. Further, constitutional rights and legislation are susceptible to interpretation by the courts, who may not always possess the resolve needed to develop a transformative equality jurisprudence.[147] And that is exactly what happened in the *FIDA*

140 ibid para 59.
141 ibid para 61.
142 ibid para 63.
143 ibid.
144 ibid paras 56–59. In the Court's thinking, the last leg of the inquiry did not need to be proven because they had already shown that the section was not discriminatory.
145 ibid para 65.
146 Marsha Freeman, 'Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries' (1990) 16(4) Commonwealth L Bulletin 1421.
147 Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 SAJHR 253-254.

case. What follows hereunder is a critical appraisal of the most salient shortcomings of the Court's judgment and some brief recommendations for how Kenya can effectively advance the matrimonial rights of its women.

The Court's Dubious Interpretive Methodology for Article 45(3) of the Kenyan Constitution

Despite endorsing a purposive and contextual approach to constitutional and statutory interpretation,[148] the Court in *FIDA* opted for a literal interpretation of article 45(3). The Bill of Rights binds all state organs and persons and applies to all law.[149] When interpreting the Bill of Rights and/or legislation, courts, tribunals and any other authority must not only promote 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom but they must also promote the spirit, purport and objects of the Bill of Rights.'[150] The Kenyan Courts have approved a broad, liberal, generous, purposive and contextual approach to constitutional interpretation.[151] The Court's bizarre reliance on the literal meaning of section 45(3) alone comprised a flagrant disregard for the key constitutional interpretive imperatives outlined above. Courts are enabled to give content and meaning to the rights protected in the Bill of Rights,[152] and they are empowered 'to develop the law to the extent that it does not give effect to a right or a fundamental freedom, or adopt the interpretation that most favours the enforcement of a right or fundamental freedom.'[153] The Court in *FIDA* fared dismally in that respect.

A Questionable Reliance on Persuasive Authority

The Court relied on several court judgments to support their conclusion. There is absolutely nothing wrong with that. What is problematic, is that the judge's deductions were drawn in most part from a dissenting judgment of the Kenyan Court of Appeal,[154] which has persuasive; not binding authority. In that case, the majority of the Court ruled *au contraire* that:

> Article 45(3) of the Constitution clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property

148 *FIDA* (n 4) paras 20–23.

149 Article 20(1).

150 Article 20(4). Also see the preamble to the Kenyan Constitution and *Katiba Institute v Independent Electoral & Boundaries Commission* [2017] eKLR (HC) para 27; *Centre for Rights Education and Awareness & 2 Others* [2017] eKLR (HC) 9; and *EG v Non-Governmental Organisations Co-ordination Board & 4 Others* [2015] eKLR (HC) para 134.

151 See *Mohammed Abduba Dida v Debate Media Limited & Another* [2018] eKLR (CA) 6; *Hashmukh Devani v Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 3 Others* [2016] eKLR (HC) para 63; *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others* [2017] eKLR (CA) para 55; and FIDA (n 4) para 22.

152 *MWK v Another v Attorney General and 3 Others* [2017] eKLR (HC) para 59.

153 Article 20(3).

154 *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes MSA CA* Civil Appeal No.127 of 2011 (unreported).

> and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends.[155]

Unfortunately, *Agnes Nanjala William* was decided in 2011, and since the passing of the KMA and the KMPA in 2013, a collective reading of sections 3(1) and 7 in the KMA and KMPA, respectively, has led to a more restrictive interpretation of article 45(3) and contrasting *dicta* on the matter.[156] The KMA and the KMPA were specifically promulgated to promote equality and give much-needed direction to Courts, when granting a decree of divorce and ordering a division of the marital assets. That has not transpired, and Kenyan Courts are still grappling with the execution of an equitable division of matrimonial property as no standardised model or practice exists. In our opinion, more flesh or substance needs to be given to the afore-mentioned provisions as they are vague, can be interpreted willy-nilly and most importantly, they do not achieve the equality aims and goals for which they were specifically decreed. Secondly, the computation of each spouse's share in the marital estate is a subjective exercise, and the Courts do not always possess adequate information or the requisite skills or expertise to make such conclusive determinations. We submit that the equitable distribution of marital property should not be left to the courts to be dealt with on a case-by-case basis. For reasons of equity, the KMPA should establish more clear-cut rules on exactly how matrimonial property should be distributed. To alleviate that fissure, we recommend that sections 7 of the KMPA, 3(2) of the KMA and article 45(3) of the Kenyan Constitution be amended by the Kenyan government invoking either of the three alternatives listed below: (1) approve a standard 50/50 division of matrimonial property upon dissolution; or (2) quantify or qualify non-monetary contribution to mean a right to a 50% stake in the matrimonial estate; or (3) allow spouses the freedom to select a regulatory matrimonial property regime that will govern the consequences flowing from their marriage. In our view, those options are more equitable because the non-monetary contributing spouse has equally supplemented and subsidised the marriage and should be entitled to a greater share of the matrimonial property than he/she presently receives.

