

# Why women judges really matter: The impact of women judges on property law outcomes in Kenya

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## Abstract

In this paper, I discuss the impact that women judges have made in property law outcomes in Kenya. The study shows that women judges were able to influence a feminist jurisprudence in matrimonial property and inheritance disputes *peripherally* even though they were not sitting in some of those cases – through trainings of other [male] judges and informal interactions with colleagues. I argue that there is need to focus lens on the collaborative and networking programmes of women judges to bring about *institutional change* as opposed to a focus on *individual women judges*. The findings suggest that studies that focus on individual [women] judges have far less potential to uncover the impact of *collective efforts* of women judges. Existing studies are based largely on Anglo-American positivist methodologies that are based on *methodological individualism* over *collectivism*. It is no wonder that the collective efforts of women judges under the auspices of the International Women Judges Association has received little to no scholarly attention.

## Keywords

Asking the African woman question, asking the woman question, collegiate judging, inheritance, Kenya Women Judges Association, legal pluralism, matrimonial property, methodological consciousness, methodological individualism

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“One day, the dance charts will be the biggest chart in the music world. Because we all need to dance. This planet will be a fun planet when the judges in court will end the day with a dance”!

Yoko Ono

## The Kenya Women Judges Association

This study is the impact of women judges on property law outcomes in Kenya, with a focus on the work of the Kenya Women Judges Association (KWJA), under the auspices of the International Association of Women Judges (IAWJ). Although studies on individual women judges are interesting, a focus on a methodological individualism (Charmaz, 2017: 3) has obscured collective efforts, actions, and processes of women judges, which are worthy of exploration in the African context. This study will begin to include these collective actions in the various narratives on the impact of women judges, by focusing on KWJA’s application of the Jurisprudence of Equality Programme in property law outcomes. The central argument made in the paper is that women judges matter for two main reasons. First, representation matters in postcolonial judiciaries such as Kenya’s, that are seeking social transformation (including gender justice) through constitution reforms. Such a transformation would be incomplete without including women judges, whose perspectives have been missing in a judiciary that has historically been largely a male enterprise, thus reflecting masculine interests in a gendered discourse in matrimonial property disputes. Secondly, I centre the study on the impact of women judges in debates around feminist judging, as opposed to essentialising women judges’ role in feminine and stereotypical norms surrounding the ‘difference’ that such women judges bring.

I demonstrate that women judges really matter in three ways. First, I showcase the KWJA as a co-ordinated women’s rights training programme of women judges, tailored towards educating and training their (overwhelmingly male) peers on sexist stereotypes about women in matrimonial property disputes, and applying international women’s rights instruments to uphold their matrimonial property rights. It is through this programme that a feminist jurisprudence on inheritance and matrimonial property disputes began to emerge, prior to a new Constitution in 2010. The finding that the KWJA educated and civilised male colleagues on sexist and stereotypical gender norms peripherally and behind the scenes is congruent with some previous studies that locate difference in challenging male bias (Hale and Hunter, 2008; Martin, 1993; Schroeder, 2002).

Second, I demonstrate that post-2010, the importance of women judges is even more stark when decisions passed by individual women judges are compared to those of individual male judges in the High Court. There are now more women judges in the High Court and Court of Appeal, as a direct consequence of the 2010 Constitution that contains a one-third minimum gender quota in all public appointments. This research found that some individual male judges did not recognise women’s property rights, but never women judges. Individual women judges judging *solo* in the High Court always uphold women’s matrimonial property rights.

Thirdly, I demonstrate in this paper that in collegiate benches in the High Court and Supreme Court, however, women judges' contributions are much more obscured, due to an 'almost always' reliance on doctrines of restraint that relies on past judgments that have stifled women's property rights. Thus, co-ordinated programmes of women judges, such as that of the KWJA, will be even more crucial where women judges once again find themselves in the minority in such collegiate benches. Post-2010, I find persuasion in the difference that feminist (as opposed to women) judges can make (Hunter, 2008), and the resultant shift in focus to feminist methods to generate feminist outcomes, by (even minority) women judges who provided different perspectives in collegiate benches. (Hunter, 2015: 137). I also find persuasion in studies that problematise 'difference' by factors of doctrines of restraint, and patterns of judgment writing.

The IAWJ was established in 1991 as a non-profit nongovernmental organisation, with the original purpose of enhancing access to justice for women and children. In 1994, the IAWJ began a training programme known as 'Jurisprudence of Equality Programme' (JEP). This was designed to encourage its members to apply international women's rights laws to enhance access to justice for women and children. The training programme resulted in formalised workshops that could be run by IAWJ members in their own countries. The IAWJ also encouraged their members to form their own national women judges associations. The IAWJ currently has 57 national member associations, 15 of which are in Africa. The KWJA is one of these.

The KWJA was formed in 1993 by the only two women High Court judges in the Kenyan judiciary at the time – Lady Justices Effie Owuor and Joyce Aluoch. At that point, there were no women judges in the highest Court of Appeal; Owuor and Aluoch were later joined by Lady Justice Roselyne Nambuye, the only woman magistrate at the time. The membership has since grown, as more women judges have joined the judiciary. The two pioneer women judges started training the male judges in the Court of Appeal, through the IAWJ's Jurisprudence of Equality Programme (JEP), to apply international (women's) rights instruments to uphold the rights of women and children, even when these international instruments had not been domesticated in the national laws. This study seeks to demonstrate the collective efforts of the KWJA, through the JEP, that has brought about positive property law outcomes recognising women's right to a share of matrimonial property at the dissolution of marriage, and women's inheritance of property.

The KWJA's *Equality of Jurisprudence Programme* in 1993 brought in new perspectives on women's access to property. I provide examples of cases decided before 2010 that set the precedent to a nearly equal division of matrimonial property. Before 2010, the Court of Appeal was made up only of male judges for a long time, until 2008 [Hon. Lady Joyce Aluoch retired in 2009 and was never replaced], while the High Court had just two women judges for an extended period. Study participants attributed the judicial outcomes of those cases to the efforts of the KWJA, whose members trained the male judges of the Court of Appeal to apply CEDAW and other international women's rights instruments, when these had not yet been domesticated.

The first part of the paper discusses the contextual framework for the study. As a former British colony, Kenya has a legal pluralist system in which personal moral codes operate alongside State laws – African customary law, Hindu laws, Mohammedan laws,

and laws relating to Christians. The Independence Constitution provided that these moral codes were not subject to challenge for discrimination, thereby sanctioning the discrimination of women in marriage. Constitutional reforms outlawed discrimination based on sex, and through personal laws. Under the 2010 Constitution, personal laws are subject to constitutional human rights principles of equality and non-discrimination. The 2010 Constitution also established the principle of equality of parties to a marriage. This context is important in understanding property law outcomes before and after 2010.

The second part of the paper discusses its theoretical basis. Studies on the impact of women judges to gender justice have tended to fall generally into two camps: the legitimacy argument and the difference argument. In this study, I discuss the different ways in which ‘difference’ has been conceptualised, and the conceptualisation of ‘difference’. The third part discusses the methodological approach of the paper and methods, while the last part discusses findings, both on the influence of the KWJA in property law outcomes pre-2010, and the influence of women judges to women’s access to property post-2010.

