

## **Kenya's Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights**

*Oral Statement by the International Women's Human Rights Clinic  
based on a joint report submitted with the Federation of Women Lawyers (FIDA) – Kenya  
3 November 2008*

Members of the esteemed Committee, good afternoon and thank you for the opportunity to speak before you today. My name is Amber Suitt, and my presentation is on behalf of the Federation of Women Lawyers (FIDA) - Kenya and the International Women's Human Rights Clinic at Georgetown University in the United States. My presentation will highlight key ongoing violations of women's and girls' property and inheritance rights in Kenya, and how these violations gravely increase their vulnerability to violence, HIV infection, and criminal prosecution for HIV transmission.

To better comply with the guarantees under the ICESCR, Kenya must address sex-discriminatory provisions in its constitution, statutes, and customary law. Although women constitute the vast majority of agricultural labor including 89 percent of the subsistence-farming labor force, and over 70 percent of labor in cash-crop production, Kenyan women often lack any legal claim to the land on which they live and labor. Women only hold 1 percent of registered land titles and only 5 percent of jointly registered titles. When the matrimonial home is registered in the name of the husband, no law requires him to consult his wife when he wishes to sell their home. Women can lose in a moment, without their knowledge -- much less their consent -- the home where they lived and toiled for decades.

Under some customary laws, women are prohibited from managing or controlling land – a serious barrier to realizing their economic, social, and cultural rights. Numerous statutes rely on discriminatory customary laws to govern land disputes, especially disputes concerning trust land and agricultural land on which the majority of Kenyans live, grow their food, and eke out a living.

Not only are women discriminated against during marriage; there are no laws to protect them at divorce. Gaps in Kenyan law on matrimonial property violate women's rights to equality in marriage and at its dissolution, and the right to an adequate standard of living, including housing, health, and property. At separation or divorce, women are often unable to keep an adequate share of their matrimonial property,

are forced to leave their home, and are sometimes chased away with little more than the clothes on their backs. One retired school teacher in Meru, explained, “If you go back, it is a beating. It is better to go without beating. The woman is sent home without anything. Sometimes the husband burns the woman’s things because he is mad and does not want to see them anymore.”

In addition to being rendered homeless, women lack any legal right to an equal share of their matrimonial property. Beginning in 1968, draft bills were introduced to ameliorate this situation. But today, forty years later, no such law has yet been passed. The archaic Married Women’s Property Act of 1882 – a relic from the colonial period – remains the only statute to govern women’s right to property acquired during a marriage. The Act was intended to govern women’s private property during marriage only. It lacks any provision to address women’s claims to matrimonial property and fails to require the equal division of such property at divorce. The recent *Echaria v. Echaria* decision by Kenya’s highest court held that non-monetary contributions to the marriage – such as tending fields, raising children, and preparing food – are not accorded any weight when assets are divided at divorce. This decision penalizes Kenyan women because they are far less likely than Kenyan men to have salaried jobs, and when they do, they earn less than half the salary of men.

Women in polygamous unions face additional barriers to realizing their rights to equality as they have no say in whether he may use *her* existing matrimonial property to acquire and support additional wives and their children. Margaret, a Kenyan woman in a polygamous marriage described how her husband acquired his second wife: “He took the food that we were farming, he sold it and spent the money on the second dowry...I felt bad because now he was using the family property to acquire a wife. But I didn’t have any say – there’s nothing I could have done.”

Kenyan widows must not only grieve the loss of their husbands, but also the loss of everything they spent their lives building. In some cases, widows are evicted by in-laws who invoke customary law to claim that they have no right to their matrimonial homes. Other widows are coerced into unions with a male relative of their deceased husband, to be “inherited” by him as part of the husband’s estate. A

woman refusing to be “inherited” faces eviction from her home and banishment from her community. Still other women are required by custom to have unprotected sexual relations with a so-called “cleanser” who is believed to rid the widow of her deceased husband’s spirits. This practice puts widows at increased risk of HIV infection. Perhaps not surprisingly, Kenya’s highest HIV/AIDS rates occur in regions where widow inheritance and cleansing are most common. In fact FIDA-Kenya’s Kisumu office has received direct complaints from women who have been evicted and are HIV positive. One such woman has five children and was still evicted from her home.

Women who have been evicted from their homes are thrust into dire economic circumstances. Lacking a place to go, many widows look for shelter in “slums,” or people’s settlements, where they and their children are often forced to resort to survival sex and where they face grave risk of exposure to HIV infection. As a consequence, close to 21 percent of widows and divorced women are living with HIV and AIDS, compared with an overall HIV prevalence rate of about 7 percent.

Kenyan women’s lack of property rights often leads to their remaining in violent marriages because they depend on their husbands for housing and sustenance. Kenya’s government reports that more than 60 percent of Kenyan women experience physical abuse, and more than 40 percent experience sexual abuse. A Maasai community activist explained that “elderly... women tell brides on the night before they marry that they cannot leave if their spouses are abusive. They use a proverb: Whatever pain the situation will bring there is no going back... There is no going back.” Women’s economic dependence on men also prevents them from negotiating safer sex, further increasing their potential exposure to HIV/AIDS. And while sexual assault is a serious crime in Kenya, the Sexual Offences Act of 2006 exempts spouses, leaving marital rape largely unpunished.

Finally, laws recently promulgated to criminalize the transmission of HIV/AIDS, including the HIV and AIDS Prevention and Control Act, and the Sexual Offences Act of 2006, though well-intentioned, actually erode women’s rights under the ICESCR. Because women constitute the group with the highest rates of HIV/AIDS and are more likely to know their status, they are also more likely to be

prosecuted under such laws. These laws may in fact undermine women's right to health by creating an incentive *not* to be tested in order to avoid potential criminal liability.

Without reforms to bring Kenya in line with the ICESCR, women will continue to shoulder disproportionately the burden of poverty and the scourge of HIV/AIDS in Kenya. Pages 6-8 of our submission to the Committee contain recommendations for Kenya to better comply with its obligations under the Covenant. We look forward to additional dialogue with Committee members.

Thank you.