The Court's Narrow and Restrictive Approach to Equality

Historically, women were treated less favourably in the sphere of marriage, property ownership and land access when compared to men;[157] so we can safely deduce that sections 7 of the KMPA, 3(2) of the KMA and articles 45(3), 40, 60 and 68 of the

155 *Agnes Nanjala William* (n 154) (unreported).

156 In *UMM v IMM* [2014] eKLR (HC), *MWM v JPM* [2015] eKLR (HC), *PNN v ZWN* [2017] eKLR (CA), *RCC v TKN* [2019] eKLR (HC) and *SN v FM* [2019] eKLR (HC) a wife was denied a fifty per cent stake in matrimonial property because such a division was neither practical nor sanctioned in statute. In *NWM v SMK* [2020] eKLR (HC) and *JDF v DB alias DB* [2020] eKLR (HC), a wife was awarded a fifty per cent share in the matrimonial property because she could authenticate her contributions.

157 Ruth Aura Odhiumbo and Maurice Adour, 'Gender Equality in the new Constitutional Dispensation of Kenya' in PLO Lumumba, Kiwinda Mbondenyi and SO Odero, *The Constitution of Kenya: Contemporary Readings* (Law Africa Publishing Ltd 2011) 102.

Kenyan Constitution were enacted to level the playing field, so to speak, and eliminate engendered disparity gaps. When courts are entreated to make a decision about the constitutionality of a legislative provision, constitutional interpretation requires that all relevant provisions having a bearing on the subject matter be considered as a whole in order to give effect to the constitutional objectives.[158] 'The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.'[159]

The equality and freedom from discrimination provisions in the Kenyan Constitution[160] are framed similarly to the equality provision in the South African Constitution.[161] Equality is an infamously difficult concept to define,[162] however, legal scholars and commentators have conventionally drawn a distinction between formal and substantive equality.[163] Formal equality essentially means 'sameness of treatment: the law must treat individuals in like circumstances alike.'[164] Substantive equality, on the other hand, requires the eradication of patterns of disadvantage, domination and discrimination arising out of political, social, legal and economic contexts.[165] Section 9 of the South African Constitution favours a substantive over a formal conception of equality,[166] and in the same vein, by defining equality as including the full and equal enjoyment of all rights and fundamental freedoms,[167] we can infer that Kenya's Constitution also entrenches a substantive approach to equality.[168] Further, the right to equality in the Kenyan Constitution is remedial or restitutionary in nature and design[169] as article 27(6) obliges the state to take affirmative measures to redress past discrimination. The Kenyan Constitution also compels all state organs and public officials to address the needs of vulnerable groups in society, including women[170] and guarantees that women and men

158 See article 259 of the Kenyan Constitution and *Hashmukh Devami* (n 118) para 63.

159 *S v Acheson* 1991 (2) SA 805 (NM) 813.

160 See s 27.

161 See s 9 of the Constitution of the Republic of South Africa, 1996.

162 In *Minister of Home Affairs v Fourie* [2005] ZACC 19 para 60, the Court held that: Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of difference. Equality does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.

163 Anne Smith, 'Equality Constitutional Adjudication in South Africa' (2014) 14 AHRJL 611.

164 Currie and De Waal (n 72) 213.

165 Sandra Liebenberg and Beth Goldblatt, 'The Inter-relationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution' (2007) 23 SAJHR 342.

166 See *President of the Republic of South Africa v Hugo* [1997] ZACC 4 para 41 and H Botha, 'Equality, plurality and structural power' (2009) 25 SAJHR 4.