## Postcolonial Constitution Reforms

African women’s exclusion from access to property has a colonial legacy that has had a lasting and stubborn impact. British colonial authorities formed what has been termed a ‘patriarchal coalition’ with traditional male elders, as their interests and their desire to control women coalesced – the colonialists’ capitalist interests, and those of the African male leaders to preserve patrilineal male interests in property, and to control women who would provide domestic and farm labour, while their husbands worked in the city for the colonialists (Chanock, 1982; Lovett, 1989: 28; Parpart, 1988). Women, therefore, had access to property, but no right to it, and would walk away with nothing at the end of a marriage by death or divorce. I argue therefore that the impact that women judges have made, and can make, is in ‘asking the African woman question’ (Durojaye and Oluduro, 2016). This is a twin-approach of *reversing* colonial legacy, and underscoring the value of domestic work in feminist legal discourse. (Duffy, 2011; Ferrant et al., 2014; Folbre, 2006).

Post-independence, the applicable law in relation to division of matrimonial property was the English Married Women’s Property Act of 1882, which was applied to Kenya as a statute of general application. Section 17 stated that ‘in any question between husband and wife as to the title to or possession of property, [...] the judge of the High Court may make such orders with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit’. Through this statute of general application, the courts continued to make discretionary determinations that perpetuated the colonial legacy of excluding women from accessing matrimonial property. This statute of general application remained in force in Kenya until 2013, when it was repealed by the Matrimonial Property Act, by then having been repealed in England since 1970.

The 1963 Independence Constitution sanctioned discrimination based on sex under personal laws. Postcolonial feminist scholars such as Nyamu-Musembi (2013) and Manji (1999) discuss the discriminatory effects that these plurality clauses recognising the

simultaneous application of multiple personal laws had on the legal status of women in postcolonial contexts.

The 2010 Constitution ushered in a new wave of positive change for women and marriage: under Article 45(3) and (4), ‘parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage’, which provision applies to any ‘marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition, or adhered to by persons professing a particular religion [...]’. What this means is that discrimination in marriage through personal laws is no longer allowed in the Constitution. This has had a profound effect to property law outcomes in Kenya post-2010.

The Matrimonial Property Act 2013 was one of the laws enacted pursuant to Article 45 of the Constitution. This legislation recognised that ownership of matrimonial property will vest in the spouses according to each spouse’s contribution towards its acquisition. Non-monetary contribution to matrimonial property was also recognised under this legislation, which is defined at section 2 to include ‘domestic work and management of the matrimonial home, childcare, companionship, management of family business or property; and farm work’. The Court of Appeal noted in *ZWN v PNN* that the Act was enacted to correct the injustice in the precedent set by the Court of Appeal that spouses must prove monetary contribution.

Regarding the right to inheritance, this was recognised in 1972 for wives and daughters through the Law of Succession Act, [including wives in polygamous unions] where this is contested, and the deceased died intestate. This did not, however, preclude a father from excluding their daughters from inheritance by way of testate succession. Before 2010, the courts carried out a ‘balancing act’ between the provisions of the Law of Succession Act, and the provisions of the Constitution that allowed discriminatory personal laws against women’s rights to inherit property.

## **Why Women Judges Really Matter: Theoretical Debates**

Studies on women judges have been framed in two ways: first in terms of ‘difference’ (Berns, 1999; Kay and Sparrow, 2001; Martin, 1989a, 1989b; Menkel-Meadow, 2011; Rehaag, 2011; Schultz, 2001; Steffensmeier and Herbert, 1990; Wilson, 1990), and ‘legitimacy’ (Feenan, 2008; Kenney, 2013; Malleson, 2016) – widening the scope beyond women to other underrepresented groups in the judiciary. The question in the legitimacy argument is really one of why diversity in the judiciary matters.

Those who rely on ‘difference’ posit that women contribute a new and essentially female perspective to lawyering, which is more empathic, sensitive, gentle, collaborative, co-operative and contextual, and averse to adversarial modes of dispute resolution based on a binary, rights-based justice (Binion, 1991; Bowman, 1999; Menkel-Meadow, 1985; Rush, 1993; Scales, 1986; Sherry, 1986a, 1986b; Tobias, 1993; West, 1998). Justice O’Connor and others criticised this approach for falling into an essentialist trap based on stereotypes ‘so nearly echo(ing) the Victorian myth of the “True Woman” that kept women out of the law for so long’ (O’Connor, 1991). A second approach within the difference argument is that women judges will bring to bear their experiences to judging

by demonstrating the fallacy of the neutrality of legal rules and principles that are biased towards men and against women, and contribute to a reassessment of jurisprudential norms that perpetuate oppressive gender stereotypes (Wilson, 1990) – that men and women have different experiences in the world, and laws made by men will always reflect men's concerns. Some of these contributions have been theorised as the 'battered women's syndrome', and sexual assault and sexual harassment cases (Mackinnon, 1983; Menkel-Meadow, 1991). Still others argue that women judges will sensitise and educate their male colleagues behind the scenes about sexism, stereotypical gender norms and male bias in judging (Hale and Hunter, 2008; Martin, 1993; Schroeder, 2002). This is the conceptualisation of difference that is closest to the finding in the study on the work of KWJA pre-2010, in training their male colleagues through the *Equality of Jurisprudence Programme*. This approach, however, does not explain the difficulties for women judges in collegial decision-making post-2010, when women judges joined the Court of Appeal.

The 'legitimacy' argument rests on the premise that increasing the diversity of the judiciary based on categories such as gender, race, class, and disability is an essential feature of democratic legitimacy (Feenan, 2008; Kenney, 2013; Malleon, 2003). In the book *Gender and Justice: Why Women in the Judiciary Really Matter*, Kenney's analysis of data on sex differences in judging provided little support for a unique style of judging attributable to women, and cautions that we cannot exclude women from juries or judging – because, if we do, justice will not be seen to be done. The process and the result will both lack legitimacy (Kenney, 2013: 28–40).

Recognising some of the difficulties and limitations associated with expectations about difference and diversity, this has led to a recasting of the ways in which difference and judicial diversity might be understood. Some of these are explored in this study: Rosemary Hunter's discussion on whether feminist as opposed to women judges make a difference (2008), and the possibility that even a minority of women judges can provide different perspectives in collegial decision-making (2015: 137); Erica Rackley's focus on transformative diversity beyond inclusive diversity (Rackley, 2013b); Elliot's 'doctrines of restraint' and norms of collegiality as limitations to difference in collegial decision-making (Elliot, 2001); Belleau's and Johnson's (2008) study on the potential significance of dissent as a 'gendered site of judicial difference' (Belleau and Johnson, 2008); and studies on patterns of judgment writing, specifically authorship and unanimity in judgment writing (such as Lynch and Williams, 2004; McComick, 2000).

Hunter's focus on feminist rather than women judges (Hunter, 2008, 2012, 2013) has opened up new possibilities – this 'has created exciting new opportunities which reveal what is possible when the world is viewed through a feminist lens. It avoids essentialising women and actually facilitates more radical discussions around difference as it removes the shackles of trying to separate the feminism and difference' (McLoughlin, 2015: 277–278). Hunter's recasting to focus on feminist judges has influenced the Feminist Judgments Project in England and Wales (Hunter et al., 2010), and subsequent projects that re-write landmark judgments by infusing them with feminist reasoning and methods to generate feminist outcomes. Some of these are 'asking the woman question' (Bartlett, 1990: 837), recognising the gendered aspect of judging and including women in judging or legal discourse; challenging gender bias, contextualisation, and particularity; making choices while balancing competing feminist interests and perspectives;

providing remedies to correct injustices; promoting substantive equality; and drawing on feminist legal scholarship to inform decisions. (Hunter, 2013: 401).

