
KENYAN LAWS AND HARMFUL CUSTOMS CURTAIL WOMEN'S EQUAL ENJOYMENT OF ECONOMIC, SOCIAL, & CULTURAL RIGHTS

Submission Summary

(Full text available at <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDAKenya41.pdf>)

The Federation of Women Lawyers (FIDA) - Kenya & the International Women's Human Rights Clinic for Kenya's Review by the CESCR in its 41st Session, November 2008

To fully comply with the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Kenyan government must take advantage of increased domestic support for political reform to improve its protection of women's rights, and in particular, their rights to an adequate standard of living, including housing, food, and health. Kenya's efforts to address the impact of the post-election violence provide an ideal opportunity to conform its laws and harmful customary laws to international-human-rights standards.

While women form a majority of the population in Kenya (52%) and play an active role in the development of the society, Kenya remains a patriarchal society, and the lives of women are marred by inequalities and inequities in many aspects of life. Women continue to suffer marginalization and discrimination in almost all aspects of their lives, a situation reinforced by the existing laws and policies, as well as the socio-cultural factors.

The Federation of Women Lawyers Kenya (FIDA Kenya), an independent, nongovernmental organization of women lawyers in Kenya, along with the International Women's Human Rights Clinic (IWHRC) at Georgetown University in the United States, jointly highlight key concerns for women's human rights in Kenya to enable a more accurate assessment of the review of Kenya's compliance with the ICESCR (41st Session, Nov. 3-21, 2008).

Since the Kenyan government became a party to the ICESCR in 1976, it has taken no steps to domesticate the Covenant. As is glaringly evident from its report to this Committee, the Kenyan government has taken few steps to eradicate sex-discrimination in the enjoyment of economic, social, and cultural rights. Our submission highlights the violation of women's and girls' property and inheritance rights, and the consequent effect on their increased vulnerability to violence, HIV infection, and prosecution for the transmission of HIV.

Kenya's current system of property and land access and ownership discriminates against women, creating social inequality and serious economic disadvantages. The Kenyan constitution, by permitting sex discrimination in customary law and personal-status law, permits violations of women's rights under the ICESCR, such as the right to an adequate standard of living, including housing, and to property, health, work, and the protection of the family. Customary laws largely preclude women from inheriting, owning, and possessing land, including their matrimonial homes, which they have worked on and, in many cases, helped purchase. Because Kenya lacks statutory guidance on the division of matrimonial property at divorce, women often must leave marriages, including abusive or polygamous unions, with nothing but the clothes on their backs. Widows are evicted from their homes or forced to be sexually "cleansed" or "inherited" as property by the kin of their deceased husband, or risk losing their housing.

While the Law of Succession Act grants widows a live interest in their matrimonial home, the government has failed to adequately enforce this protection, especially in rural areas. Many widows evicted from their homes along with their children have nowhere to go and end up migrating to the urban "slums," or

peoples' settlements, where they eke out sub-standard living, and often must resort to survival sex for necessities for themselves and their children. Without laws to protect the equal rights of women to housing and property, including during marriage and at its dissolution, both at divorce and death of a spouse, women will continue to shoulder the burden of poverty in Kenya.

While women and girls are disproportionately affected by HIV, in particular widowed and divorced women (with 17-21% HIV infection rate) and those in polygamous unions (11% compared to the overall rate of 7%), the Kenyan government has failed to directly address their needs and the root causes for their plight. Instead, in an effort to curb the disease, the government has instituted laws criminalizing HIV and AIDS transmission. Though they are well-intentioned measures to curb the spread of HIV, these laws violate women's rights to non-discrimination, health, work, and dignity under the ICESCR, because women are more likely both to contract HIV/AIDS and to know their HIV status, making them likelier targets for prosecution. The Kenyan government should follow the standards contained in the ICESCR and support women who seek treatment, rather than pass laws which direct government resources towards pointless retribution.

The Committee on Economic, Social, and Cultural Rights (CESCR) in its Concluding Observations to the Kenyan government could lend substantial support to local efforts by human-rights groups to achieve gender equality in the enjoyment of economic, social, and cultural rights. The timing of Kenya's review by the CESCR is critical as the government builds on political will for reform following post-election violence in early 2008.

In considering its concluding observations to the Kenyan government, the Committee should consider the condition of women in Kenya, and the ways in which the government could improve women's lives via better compliance with the ICESCR. We urge the Committee to consider the following recommendations to the Kenyan government:

- Eliminate the claw-back provision in sections 82(4)(b) and (c) of the Constitution which permits discrimination in matters of "personal law" and customary law, respectively. Personal law encompasses marriage, divorce, and inheritance, which most deeply and directly impact women's and children's lives.
- Pass legislation to harmonize and govern comprehensively marriage and divorce laws, in particular ensuring women's equal rights to matrimonial property during marriage and at its dissolution.
- Abolish customary practices that degrade and harm widows, such as forced inheritance of widows by male relative of the deceased's husband, or sexual "cleansing" of widows from their dead husband's spirits.
- Amend the sections of the Sexual Offenses Act and the HIV Prevention and Control Act which broadly criminalize the transmission of HIV with no safeguards for potential adverse impact on women, especially those who lack equal bargaining power in negotiating safer-sex practices.

The full joint submission, *Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of Economic, Social, & Cultural Rights*, is available at <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDAKenya41.pdf>.

The Federation of Women Lawyers (FIDA) - Kenya
Amboseli Road, Off Gitanga Road, P.O. Box 46324-00100
Nairobi, Kenya
Tel: +254 20 3873511, 3876954, 3876991
Email: info@fidakenya.org
Website: www.fidakenya.org/index.html

The International Women's Human Rights Clinic
Georgetown University Law Center
600 New Jersey Avenue, NW, Washington, DC 20001, USA
Tel: +1 202 662 9640
Email: mort@law.georgetown.edu
Website: www.law.georgetown.edu/clinics/iwhrc/index.html