167 See s 27(2) of the Kenyan Constitution.

168 See Karthy Govender, 'Equality, Sexuality and taking Rights Seriously' (2008) 29(1) Obiter 6.

169 The equality right in the South African Constitution is also remedial and restitutionary in nature. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] ZACC 17 para 61 and *Minister of Finance and Others v Van Heerden* [2004] ZACC 3 para 69 and 75.

170 Section 21(3).

have the right to equal treatment, including the right to equal opportunities in political, economic, social and cultural spheres.[171]

The rights of married women were conventionally influenced by accepted or acceptable social and cultural norms for men and women.[172] In almost all patriarchal societies, with Kenya being no exception, women were characteristically the caregivers and caretakers of the home (even if they were employed), and men were the financial breadwinners.[173] This often led to the inequitable situation that the spouse that remained at home had a diminutive or no income, limited assets and no vendible skills during the subsistence of the marriage and when the marriage broke down.[174] In order for the equality commitments in the Kenyan Constitution to be realised, such social and economic disparities must be addressed.[175] Neither sections 7 in the KMPA , 3(2) in the KMA, nor article 45(3) of the Kenyan Constitution, addresses the social and economic inequality experienced by women following marriage and divorce. All that those provisos accomplish is formal equality and gender-neutral textual changes in the law that superficially protect the fundamental rights of women. As stated previously, substantive equality within the context of marriage and divorce not only 'seeks to place spouses in an equal position',[176] but also requires that systematic patterns of gender inequality ingrained in the economic and social structure be remedied. When judges interrogate legislation containing an alleged rights violation, they need to be mindful of 'the context in which the inequality occurs and identify the social and economic conditions that structure action and create unequal and exclusionary consequences for groups and individuals.'[177] The adjudicator in *FIDA* did not deliberate on that askew context at all. Instead, he/she unjustifiably limited the meaning and scope of equality in section 7 of the KMPA and article 45(3) of the Kenyan Constitution to formal equality alone, contrary to what article 27 guarantees.

The Ambiguity of the Drafted Language in Section 7 of the KMPA

The language employed by the drafters in section 7 of the KMPA is ambiguous and potentially produces inequality. Initially, the provision recognises that ownership of matrimonial property vests in both spouses. But then the provision goes on to stipulate that the division of matrimonial property on divorce or dissolution is dependent on the

171 Section 27(3).

172 Kivutha Kibwana, 'Women and the Constitution in Kenya' (1992) 25(1) Law and Politics in Africa, Asia and Latin America 16.

173 See generally Mary Achieng Machira, 'The Experience of Patriarchy by Kenyan Women in the Pursuit of Higher Education' (DPhil thesis, Walden University 2013) 17 and Edith M Omwami, 'Relative Change-theory: Examining the Impact of Patriarchy, Paternalism, and Poverty on the Education of Women in Kenya' (2011) 23(1) Gender and Education 21.

174 Jacqueline Heaton, 'Striving for Substantive Gender Equality in Family Law: Selected Issues' (2005) 21(4) SAJHR 550.

175 *Minister of Finance and Others* (n 169) para 23.

176 Heaton (n 174) 549.

177 Albertyn (n 147) 259.

contribution that each spouse made towards the acquisition of the matrimonial property. The section creates an unusual nuptial situation in that there is equality of ownership but no equality in division. Section 7 of the KMPA is thereby defunct in that it fails to ensure equal protection and benefit of the law for both spouses.[178] To remedy that inconsistency, the Court in *FIDA* should have affirmed the invalidity and unconstitutionality of section 7 of the KMPA, and they should have espoused the preferred reading proposed by the Petitioners.

The Petitioners Imprudent Dependence on Sex Alone as a Ground for Evidencing Unfair Discrimination

Article 27(4) of the Kenyan Constitution prohibits discrimination on certain specified grounds but does not proscribe discrimination on unspecified grounds.[179] If discrimination is based on an unspecified ground, the unfairness must be proved by the complainant,[180] and the test of unfairness requires an evaluation of 'the impact of the discrimination on the complainant and others in his or her situation.'[181] That is where we believe the Petitioners submissions erred. In our view, the Petitioners reliance on sex as the sole ground of discrimination in the proceedings was misguided, left the application wanting and deleteriously affected its outcome. Simply put, discrimination refers to:

> any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs, political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.[182]

178 In *John Harun Mwau v Independent Electoral and Boundaries Commission & Another* [2013] eKLR (HC) para 33, the Court held that 'a person alleging a violation of article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law.' Equality is assured to all persons simply because they are human beings and 'must be enjoyed by all persons in equal measure and to the fullest extent' (*Reuben Njuguna Gachukia v Inspector General of the National Police Service* [2019] eKLR (HC) para 42).