There have also been reformulations on the purpose of diversity, especially by Erica Rackley and Rosemary Hunter. Rackley proposes reformulating diversity beyond inclusion to 'transformative diversity' (Rackley, 2013): 'while inclusive diversity is concerned simply with bringing a wider variety of backgrounds or attributes to the bench, transformative diversity seeks to ensure that those diverse characteristics and experiences are actually tapped into, that they lead to diversity in judging' (Rackley, 2013: 512). Hunter argues that increasing judicial diversity may have an impact – maybe not so much on substantive outcomes (except in a minority of cases), but in the fact that even minority feminist judges might provide different perspectives in collegial decision-making (Hunter, 2015: 136–137).

Elliot (2001) proposed the 'doctrines of restraint' as a more effective way to test 'gender' and 'difference' – the doctrine of precedent, and judicial norms of collegiality. Elliot argues that 'procedural law and associated norms of judicial behaviour may produce a better focus of study' (Elliot, 2001: 43). Capitalising on studies that have found 'measurable differences between men and women in their responses to conflict' (Elliot, 2001: 43), such as Shelley Taylor et al. (2000), Elliot writes that 'if such differences exist, one would predict that male and female judges would respond differently to the doctrines of restraint of *precedent*, incrementalism, justiciability and collegiality – collectively the doctrines of restraint' (Elliot, 2000: 44).<sup>1</sup> Elliot emphasises 'inequities of *precedent* and adherence to precedent when those doctrines protect laws based on gender or racial stereotypes' (Elliot, 2001: 45) in that 'any system that demands fidelity to existing precedent hinders change and reinforces the benefits given preferred groups under the status quo' (Elliot, 2001: 44). Elliot makes three general statements: first that 'women on the bench may find it more difficult to overcome the doctrines of restraint in expressing their true views of the law' (Elliot, 2001: 45); secondly, women may find it easier to work within the doctrines of restraint to achieve their goals; and thirdly, the 'feminine voice in jurisprudence' may simply be female judges' responses to these doctrines of restraint. Elliot writes that,

if women react to stress and conflict by wanting to 'tend and befriend', female judges should respond more strongly to doctrines of restraint than male judges. If aversion to conflict makes disagreement unpleasant, women on the bench probably would be more reluctant to dissent or even concur separately in panel decisions and would reveal higher levels of adherence to the doctrines of restraint. Female judges would be more likely to work to create consensus when writing for the majority, which again would result in higher conformity with the doctrines of restraint... because departure from precedent is an act of conflict. (Elliot, 2001: 45)

To support the three general statements on the response of women judges to doctrines of restraint, Elliot proposes three hypotheses for future studies: female judges will dissent less often than male judges, they will do so later in their career, and will depart from precedent less frequently than male judges; secondly that 'women judges will spend a longer time than male judges on the bench before they dissent' (Elliot, 2001:

45), and thirdly that ‘female judges will depart from precedent less frequently than male judges, whether writing for the majority or dissent’ (Elliot, 2001: 46).

The reliance of Elliot’s study on moral reasoning, particularly tend-and-befriend studies, is still problematic, as it remains within the psychoanalytic debates, a fact acknowledged in the paper (Elliot, 2001: 51). I find persuasion in Elliot’s reliance on studies that find the doctrines of restraint as a hinderance to change, but much less so in their three hypotheses on the differences between men and women in patterns of dissent based on psychoanalytic theories of aversion to conflict. Elliot’s three hypotheses have not been adequately tested by further empirical studies, and have been complicated by subsequent studies on differences in patterns of dissent between male and female judges.

Belleau’s and Johnson’s (2008) study on differences in patterns of dissent between male and women judges did not provide straightforward answers. Their study on seven women judges of the Supreme Court of Canada showed that some women judges generated more dissents the longer they were in the court, while others started as great dissenters, but became much less so the longer they were in the court (Belleau and Johnson, 2008: 64). One woman judge had a low rate of dissent, but was in the court for only 5 years – whether the low rate of dissent would have persisted had the judge stayed longer is unclear (Belleau and Johnson, 2008: 64). Further complications are that ‘dissent, like difference itself, is deeply relational [ . . . ] a dissent has meaning only in the context of the majority against which it stands in opposition’. Secondly, dissent as a phenomenon predates the entry of women on the Supreme Court – they therefore caution against ‘the risk of apprehending as “gendered” differences that which may find root in other sources . . . what identities do we privilege, what is the deemed content of those identities, and how do we know we have correctly determined which identities get attached to which bodies?’ (Belleau and Johnson, 2008: 66).

More generally, Belleau and Johnson cast doubt on the reliability of quantitative studies on levels of dissent in measuring difference. Quantitative studies such as Lynch’s and Williams’ annual studies (2004–2019), and McComick (2000) show a general disinclination to dissent and higher levels of unanimity in judging. Belleau and Johnson caution that the focus should be on the substance and reasons for the dissents, more than the number of the dissents themselves:

The statistics, while making visible some of the variations in patterns of voting and writing, tell us very little about the substance of the disagreements, the shape of the written reasons, or the context in which the conflicts emerged . . . dissent is something that necessarily emerges out of a context, and shifts in the context matter hugely. (Belleau and Johnson, 2008: 64, 66)

Due to the potential complications of quantitative studies, I have chosen to find persuasion in the general statements on doctrines of restraint as a potential hinderance to change (Elliot, 2001), dissent as a potential site of gender difference (Belleau and Johnson, 2008), and that patterns of judgment writing matter (such as McComick, 2000) – but not to focus on the falsifiability of hypotheses on different levels of dissents or patterns of judgment writing between men and women judges. On dissent, Belleau and Johnson write that

all judges appear to grapple constantly with the unavoidable tension between the demands of stability and responsive change. But the grappling is intensified for appellate judges, who bring multiple skills and divergent life experiences to bear on a single case, working as a group to do justice in ways that the world should be legally ordered. And in the resolution of these disagreements, judges sometimes find themselves in the space of dissent. (Belleau and Johnson, 2008: 57)

On patterns of judgment writing, concern has been raised on the high levels of unanimity and consensus, and disinclination to dissent in the High Court of Australia, the French High Court, the Supreme Court of Canada, and the Supreme Court of the USA. Chief Justice McLachlin of the Canadian Supreme Court remarked that they were aiming to ‘reduce the unnecessary differences’ (Belleau and Johnson, 2008: 67), while Chief Justice John Roberts of the US Supreme Court stated that he ‘wants the justices to speak with one voice as much as possible, to decide cases 9 to 0, with no pesky dissents or concurrences’ (Belleau and Johnson, 2008: 67). McLoughlin observes that ‘authorship remains fraught in this respect, as joint judgments do not conventionally give away the identity of the writer . . .’ (McLoughlin, 2015: 288). Lynch and Williams (2014: 545) argue that there is need to understand that who ‘individual judges are and who they sit alongside matters in our attempts to fully appreciate the High Court as a public institution’. In their study on patterns of judgment writing and dissent as a potential site of difference, Belleau and Johnson (2008) and McLoughlin (2015) conclude that, because dissent sometimes has a gendered face, the trend of reductions in dissenting judgments and concurrences suggests a need to think seriously about their impact.

These trends on unanimity in judging have also not been without controversy – Justice Heydon of the French High Court expressed distaste regarding practices that forge consensus over disagreement; what he terms ‘judicial herd behaviour’ and ‘excessively dominant personalities’ in single composite judgments:

Composite judgments raise questions. Who did the work? Did every judge understand the judgment? Did every judge closely examine it? Did a confident ‘specialist’ assume dominance over nervous ‘generalists’? What, if any, compromises were made? [ . . . ]. The same difficulty exists where a judge delivers a full judgment and the remaining judges say, ‘I agree’. No doubt the judges do sincerely agree to something, but to what? (Heydon, 2013: 212)

Justice Kiefel of the Australian High Court argued that ‘collegiality is not compromise’ (Kiefel, 2014: 7), asking: ‘What is the vice in seeking to persuade colleagues, one’s equals, to one’s point of view? It is hardly as if they are unused to efforts of persuasion’ (Kiefel, 2014: 4). Instead, he points to a potential tension between judges’ individualism and collegiality on the bench, and states that ‘a greater difficulty presented by the practice of joint judgments may arise not from the pressure of colleagues to join in, but from a personal desire to stand out, to have one’s own voice and develop one’s own reputation’ (Kiefel, 2014: 4).

In this paper, I demonstrate the work of the KWJA in training their male peers to apply international women’s rights to matrimonial property disputes in the Court of

Appeal before 2010, when there were absolutely no women judges in that court. I compare judgments on matrimonial property division decided by women judges, and those of male judges in the High Court post-2010, and make the point that women judges always uphold the wives' matrimonial property rights, while male judges in the High Court don't always do so, and sometimes employ sexist reasoning. I examine the extent to which doctrines of restraint, authorship and patterns of judgment writing have complicated the work of women judges (including KWJA members) in the Court of Appeal post-2010, after they gained access to the court. For matrimonial property disputes, to what extent have they challenged judicial precedent set by male judges that wives must prove their monetary contribution? It is in these three ways that I demonstrate the difference that women judges in Kenya (and the KWJA in particular) have made to women's property law outcomes in Kenya, and discuss the competing interests that members of the KWJA have had to balance in developing the jurisprudence in matrimonial property disputes.

## Researching Women Judges and Property Law Outcomes in Kenya

I am deeply conscious of the fact that studies on women judges have taken a form of *methodological individualism* that is characteristic of Anglo-North American positivist epistemologies that shape qualitative research (see Charmaz, 2017: 33, 34). Some indigenous and international scholars have found that methodological individualism does not fit in societies that are based on *collectivism*, *homogeneity* and *personal networks* (Abdolon and Willett, 2005; Bhattacharya, 2013; Hsiung, 2012, 2015; Kovach, 2005, 2009). Park and Lunt (2015: 5) write that 'social research methods are in fact typically ontologically and epistemologically individualistic'. The methods have been developed to study particular 'social' settings (western, industrialised, capitalist – but in so doing, a broader methodological veil is drawn across all cultures and situations). In this study I attempt, as far as possible, to adopt a *methodological self-consciousness* that seeks to not only question taken-for-granted language and meanings, but also take a *strong reflexivity* (Harding, 1991) that locates the [women] judges in Kenya in their specific social, cultural, and historical context, in relation to other predominantly western projects on the impact of women judges. I also acknowledge my positionality (see Clarke, 2005) in the research, as one that has been 'brought up' in the Anglo-North American ways of doing research, and *liberal legalism* that places a focus on *individual liberties*.

I employ a *constructivist grounded theory* methodology (Charmaz, 2017). I employ qualitative methods, because I am interested in the substance of the reasons for dissent or concurrence with other judges, and not on the number of dissents alone. I place concurrences or dissents in context – that is, in relation to the facts and legal questions in the case, and in relation to the other members of the bench. I employ Hunter's focus on *feminist* rather than *women* judges, for the obvious reason that not all women judges are members of the KWJA, and certainly not all women judges are feminist. I explore the extent to which the feminist methods to generate feminist outcomes have been employed by KWJA members. I am particularly interested in the feminist method of 'asking the

woman question' (Bartlett, 1990: 837) that has been extended to the African context: 'asking the African woman question' (Durojaye and Oluduro, 2016).

The empirical study combines textual analysis of cases as the primary data collection method, augmented with a methodological triangulation of three research methods, namely elite interviews, focus-group discussions and documentary analysis. I decided to use triangulation as a validation strategy to eliminate data bias and avoid the deficiencies of using any single method (Denzin, 1978; Fielding and Fielding, 1996; Flick, 1992; 2004: 144). I conducted the fieldwork study in Kenya in October to December 2018, and obtained ethical approval before undertaking the fieldwork. I interviewed 10 judges of the High Court, Court of Appeal (3 of whom are members of KWJA), and the Supreme Court; 2 academics with expertise in family law and gender studies; and 12 others who were either constitutional review experts, civil society stakeholders that were active in constitutional reform processes, and/or public interest litigators. In selecting the interview participants, I employed a purposive sampling method to identify and recruit interview participants in congruence with the purpose and information I wanted to obtain from the participant. Therefore, they are not a representative sample of all the judges, constitution reform stakeholders, or public interest litigators. I was more interested in validating data from documents and judgments than in proving any quantifiable and falsifiable hypotheses.

Focus-group discussions were made up of six public interest litigators in each, sourced directly from civil society organisations that have instituted or taken part in *pro bono* or public interest litigation relating to women's rights. Both focus-group discussions took place on 8th November 2018, at the British Institute of Eastern Africa in Nairobi.

The documents I examined were those on broadly constitutional reforms, to examine the extent to which women's access to property was part of the agenda on constitution reform. I also examined reports of the Judiciary on judicial reforms and access to justice generally, and of the KWJA on women's access to justice.

I examined laws on inheritance and matrimonial property, and landmark decisions on inheritance and matrimonial property disputes. These are divided roughly into two sections – those decided before 2010, and those after 2010. I applied a purposeful sampling method to identify these decisions, either because they were identified as *landmark* and *precedent-setting* by study participants, or because they received wide media attention. Two of these cases are also being rewritten and critiqued in the ongoing African Feminist Judgments Project. These cases are not a representative sample of all the matrimonial property and inheritance disputes before and after 2010. Pre-2010, I focus on only one case on inheritance: *Rono v Rono*. Matrimonial property disputes considered in the paper pre-2010 are of interest to this study, because the outcomes have a link with the influence of the KWJA's *Equality of Jurisprudence Programme*. Notably, there were no women judges at all during their adjudication. In these cases, the wives were awarded an equal share of the matrimonial property. Their contribution to the property was deemed to be both direct and indirect, and considered and assessed as equal to that of their husbands. Landmark decisions on matrimonial property disputes post-2010 are discussed in the second section of the findings. Such cases demonstrate the challenges relating to matrimonial property disputes post-2010.

To analyse the data, I used a thematic coding structure, inspired by Boyatzis (1998) and Braun and Clarke (2006, 2012), and assisted by the computer software *NVivo*.