179 See *Masai Mara (SOPA) Limited v Narok County Government* [2016] eKLR (HC) paras 74–76 and *Tukero ole Kina v Attorney General* [2019] eKLR (HC) para 116.

180 *Harksen v Lane NO* (CCT9/97) 1997 ZACC 12 para 52.

181 *EG & 7 others v Attorney General*; *DKM & 9 Others*; *Katiba Institute (Amicus Curiae)* HC [2017] eKLR (HC) para 290.

182 *Jacqueline Okeyo Manani v Attorney General* [2018] eKLR (HC) para 28. In *Peter K Waweru v Republic* [2006] eKLR (HC) para 2, the Court expressed discrimination as: affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description … Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

Section 7 of the KMPA produces an unintentional differentiation not based on sex but based on the distinction between 'contribution' and 'non-monetary contribution' which has the effect of imposing a disadvantage on most women which is not imposed on most men *per se* and withholds or limits access to the matrimonial property advantages that are available to men.

The germane section further propagates unfair discrimination in that evidence must be led by the spouses corroborating their respective contribution(s). Financial or monetary contributions are relatively unproblematic to prove. They can be authenticated with receipts, bank statements, etc. Indirect contributions to the matrimonial property, on the other hand, are more difficult to validate. For example, what type of evidence would a spouse have to present to a court to discharge the evidentiary burden of proof to support a claim pertaining to an indirect contribution—must video footage, photographs or records of their daily activities be submitted and attested to by a witness? Because of that discrepancy, one of the spouses (and that is usually the husband) could end up being awarded a greater share in the matrimonial property for no other reason, but for that, they were employed and were able to make a larger contribution to the matrimonial estate supported by verifiable data. Such a grievous state of affairs is further exacerbated by the fact that no present guidelines exist on how to quantify non-monetary contributions—such decisions are arbitrarily left to the courts to be dealt with on an *ad hoc* basis. It would have been more prudent and judicious for both the Petitioners and the arbitrator to bring human dignity into the fray when considering the rights to equality and non-discrimination. The rights to equality and human dignity are closely connected[183] and are not just constitutional rights but also constitute core values underlying the Kenyan Constitution.[184] The recognition of a right to human dignity is an attestation of the 'intrinsic worth of all human beings and ensures that all human beings are entitled to be treated as worthy of respect and concern.'[185] Human dignity is inherent, and it constitutes the foundation for all other human rights to be executed by a human being.[186] Because non-monetary contributions to a marriage have to be verified and are routinely underestimated, a spouse's human dignity is negated. With due respect, the fact that human dignity was omitted for consideration was a key lapse in judgment that impacted negatively on the litigant's result.

183 The rights in the Kenyan Bill of Rights are interrelated and interdependent. See *Seventh Day Adventist Church (East Africa) Limited v Minister for Education* [2014] eKLR para 27.

184 See article 10(2)(b); J Fitzgerald, 'The Road to Equality: The Right to Equality in Kenya's New Constitution' (2010) 5 The Equal Rights Review 58–59, and *KELIN (Kenya Legal and Ethical Network on HIV and AIDS) v Cabinet Secretary Ministry of Health* [2016] eKLR (HC) para 101.

185 *Kenya National Commission on Human Rights v Attorney General* [2017] eKLR (HC) 14.

186 See *JWI V Standard Group Limited* [2013] eKLR (HC) para 28, *Kenya National Commission on Human Rights v Attorney General* [2017] eKLR (HC) 14 and *S v Makwanyane* [1995] ZACC 3 para 144.