## The Impact of Women Judges on Property Law Outcomes Pre-2010

Before 2010, the jurisprudence on the division of matrimonial property had developed to 50:50 per cent – wives' contribution, both direct and indirect, was considered and assessed as equal to that of their husbands. Some of these cases were *Kivuitu v Kivuitu*, *Essa v Essa*, *Nderitu v Nderitu*, *Kamore v Kamore*, *Muthembwa v Muthembwa*, and *Mereka v Mereka*. All were decided in the Court of Appeal; there were no women judges in the Court of Appeal at this time. Study participants attributed the outcomes in these cases to the work and efforts of the KWJA through its *Equality of Jurisprudence Programme*.

In *Kivuitu v Kivuitu*, the estranged husband and wife had registered the matrimonial property jointly as a family venture, and the wife had made substantial indirect contributions to the purchase of the matrimonial home. The Court divided the matrimonial property equally. Justice Omolo ruled that,

where a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property, being a family asset, is owned in equal shares [. . .]. It will be extremely cruel to the wife and to the other women in her position that they can only have a share in property acquired during marriage if they can prove financial contribution.

Justice Omollo advised that even if the property is registered in the name of the husband only, the wife can apply to the court, under section 17 of the Married Women's Property Act, for the court to determine her interest in the property, and to assess the value of her non-monetary contribution to the property. Thus, in this case, the determination of an equal share was because the husband had registered the matrimonial property in their joint names, and that the wife had made substantial indirect contributions to the property. Even if the property was not registered in the joint spouses' names, the court was still prepared to assess and determine the value of the wife's non-monetary contribution to the property.

*Essa v Essa* followed the precedent in *Kivuitu v Kivuitu*, but held that there is no presumption of equal share to any or all property acquired during the subsistence of a marriage.

In *Nderitu v Nderitu*, the Court of Appeal held that the English Married Women's Property Act did not discriminate between statutory and customary marriage [. . .] all that a wife needed to prove under the Act was that she was married to the husband at the time of lodging her application, that the property subject to the proceedings was acquired during the subsistence of the marriage, and that she had contributed directly or indirectly to the acquisition of the assets. When determining the issue of contribution, the court must assess the value of a wife's non-monetary contribution to determine her interest in the disputed property. Childbearing is also a contribution to the common good of the

family, and despite this being an indirect contribution, it nonetheless entitled the wife to an equal share of the family property. This case was important because the Court of Appeal recognised for the first time childbearing as an entitlement to a wife's equal share in matrimonial property.

In *Muthembwa v Muthembwa*, the Court held that the jurisdiction of the Court in section 17 of the MWPA 1882 extends to shares in limited liability companies owned by the parties, but that it had no jurisdiction to distribute properties registered in the name of the company in which the couple are shareholders. The court stated:

If there are disputes between husband and wife as to their respective rights to the shares in a company registered in the name of one spouse, then the court, like in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare [ . . . ] that one spouse holds a certain number of shares in trust for the other spouse. What the court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal titles to property or in other words to pass proprietary interest from one spouse to the other.

This case was important because husbands had begun the practice of registering property acquired during marriage in limited liability companies, thus making it difficult for wives to lay claim to shares in those properties. The judge in this case was prepared to go behind the corporate veil, and assess the value of wives' shares in those limited liability companies.

In *Echaria*, the parties divorced in 1987, after which the wife filed a dispute in the High Court for the distribution of the matrimonial property, which included Tigoni Farm comprising 118 acres. The High Court determined an equal share to the farm in 1993. The husband appealed in the Court of Appeal, in which the judgment of the High Court was set aside. The Court of Appeal awarded the wife less than a quarter of the farm acreage (25 acres), and the rest went to the husband. The Court of Appeal rejected the argument that domestic chores or childbearing ought to be taken as a form of contribution to matrimonial property. The court set the precedent that a spouse must prove their financial contribution to matrimonial property (direct or indirect), and that there is no presumption of equal division.<sup>2</sup> The Court of Appeal divided the matrimonial property between the estranged husband and wife in three quarter to one quarter shares respectively, as the property was registered in the name of the husband only. The bench was made up of five male judges.

*Echaria* cast doubt on the jurisprudence recognising wives' non-monetary and indirect contribution, as had been developing in the previous cases *Kivuitu*, *Nderitu*, *Muthembwa* and *Essa*. This precedent has been found to be regressive (Maina, 2013), and was in fact referred to the African Commission on Human and People's Rights in 2009 by the Federation of Women Lawyers. The African Commission ruled that the case was inadmissible because it was filed 31 months after the Court of Appeal Ruling, which the Court found an unreasonable delay.

On inheritance of property, *Rono v Rono* was originally a succession matter in the High Court of Eldoret involving a man who died intestate and was survived by two

wives, six daughters, and three sons. The dispute was on the distribution of the assets and liabilities of the estate. The woman judge determined that under the Marakwet customary law,<sup>3</sup> the inheritance system in polygamous families is patrilineal; property is distributed according to the wives' households irrespective of the number of children, and that daughters receive no inheritance. The woman judge disregarded the provisions of the Law of Succession Act that provides that all children are entitled to equal inheritance, and argued that the daughters will get married and inherit property from their new families, and that this will put them at an unfair advantage over their brothers. On appeal to the Court of Appeal, the High Court decision was reversed for relying on Marakwet Customary Law, and not the Law of Succession Act. The Court of Appeal also found that the daughters were already at an advanced age, making the argument of marriage irrelevant.

*Rono* elicited great interest, because the woman judge was seen to be advancing male interests. Court of Appeal Justice #3 also expressed disappointment: 'in fact she always says being brought up in the village and being cultured in a way that women don't have anything to do with those things – she said you know, you don't have a right!' Study participants observed that gender bias is found in both men and women, 'because you know that in any system of oppression [...] it's the people [...] the victims who internalise it and socialise it. So they too don't know any different... You have to unlearn. It's an ideological issue. It's not something which by your nature inherently that you understand' (Constitutional law expert #1). Public Interest Litigator #4 believed that it is the reason why a woman judge may be 'advancing a man's agenda, or an agenda that is detrimental for women'.

Supreme Court Justice #3 observed that 'There are some judges, whether men or women, who understand the transformative nature – who understand human rights language – and that will impact on how they interpret human rights. Yes, it has more to do with philosophical orientation – I don't think it's just because someone is a woman' (Supreme Court Justice #3).

High Court Justice #4 explained that old cases on women's property rights proved that a judge's gender is not especially significant, because the pre-2010 landmark cases that recognised wives' contribution in marriage were decided by male judges. However, Supreme Court Justice #2 was unequivocally of the view that women judges in the KWJA were responsible for the judicial outcomes that recognised wives' indirect contribution to matrimonial property, specifically Lady Justices Aluoch and Awuor.

Court of Appeal Justice #3 spoke at length of the behind-the-scenes work of Owuor and Aluoch, through the Equality of Jurisprudence Programme to train male judges of the Court of Appeal to apply international principles of equality such as the Convention on the Elimination of Discrimination Against Women (CEDAW). Court of Appeal Justice #2 expressed a similar view.

The 'difference' that KWJA made to matrimonial disputes before 2010 was, therefore, in challenging male bias through educating and civilising their male colleagues on sexism, stereotyping and gender bias (Hale and Hunter, 2008; Martin, 1993; Schroeder, 2002), and training them to apply international women's rights through the *Equality of Jurisprudence Programme*. It is therefore not a just a lucky coincidence that the jurisprudence on matrimonial property disputes in Kenya started to shift towards equitable

(if not equal) distribution after the KWJA was formed in 1993, as evidenced in the cases already discussed, until that jurisprudence was unfortunately overturned by an all-male bench in *Echaria*.

## **The Impact of Women Judges on Property Law Outcomes Post-2010**

The promulgation of the new constitution in 2010 provided women in Kenya with opportunities that had not been available to them before, as it opened up spaces for more women in public appointments through the new one-third gender quota (Kamau, 2013). The quota provided opportunities for more women judicial officers not only to join the judiciary, but also to rise to higher ranks beyond the magistracy, where they were mostly concentrated – to the Supreme Court, the Court of Appeal and the High Court (Kamau, 2013: 181–182). When comparing female judges and magistrates in 2010 (when the Constitution was promulgated), and in 2016/17, women remained in the minority, but increased slightly in most areas, particularly in Magistrate and Kadhi Courts (going from about one-third to almost 80%).<sup>4</sup> The gender quota has had the effect of increasing the chances of women judges sitting in collegiate benches in the Court of Appeal to adjudicate on matrimonial property disputes. Three of these minority women judges are members of the KWJA; three of them are and have been active participants in matrimonial property disputes in the Court of Appeal.

In this section, I demonstrate that in the High Court, members of the KWJA have contributed to a feminist jurisprudence in matrimonial property, especially when one contrasts single judgments made by women judges versus those of male judges, in which some of the latter demonstrate clear bias towards men. I will give examples of cases in the High Court in which the judges declaring that non-monetary contribution of matrimonial property should not be considered for division are notably male judges. For the Court of Appeal, such a feminist contribution by KWJA members is complicated by the doctrines of restraint, and collegiate patterns of judgment writing. I discuss three factors standing in the way of a jurisprudence of equal division of matrimonial property in the courts. The first factor is male sexist bias in judging. The second and third factors are the doctrines of restraint (notably rules of precedent – the question whether *Echaria* is still good law), and patterns of judgment writing in which collegiate benches write composite judgments.

### **Doctrines of Restraint: Is *Echaria* Still Good Law?**

The issue I examine in this section is the extent to which the precedent of *Echaria* has been challenged, and the extent to which women judges have contributed to that challenge. Study participants expressed disappointment that judges in recent cases have not reflected the provisions of the Constitution on the equality of parties to marriage, but have put wives to task to prove monetary contribution. Public Interest Litigator #5 reported that ‘[...] it’s hard to quantify non-monetary contribution, but I think it has also been controversial’. Court of Appeal Justice #3 reported that their colleagues say that ‘[a woman does not have to prove financial contribution if they have been looking

after the children and the home], but when it comes to applying it, [ . . . ], it becomes very difficult [ . . . ] It is the judge's discretion – depending on the evidence, and how they understand the evidence'.

The subjective assessment of the value of non-monetary contribution to marriage means that there may be avenues for considerations of extraneous subjective factors – such as the judges' own perceptions, beliefs, and world views. Court of Appeal Justice #4 observed that 'matrimonial property disputes are seldom straightforward'. Some of these cases reveal misogynist attitudes about the worth of women in marriage, a point discussed further in the next section.

I summarise below the outcomes of matrimonial property disputes in both the High Court and the Court of Appeal. I make a distinction between cases that were filed before 2010, but finalised after the 2010 Constitution came into force, and those that were filed after 2010. The year the case was filed is important. For cases filed before 2010, one can see that two judges in the High Court – Lady Justice Roselyne Nambuye in *ZWN v PNN* (filed in 2004), and Lady Justice Ang'awa in *MSK v SNK* (filed in 1997) disregarded *Echaria*, and awarded equal division of the matrimonial property, even when the constitutional principle of equality of parties to a marriage was not yet established. Lady Justice Nambuye relied on CEDAW and other international human rights instruments. Both Lady Justices are KWJA members. For cases filed post-2010, one can see that there isn't yet a firm stand by the courts on whether *Echaria* is still good law, as there are even conflicting decisions from the Court of Appeal on the same matter (such as in *PWK v JKG* on the one hand, and *VWN v FN* on the other hand). The High Court is bound by *Echaria* until it is repealed by the Court of Appeal itself – this explains the outcomes in High Court cases such as *UMM v IMM* and *FIDA-K v AG & Another*.

In *UMM v IMM* in the High Court, Justice Francis Tuiyott stated thus: 'I take the view that at the dissolution of marriage, each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution, whether it be monetary or non-monetary'.

*PWK v JKG* was an appeal from the High Court of Kenya at Nyeri – the issues were: (a) whether, and if so to what extent, the appellant wife contributed to the acquisition of matrimonial property, (b) whether the properties registered in the name of the respondent husband's company were part of matrimonial property and available for distribution, and (c) whether the properties admittedly sold or otherwise disposed of by the respondent during the pendency of the litigation should be taken into account in the distribution. Lady Justice Roselyne Nambuye, Justice Waki, and Justice Kiage stated thus: 'We are of the respectful view that the principles restated by *Echaria* are good law and contribution as the basis for distribution of matrimonial property remains valid'. In this case, the wife had made both direct (hence the reliance on *Echaria*) and indirect contributions to the matrimonial properties; she was working as a nurse, and then later ran the family company business – she and the husband were the only shareholders in the company. The husband claimed that the wife had no beneficial interest, because her contribution to some of the properties was minimal, and that in some of the properties, he was the sole contributor. What was interesting about this case was that some of the properties registered in the name of the company were held by the Court of Appeal as matrimonial properties, because the appellant wife was running the company business as an indirect

contribution, – but the trial High Court [male] judge had failed to pay attention to this. The Court of Appeal judges went behind the corporate veil [*Salomon v Salomon*] and held it to be matrimonial property, of which the wife was awarded a half share in one of them, and two others were transferred to her absolutely, as she was residing on those properties.

In *ZWN v PNN* in the High Court, the estranged couple was married in 1961 under the African Christian Marriage & Divorce Act, and divorced in 2001. Both were civil servants, and all the properties registered in the name of the husband in good faith; there were no audited accounts on how much each spouse contributed to the matrimonial property. The wife claimed 50:50 non-monetary contribution from looking after the children, the home, and the farm, and fulfilling wifely duties. Lady Justice Roselyne Nambuye found non-monetary contribution in favour of wife as 50:50. The judge discussed the injustice occasioned by *Echaria*, even though it was still the position in law then, and was to be corrected by Article 45 of the Constitution and the Matrimonial Property Bill. However, the case was filed in 2004, meaning that the 2010 Constitution could not apply. Nambuye therefore relied on international human rights instruments to determine equal contribution to matrimonial property.

The husband in *ZWN v PNN* appealed against the decision of Lady Justice Roselyne Nambuye in *PNN v ZWN*. The all-male bench upheld Nambuye's judgment, adding that it was evident that when the husband lagged behind in mortgage payments for one of the properties, he relied on funds from the joint account that was made of proceeds from the farm. Waki JA took the school of thought that *Echaria* has been rendered obsolete by the Constitution and the Matrimonial Property Act 2013, and Azangalala JA concurred. Waki JA stated: 'Speaking for myself, I would find little, if any, utility in applying the *Echaria* case post the provisions of the Constitution and the Matrimonial Property Act examined above. The former is loud on equality while the latter has an expansive definition of "contribution." As stated earlier, those provisions lay a new basis for the future which will generate its own jurisprudence'. Justice Kiage JA however, dissented, and was of the view that *Echaria* is still good law.