Conclusion

Kenya and Swaziland have enacted supreme constitutions endeavouring to fundamentally transform and improve the economic, social, political and cultural lives of their citizens. The principle of equality is a crucial underlying value that foreshadows both countries' constitutional initiatives. In saying that, however, a constitutional commitment to equality is no guarantee that the lives of women will be improved, nor is it a guarantee that men and women will be treated equally. That is why when courts interpret laws affecting the rights of women, it is vital that they adopt a transformative approach, which substantive equality dictates. In *Sacolo*, the Court implemented a pragmatic, transformative and constitutionally sound approach when abolishing the husband's marital power. In *FIDA*, however, the Court missed the mark—it resisted development and employed anti-transformative and unconstitutionally sound strategies to deny women equal matrimonial rights with men.

Women have historically confronted inequality in marriage and divorce on account of strongly held social and cultural beliefs, which ultimately found sanction in legislation. These established beliefs have additionally resulted in the economic subjugation of women through continued application of the marital power and a sustained relegation of women to the management of the typical feminine domestic duties of the household, which has the latent effect that women have nothing during the marriage and are left with nothing post-divorce. For the nation-states apprised in this article, the full realisation of women's matrimonial property rights can only be accomplished if gender apertures undermining the rights of women in the statute be removed as a priority and/or exigent new legislation be promulgated. Additionally, the judiciary needs to play its remedial and pre-emptive role in the protection, enforcement and promotion of constitutional rights[187] and the facilitation of protecting and ensuring equality reform.

To achieve these objectives, Swaziland needs to implement the following reforms. Sections 24 and 25 of the Swazi Marriage Act needs to be expunged, and the Swazi Marriage Act should be repealed in its entirety after a new Act has been promulgated. The current Swazi Marriage Act is inherently outdated and no longer serves the matrimonial needs of all the people of Swaziland. The proposed new legislation should equalise the rights of men and women with regards to matrimonial property and rectify the social and economic, and other inequities in society, thereby giving effect to the underlying principles and values entrenched in its supreme Constitution. Remnants of the pre-constitutional era like the Swazi Courts Act, which establishes a binary court structure, should also be repealed, and new legislation should be enacted enabling all Swazi courts to hear matters pertaining to Swazi customary law. The Swaziland Constitution needs to be amended to reflect a veritable constitutional democracy. In that

187 Courts are the enforcers of the Bill of Rights (arts 23(1) of the Kenyan Constitution and s 151(2)(a) of the Swazi Constitution).

regard, the powers of the King need to be curtailed;[188] the *tinkhundla* system of government needs to be abandoned; and a democratic system of government needs to be installed. General interpretive and limitation provisions should also be incorporated; the organisation of political parties should be permitted; and a system of free and fair elections needs to be sanctioned and implemented. Socio-economic and cultural rights need to be expressly provided for and not merely referred to in passing, subject to the values articulated in the Swazi Constitution.

In Kenya, the following amendments will have to be executed to achieve substantive equality. Sections 6(1), 6(2), and 7 of the KMPA need to be reconfigured. Ownership of matrimonial property should not be reliant on the contribution of either spouse towards its acquisition, and the evidentiary burden placed on a spouse in that regard should be relaxed. Trust property and property held in trust under customary law should be included (and not barred) in the definition of matrimonial property in section 6(2) of the KMPA. 'Non-monetary contributions' to the matrimonial estate are just as imperative as monetary contributions and women should be recompensed adequately, therefore. Section 3(2) of the KMA and article 45(3) of the Kenyan Constitution need more clarity. The legislature needs to expound on what is meant by 'equal' (and obligations) at the time of the marriage, during the marriage and at the dissolution of the marriage. The equitable division of matrimonial property should not be left to the acumen of the courts alone. Legislation should also provide ample guidelines on how matrimonial property will be distributed upon divorce.

For both Swaziland and Kenya, the alignment of women and men's rights hinges chiefly on the principles of constitutional interpretation being applied correctly. As already stated, when supreme constitutions are interpreted, a court must consider all factors aimed at assisting the court to protect fundamental rights and uphold the rule of law. Second, courts must espouse 'a constitution's spirit and tenor', or alternatively, 'its underlying values and moral standards' for the duration of the interpretative process.[189] Third, constitutions must be given a generous and purposive interpretation. Fourth, various interpretive aids, including historical context, must be considered; and finally, a court must interpret a constitutional provision in its context as a whole and not in

188 For example, in Lesotho, the King is a constitutional King (see s 44 of the Constitution of Lesotho, 1993) not an absolute monarch like the Swazi king (Olubunmi O Obioha, 'The Powers of Lesotho Monarchy and the Constitutional Instruments: The Chicken and the Egg Question' (2019) 3(1) Journal of Nation-Building and Policy Studies 173). 'Under the Lesotho design, the government has a broader space of operation because of the animating principle of democracy. The rights of the King to be consulted and to be informed – even when it is interpreted to include the rights to warn and advise – may not be used to limit the government operational space' (Hoolo Nyane, 'Re-visiting The Powers of the King under the Constitution of Lesotho: Does He Still Have Any Discretion' (2020) 53 De Jure 174–175).

189 Swaziland's values can be located in the preamble to its 2005 Constitution.

isolation.[190] When interpreting the rights to equality in their respective Constitutions, neither the Swazi nor the Kenyan Court adhered to these authoritative principles, hence the capricious results.

Promoting gender equality is crucial for economic and human development and is an integral pre-requisite for social justice and good governance to be realised.[191] Some of the practical ways in which women's rights can be augmented is as follows. The girl child and women must be provided with equitable access to education, which is mandatory for the economic development and empowerment of women.[192] The work that women perform domestically and through engagement in subsistence farming should be accorded its proper value.[193] Women should be emboldened to participate in unconventional careers demanding equal remuneration for equal work. Women should engage with women's and human rights organisations regularly. African customary law needs to be developed and modified[194] by communities themselves. Women should be allowed to participate in government and legal reform processes. The state must 'create an enabling environment for women's access to justice and effective, accountable and gender-responsive justice institutions.'[195] The enforcement of international human rights instruments by nation-states[196] is pivotal to expanding the rights of women. In

190 Angelo Dube and Sibusiso Nhlabatsi, 'On Amorphous Terms, Terrorism and a Feeble Judiciary: Analysing the Dissenting Judgment in *Maseko v Prime Minister of Swaziland and Others* (2016)' (2017) 12(1) Intl J of African Renaissance Studies – Multi-, Inter- and Transdisciplinary 171–172.

191 Mediatrice Kagaba, 'Women's Experiences of Gender Equality Laws in Rural Rwanda: The Case of Kamonyi District' (2015) 9(4) J of Eastern African Studies 576.

192 Elizabeth Nahamya, 'Child, Early and Forced Marriages (CEFM) in the Commonwealth: The Role of the Judiciary' (2017) 43(1) Commonwealth Law Bulletin 116.

193 Rachel Rebouche, 'Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women' (2006) 19 Harvard HRJ 240.

194 Tiffany McKinney Gardner, 'The Commodification of Women's Work: Theorizing the Advancement of African Women' (2007) 13 Buffalo Human Rights LR 33

195 The United Nations Entity for Gender Equality and the Empowerment of Women, the United Nations Development Programme, the United Nations Office on Drugs and Crime and the Office of the United Nations High Commissioner for Human Rights, *A Practitioner's Toolkit on Women's Access to Justice Programming: Module 2: Marriage, Family and Property Rights* <WA2J_Module5.pdf (ohchr.org)> accessed 3 April 2020.

196 The Universal Declaration of Human Rights 'promotes the principle of non-discrimination' (Art 2); the International Covenant on Civil and Political Rights 'guarantees equality between men and women and prohibits discrimination based on sex' (Art 3); the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination on the ground of sex and 'undertakes to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant' (Art 3); and the Convention on the Elimination of All Forms of Discrimination Against Women requires that state parties: '(1) end discrimination against women in laws, policies and practices, including through the adoption of temporary special measures; (2) take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (Art 2); (3) take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development … this includes the right to education, access to credit and loans, access to housing and the right to participation. Importantly, it also includes guarantees of equal treatment in land and agrarian reform.

that regard, it is suggested that the African Commission on Human and Peoples' Rights which is mandated to promote human and peoples' rights in Africa, needs to play a more concrete role in not only holding nation-states accountable for human rights violations but also holding them liable for the lack of progress made in advancing the rights of women through legislation and/or liberal constitutionalism.