In *CWN v BN*, 2009, Lady Justice Hannah Okwengu, Lady Justice Philomena Mwilu, and Justice Otieno-Odek observed that the trial judge 'failed to appreciate the meaning of indirect contribution'.

In *SNK v MSK & 5 Others*, 2010, the Court observed that indirect contribution of a wife is a factor to be considered, even though it may not be as high as that of the husband. In the original High Court matter, the husband had claimed that the wife had made no personal contributions to any of the properties in dispute. Regarding the High Court's determination of a half share in three of the properties owned by the husband in favour of the wife, Lady Justice Roselyne Nambuye, Justice Daniel Musinga, and Lady Justice Agnes Murgor held that they were bound to apply the law as it was in then 1997, which was set in *Echaria* that a spouse had to prove financial contribution to matrimonial property, direct or indirect. The Court then found that the wife had made some indirect financial contribution to the matrimonial property, though not as high as that of the husband. The judges therefore assessed her contribution at 25%, and not at 50%.

*VWN v FN* (2014) was an application for leave to appeal to the Supreme Court on the question of the extent to which Article 45 (3) of the Constitution on the equality of

parties to a marriage applies, vis-à-vis the principles enunciated in *Echaria*. Justice Waki, Justice M’Inoti and Justice Mohammed stated: ‘In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non-monetary contribution, *Echaria* [supra] is no longer good law’.

In *FIDA-K v AG & Another* (2016), Justice John Mativo in the High Court held that ‘Article 45(3) of the Constitution does not envisage 50:50 sharing of matrimonial property, upheld s7 MPA that contribution must be proved, and held that *Echaria* is still good law’.

By now we can see that some cases uphold *Echaria*, while others do not, as some judges attempt to enforce the principle of ‘equality of marriage’ enunciated in Article 45(3) of the Constitution. These outcomes bring out the inconsistency in these outcomes, and what seems to be a ‘two-steps forward, one-step back’ kind of jurisprudence. Perhaps the Constitution’s introduction of the principle of ‘equality of marriage’ has not changed the inconsistency in the jurisprudence in matrimonial property disputes that was there before 2010. Notably, and to make the point that women judges have upheld women’s matrimonial property rights while judging *solo* in the High Court, two women judges did so in *ZWN v PNN*, and *MSK v SNK*. The cases in the Court of Appeal where women judges sit alongside male judges in collegiate benches prove the obscurity of women judges’ contributions, as the outcomes are inconsistent, sometimes upholding *Echaria*, and sometimes challenging it.

Oloka-Onyango has reflected on this in wider discourses on the courts’ inconsistencies in gender equality in postcolonial East Africa, suggesting that the jurisprudence is ‘manifestly gendered, and outrightly sexist’ (Oloka-Onyango, 2017), underscoring the need for more women judges in postcolonial East African judiciaries. I reflect further on this in the next section on the gendered nature of judging in matrimonial property disputes.

## Matrimonial Property Disputes as a Gendered Discourse

*Echaria* is a classic example of the law’s reflection of masculine values, and male interests (Smart, 1992). *PNN v ZWN* was also decided by a bench of male judges only. Justice Kiage referred to stay-at-home partners as ‘gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides [and, alas, grooms]’. Justice John Mativo in the High Court decision of *FIDA v Attorney General & Another* also referred to some spouses as ‘fortune-seekers’. Although both judges apparently directed those terms to both wives and husbands, it is a well-known fact that stay-at-home spouses/partners are likely to be wives/women, especially mothers. This confirms the lack of value attached to domestic and care work (see Duffy, 2011; Ferrant et al., 2014; Folbre, 2006) – any woman that claims recognition for care work is branded a fortune-seeker. Academic #1 and Civil Society Participant #2 reflected on the gendered remarks by Justice Kiage in the Court of Appeal and Justice Mativo in the High Court.

Critical legal feminists refute the neutrality of law, and argue that judging (which has historically been dominated by men) has traditionally reflected male interests (Abrahamson, 1993; Graycar, 1998; Hensler, 1992). Carol Smart discusses the ways in which law is sexist, male, and gendered, as it reflects masculine values (Smart, 1992). The

masculine values reflected in these cases are the male veto of property ownership, that was reinforced by the patriarchal coalition of African traditional patriarchy, and colonial patriarchy. All three cases [*Echaria*, *PNN v ZWN*, and *FIDA v Attorney General & Another*] were not handled by women judges, so it is not known to what extent the reflection of these masculine values on property could have been picked up and challenged, if a woman judge sat in those cases. This is the precise point. Such biases continue to be perpetuated in the judiciary, in the guise of neutrality and objective principles such as contribution, when those legal principles themselves are designed to favour men. To what extent has this kind of male bias been challenged by KWJA members post-2010?

## Collegiality and Patterns of Judgment Writing

Court of Appeal Justice #3 spoke of the difficulty of judging in a collegiate bench as a woman [feminist] judge. Further, Court of Appeal Justice #3 stated that *Echaria* is usually upheld by judges who ‘are the majority so it’s very difficult to break through’. Court of Appeal cases are usually heard by three to five judges, and most of the time they write a single judgment. The individual opinions, sentiments and biases of the judges are therefore difficult to discern, unless they write a separate dissenting or concurring judgment/opinion (Lynch and Williams, 2014: 545; McLoughlin, 2015: 288).

Several inferences can be made from an analysis of the cases post-2010. First is that KWJA members made more bold decisions when they ruled solo in the High Court – this happened in *ZWN v PNN*, and *MSK v SNK & 5 Others*, both decided by KWJA members. Both KWJA members divided the matrimonial properties in a 50:50 per cent split, even when the applicable law was *Echaria* in 2004 and 1997, respectively. The KWJA member in *ZWN v PNN* relied on international instruments (including CEDAW).

Second, and related to the first inference is that the court matters, and by extension the patterns and authority of judgment writing. The same KWJA member in *ZWN v PNN* sat with another KWJA member and a male judge in *SNK v MSK & 5 Others*, where it was determined that they were bound to apply the law as it was then in 1997 [*Echaria*], when the case was filed. One cannot help but note the inconsistency here. Three cases in the Court of Appeal illustrate this point further: *PWK v JKG*, *CWN v BN*, and *SNK v MSK*. There were KWJA members in all three cases, and there was a single judgment in each, and not a single dissent. Since 2010, there has been one dissent in the Court of Appeal, not from a woman judge, but by Justice Kiage in *PNN v ZWN* – in which he argued for the status quo in *Echaria*, which confirms Belleau and Johnson’s point that ‘dissents can lean in the direction of change, as well as pull towards a status quo’ (Belleau and Johnson, 2008: 65). One can trace the explanation for this back to Court of Appeal Justice # 3’s response that they ‘are the majority so it’s very difficult to break through’. Does this confirm Elliot’s assertion about women’s tendency to work towards consensus? (Elliot, 2001: 47). The high level of unanimity in writing of composite judgments, and disinclination to dissent in the Court of Appeal does not make it easy to discern what these KWJA members’ jurisprudential contributions might be. McLoughlin writes that in such composite judgments, there is not sufficient provocation to dissent (McLoughlin, 2015).