Despite the legal and policy reforms made in Kenya, and the judicial pronouncements made in Swaziland, a women's economic well-being continues to hinge largely on her rights in marriage, divorce[197] and 'patriarchal systems where male authority and power are dominant.'[198] In that regard, Swaziland and Kenya can draw on a few African exemplars like South Africa and Namibia who have been instrumentally progressive not only in amalgamating existing law or creating new law that improves the rights of its local women; but whose courts are perpetually playing their role in developing the common and customary law[199] to promote constitutional values thereby positively engendering the improvement of women's rights.

South Africa adopted its supreme Constitution in 1996. Since 1996, the South African Constitutional Court (the uppermost Court in South Africa) has been yielding a wealth of jurisprudence on the Constitution's right to equality contained in section 9.[200] Principles and institutions of African customary law that offend against the right to equality have not been exempt from this constitutional exercise. For example, in *Bhe & Others*[201] the customary law rule of male primogeniture was ruled as being discriminatory against two minor female children who were precluded from inheriting their deceased father's estate. In *Shibi*[202] the rule of male primogeniture was again ruled as discriminatory in that it prevented a woman from inheriting her deceased brother's estate. In *Shilubana & Others*[203] the Court endorsed the Valoyi tribal community's decision to appoint Ms Shilubana as their rightful successor or chief. In *Mphephu*[204] the Supreme Court of Appeal held that the Commission on Traditional Leadership Disputes and Claims had no authority to appoint a King or Queen for the Vhavenda. Such power vested in the royal family alone according to the custom of Khadzi whereby the sister

197 Pauline Musangi, 'Women, Land and Lroperty Rights in Kenya' (World Bank Conference on Land and Poverty, Washington DC, 20–24 March 2017).

198 Grace Wamue-Ngare and Waithera N Njoroge, 'Gender Paradigm Shift within the Family Structure in Kiambu, Kenya' (2011) 1(3) African J of Soc Sci 10.

199 See s 39(2) of the South African Constitution.

200 See *Prinsloo v Van Der Linde* 1997 (6) BCLR 756 (CC); *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *Jordan v S* 2002 (6) SA 642 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), *MEC for Education: KwaZulu-Natal v Pillay* [2007] ZACC 21 and *King NO v De Jager* [2021] ZACC 4.

201 *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC).

202 *Shibi v Sithole* 2005 (1) SA 580 (CC).

203 *Shilubana v Nwamita* 2008 (9) BCLR 914 (CC).

204 *Mphephu v Mphephu-Ramabulana* [2019] ZASCA 58.

of the incumbent ruler would announce her choice of successor. In *Ludidi*[205] the Court sanctioned the decision of the amaHlubi tribe to elect a woman to succeed to the throne or traditional leadership. In *Gumede (born Shange)*[206] the Court found sections 7(1) and 7(2) of the Recognition of Customary Marriages Act 120 of 1998 to be unconstitutional in so far as it treated the proprietary consequences flowing from customary marriages entered into before and after the commencement of the Act contrarily. The Court also found section 20 of the KwaZulu Act on the Code of Zulu Law to be unconstitutional because it gave the family head exclusive ownership over all the family property in the family home. In *MM*[207] the Court developed a Tsonga custom by making it obligatory for a husband to acquire the consent of his wife to conclude a successive marriage.

South Africa has also made significant strides in promulgating domestic legislation supporting gender equality usually emanating on the heels of the case-law mentioned immediately above. For example, South Africa repealed the Black Administration Act 38 of 1927, an apartheid piece of legislation which provided for the better control and management of black person's affairs[208] and which was especially discriminatory towards women. South Africa has also promulgated the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which seeks to give effect to section 9 of the South African Constitution by preventing and prohibiting unfair discrimination and harassment, and promoting equality and eliminating unfair discrimination; the Recognition of Customary Marriages Act 120 of 1998 which transforms customary marriage law with regards to the legal status of women and the financial consequences flowing from the conclusion and/or dissolution of a customary marriage; and the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 which grants women equal rights of succession with men under customary law.

Namibia also boasts a supreme Constitution[209] which possesses a justiciable Bill of Rights.[210] In general, like most African constitutions, the Namibian Constitution promotes respect for human dignity,[211] equality and freedom from discrimination,[212] equal rights to property[213] and political activity[214] and culture.[215] Article 10 of the Namibian Constitution must be interpreted in light of article 23(3), which makes it permissible 'to have regard to the fact that women in Namibia have traditionally suffered special discrimination, and that they need to be encouraged and enabled to play

205 *Ludidi v Ludidi* 2018 (4) All SA 1 (SCA).
206 *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC).
207 *MM v MN* 2013 (4) SA 415 (CC).
208 The majority of the Act was repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.
209 See art 1(6).
210 Chapter 3.
211 Article 8.
212 Article 10.
213 Article 16.
214 Article 17.
215 Article 19.

a full, equal and effective role in the political, social, economic and cultural life of the nation'[216] and that the state should actively promote the 'enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society.'[217] We can thus conclude that article 10 of the Namibian Constitution aims to achieve substantive rather than formal equality as a means to rectify previous injustice.[218]

Namibia also adopted a National Gender Policy in 1997,[219] which was re-developed in 2010 because many challenges lingered which had to be addressed to achieve true equality. Namibia's National Gender Policy aspires to create a supportive environment for all sectors to mainstream gender in line with National Development Plans (NDPs).[220] The Policy contains twelve areas of concern which include 'gender, poverty and rural development; gender, education and training; gender, health, reproductive health and HIV and AIDS; gender-based violence; gender, trade and economic empowerment; gender, governance and decision making; gender, media, research, information and communication; gender and the environment; the girl-child; gender, legal affairs and human rights; gender, peace-building, conflict resolution and natural disaster management and gender equality in the family.'[221] Like South Africa, Namibia has also promulgated legislation to stimulate equality. For example, the Married Persons Equality Act 1 of 1996 abolishes the concept of marital power and affords spouses joint ownership and control of marital property;[222] the Combatting of Rape Act 8 of 2000 bans marital rape; the Maintenance Act 9 of 2003 provides for the payment of maintenance, the holding of maintenance enquiries and the enforcement of maintenance orders; and the Communal Land Reforms Act 5 of 2002 seeks to extend the allocation of rights in respect of communal land to women.[223] Further, comparable to the South African Constitution, the interpretation of the right to equality in the Namibian Constitution is steeped in transformative constitutionalism.[224] The Namibian courts

216 Article 23(3).

217 Article 95(a).

218 Dianne Hubbard, 'The Paradigm of Equality in the Namibian Constitution: Concept, Contours and Concerns' <https://www.kas.de/upload/auslandshomepages/namibia/constitution_2010/hubbard.pdf.> accessed 2 August 2021.

219 Namibian National Gender Policy (2010–2020) <#10-0989-MGE-PolicyBooklet (africanchildforum.org)> accessed 3 April 2020.

220 See National Development Plan of Namibia <National Development Plan in Namibia (commonwealthgovernance.org)> accessed 3 April 2020.

221 Ministry of Gender Equality and Child Welfare (MGECW), 'National Gender Policy (2010–2020)' (MGECW, 2010).

222 Also see *Myburgh v Commercial Bank of Namibia* [2000] NASC 3, where the Court ruled that marital power is unconstitutional because it amounts to sex discrimination.

223 The Borgen Project, 'Women's empowerment in Namibia' <https://borgenproject.org/womens-empowerment-in-namibia/> accessed 2 August 2021.

224 Clever Mapaure, 'Decoding the Right to Equality: A Scrutiny of Judiciary Perspicacity over 20 years of Namibia's Existence' (2010) 2(2) Namibia LJ 37. Transformative constitutionalism refers to a 'long-term project of constitutional enactment, interpretation, and enforcement committed to …

have also affirmed that every constitution must be interpreted with regard to its own provisions and the values subscribed to therein.[225] Relying predominantly on South African jurisprudence (for obvious reasons) the Namibian courts have also been instrumental in developing article 10 of the Namibian Constitution by demarcating the interpretation to be applied thereto.[226]

The preambles to both the Swazi and the Kenyan Constitutions capture the notion of transformative constitutionalism and will prove to be key in aiding courts in its interpretation of the fundamental rights to equality and non-discrimination.[227] Further, constitutions are not static but are regarded as 'living documents'.[228] In our opinion, equality between men and women is attainable in Swaziland and Kenya. It simply requires the concerted systematic effort, commitment, collaboration and co-operation of the legislature and the judiciary.

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225 *Chairman, Ciskei Council of State v Qokose* 1994 (2) BCLR 1.

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