An exception to this situation is in the most recent Court of Appeal judgment in *MNK v POM* [2020], which was decided by two women judges and one male judge. All the three judges wrote separate judgments – the majority wrote two separate concurring judgments, and a KWJA member dissented. This case is discussed in the next section, to demonstrate value of dissent as a potential site of difference (Belleau and Johnson, 2008), alongside issues of class and contemporary marriage trends.

## Class and Contemporary Trends on Marriage

*MNK v POM* [2020] posed interesting jurisprudential concerns, that would not have been pointed out had a KWJA member not dissented.

The trial judge in the High Court had determined that MNK and POM had not been married during their period of cohabitation, as MNK was married to another man at the time, and therefore lacked the capacity to marry somebody else. This decision was reversed in the Court of Appeal, and the common law doctrine of presumption of marriage was applied, also applicable for African customary marriages set out in *Githatu v Kiarie*. MNK therefore filed an application for leave to appeal to the Supreme Court for clear guidelines and principles in claims for presumption of marriage.

One of the majority judges had determined the issue to be ‘whether the applicant and the respondent had cohabited and whether, during that cohabitation, they had acquired the property in question’, and that these issues were factual, straightforward and of a private nature, and had been determined sufficiently by the Court of Appeal that the parties were married. Kantai JA therefore determined that the applicant MNK did not deserve to go to the Supreme Court. A woman judge (not a KWJA member) wrote a separate concurring judgment.

The KWJA member dissented and differed right from the issues for determination. The KWJA member begins to set the record from the outset that POM, the cohabiting male partner, had filed the original trial suit under section 17 of the MWPA, seeking an order that the property in dispute be divided equally between the parties – never at any one point did POM seek a declaration of presumption of marriage – hence the reason the trial High Court judge dismissed the suit, as he was not satisfied that there was a marriage.

The KWJA member, therefore, concludes that these issues raise questions of public importance, pertaining to whether parties who are not in a recognised union of marriage in the first place, or where one seeks a declaration of presumption of marriage, can also file a suit under section 17 of MWPA – which comes first? The KWJA member differed with the Court of Appeal’s determination that there was a marriage between the parties based on a presumption of marriage.

The KWJA member’s dissent is forward-looking, pointing to a new contemporary society where men are increasingly moving in to live with middle-class property-owning women – unlike in the past, where women were completely reliant on the good will of their property-owning husbands, and were therefore left destitute with their children on the dissolution of marriage. More and more women now work, run businesses and own property. The perceived role of men and women in society, however, has not changed – property-owning women still must conceive, bear, and look after the children, a role that

men do not generally perform, and for which middle-class women obtain paid help from poorer women. How will the courts move with the times to deal with this new contemporary situation?

This case clearly illustrates the value of dissent as a potential ‘gendered site of judicial difference’ (Belleau and Johnson, 2008) in two ways: first in the determination of issues, which can lead to very different outcomes, as some may not be perceived important enough and therefore ignored. Secondly, in the potentially forward-looking nature of the dissent itself, as happened in this case for contemporary marriage trends in Kenya. There are also questions of class here, that are not straightforward. One question that was not raised, for instance, is that of non-working men married to women who are clearly the ones making the money needed to earn the family properties – what will the non-working men prove as indirect non-monetary contribution to marriage, when their perceived role in society does not include care work? These are questions that KWJA members will need to be vigilant in considering, and regarding which the KWJA member in this case was conscious.

## Conclusion

Studies on women judges have been based on a methodological individualism, that focuses on the individual (woman) judge. I argue that this has had the effect of masking collective and collaborative approaches of women judges. It is no wonder that the work of national women judges’ associations, such as the KWJA, have received little or no scholarly attention. This paper begins to redress this gap.

The empirical study I conducted in Kenya, in October to December 2018, led to the discovery of the influential work of the KWJA under the *Equality of Jurisprudence Programme*. In this paper, I have demonstrated the ways in which the KWJA influenced property law outcomes in Kenya, and that this influence would not have been possible without the collaborative efforts of the KWJA, at a time when there was not a single woman judge in the Court of Appeal. The jurisprudence on equal division of matrimonial property had begun to emerge in the mid to late 1990s, a few years after the KWJA was formed in 1993 – this they did by training the male judges in the Court of Appeal under the *Equality of Jurisprudence Programme* to rely on international human rights instruments such as CEDAW, at a time when the Kenyan Constitution sanctioned discrimination against women through personal laws in a legal pluralist system. Through the *Equality of Jurisprudence Programme*, male judges in the Court of Appeal passed a few judgments recognising wives’ indirect and non-monetary contribution to marriage, up until the passing of *Echaria*, that reversed that jurisprudence, requiring wives to prove direct contribution to matrimonial property.

Post-2010, when the new constitution recognised the equality of parties to a marriage, and the passing of the Matrimonial Property Act 2013, the standing of *Echaria* is at issue. I have demonstrated that the impact of the KWJA post-2010 is much more visible in the High Court when women judges judge individually, but much less so in the Court of Appeal – I argue the Court of Appeal is complicated by doctrines of restraint such as precedent (*Echaria*), norms of collegiality, and patterns of judgment writing, where there is increasing unanimity and disinclination to dissent, and a prevalent practice of writing

composite judgments. The court itself (scope of jurisdiction, rules of procedure, whether collegiate or single-judge benches etc.) therefore matters hugely. I have also demonstrated some evidence of the KWJA's sensitivity to contemporary trends of marriage life in Kenya, albeit limited at this point.

Studies on behind-the-scenes education and civilisation of male colleagues on sexism, stereotyping and male bias (Hale and Hunter, 2008; Martin, 1993; Schroeder, 2002) are applicable to this study on the impact of KWJA pre-2010. I also find persuasion in Hunter's argument for a difference in feminist as opposed to women judges (2008, 2012, 2015), Elliot's reliance on doctrines of restraint and norms of collegiality (2001), and Rackley's transformative rather than inclusive diversity (2013) to locate the findings of this study. I argue therefore that KWJA's impact is in generating feminist (as opposed to essentially female) property law outcomes in Kenya, that have involved 'asking the African woman question', to reverse the colonial 'patriarchal coalition' of colonial authorities and traditional patrilineal systems (Parpart, 1988). On this basis, I argue that the increase in women judges in Kenya would lead to a transformation not only of the Judiciary, but also in generating a more feminist jurisprudence (Rackley, 2013), but this is complicated by the doctrines of restraint (particularly *precedent*), and norms of collegiality (such as unanimity in composite judgments). Therefore, co-ordinated programmes such as those of the KWJA will be key in influencing feminist jurisprudence, as it cannot be left to strong and domineering individual judges in composite benches on their own.

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### Notes

1. See a discussion of some of these doctrines of restraint in Ginsburg (1992: 1189) where Justice Ruth Bader Ginsburg discusses justiciability as 'measured motion'; and discussions on

- 'justiciability' in Bickel (1968); Fletcher (1968) where judges use justiciability to avoid controversial decisions.
2. See Oyaro (2007).
  3. Marakwet Customary Law refers to the customary law of one of the ethnic communities of Kenya, which forms part of African Customary Law as has been restated by Cotran in his *Restatement of African Law*.
  4. Final Report of the Task Force on Judicial Reforms 2010, Government of Kenya, and The Judiciary of Kenya (2019) 'State of the Judiciary and Administration of Justice Report 2016–2017', Nairobi, p. 129. Available at: <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> (accessed 15 October 2019).

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