

## VI. INTERNATIONAL LEGAL STANDARDS

When women in Kenya are forced out of their homes, stripped of their belongings, and coerced into risky sexual behaviors in order to keep their property simply because they are women, and when the government does little to prevent and redress this, they are not just experiencing “culture.” They are experiencing human rights violations.

International human rights law proscribes discrimination, including on the basis of sex. It sets out certain civil, political, economic, social, and cultural rights and requires governments to respect and fulfill those rights in a nondiscriminatory way. Human rights law also contains the principle that states have a duty to affirmatively protect human rights even from abuses committed by private actors. Kenya has ratified or acceded to international human rights treaties and has legal obligations under them, including with respect to women’s property rights.<sup>214</sup> A number of treaties and rights are implicated when women’s property rights are violated.<sup>215</sup>

The principles of nondiscrimination and equality are central to human rights. The core international treaty on women’s rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>216</sup>

CEDAW obliges states to “refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation” and to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>217</sup> It also requires that states “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>218</sup> The fact that men in Kenya have greater rights than women when it comes to owning, accessing, and inheriting property under the constitution, the Law of Succession Act, and customary laws violates the principle of nondiscrimination.

CEDAW also recognizes that many women’s rights abuses emanate from society and culture, and compels governments to take appropriate measures to correct these abuses. CEDAW requires governments:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>219</sup>

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<sup>214</sup> For example, Kenya has ratified or acceded to the following treaties: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, U.N. Doc. A/34/46, entered into force September 3, 1981 and acceded to by Kenya on March 9, 1984; the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, entered into force March 23, 1976 and acceded to by Kenya on May 1, 1972; the International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, entered into force January 3, 1976 and acceded to by Kenya on May 1, 1972; Universal Declaration of Human Rights (UDHR), G.A. Res.217A(III), U.N. GAOR, 3d. Sess., pt. 1, at 71, U.N. Doc. A/810 (1948); and the African (Banjul) Charter on Human and Peoples’ Rights (African Charter), adopted June 26, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986 and acceded to by Kenya on January 23, 1992.

<sup>215</sup> For an extensive overview of the international human rights instruments relating to women’s equal rights to land, housing, and property, see Benschop, *Rights and Reality*.

<sup>216</sup> CEDAW, article 1.

<sup>217</sup> CEDAW, article 2.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*, article 5(a).

The Kenyan government has done little or nothing to comply with this requirement with respect to women's property rights. The constitution and statutes expressly permit the application of customary laws based on women's inferiority and stereotyped roles for women. Officials condone customary laws and practices even when they realize that they discriminate against women. The government's acquiescence to social and cultural patterns of conduct that harm women's property rights violates CEDAW.

Human rights law also requires that governments address the legal and social subordination women face in their families and marriages. Under CEDAW, states must:

take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on a basis of equality of men and women:

...  
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution; [and]

...  
(h) The same rights for both spouses in respect of the *ownership, acquisition, management, administration, enjoyment and disposition of property*, whether free of charge or for a valuable consideration. (Emphasis added.)<sup>220</sup>

Interpreting these provisions, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) noted that violations of women's marriage and family rights are not only discriminatory, but stifle women's development. The CEDAW Committee observed:

[A]ny law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family, and to live in dignity as an independent person.<sup>221</sup>

Kenya's laws and customs violate women's marriage and family rights under CEDAW. The coercive nature of wife inheritance arrangements, where widows do not have a reasonable alternative and cannot choose the union freely, violates the right to choose a spouse and enter into marriage with free and full consent. Women and men have vastly different property rights, especially under customary law, during marriage and at its dissolution. Since women are unable to inherit and retain family property upon separation or divorce on an equal basis with men, their rights are unequal to men's in respect of owning, acquiring, enjoying, and disposing of property. Women are less able than men to manage, administer, and dispose of property during marriage: customarily and in practice, men have far greater rights than women to determine how family property will be used or transferred. All of this violates CEDAW and other sources of international law.

International human rights law increasingly recognizes women's right to sexual autonomy, including the right to be free from nonconsensual sexual relations. The right to sexual autonomy is reflected in a number of international declarations and conference documents.<sup>222</sup> Sexual autonomy is closely linked to the rights to

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<sup>220</sup> Ibid., article 16. The ICCPR also provides that governments must guarantee the equal rights of spouses as to marriage, during marriage, and at its dissolution. ICCPR, article 23(4).

<sup>221</sup> CEDAW Committee, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 90 (1994), para. 28.

<sup>222</sup> At the U.N. International Conference on Population and Development held in October 1994 in Cairo, Egypt, and the U.N. Fourth World Conference on Women held in September 1995 in Beijing, China, governments explicitly endorsed women's sexual autonomy. In the 1994 Cairo Programme of Action on Population and Development, delegates from governments

physical security and bodily integrity,<sup>223</sup> the right to consent to and freely enter into a marriage, as well as equal rights within the marriage.<sup>224</sup> When women are subjected to sexual coercion with no realistic possibility for redress, a woman's right to make free decisions regarding her sexual relations is violated. Lack of sexual autonomy may also expose women to serious risks to their reproductive and sexual health. In Kenya, women's rights to sexual autonomy, physical integrity, and security of person are violated when women are forced to undergo traditional rituals like cleansing and wife inheritance involving nonconsensual sex and when they are physically abused in connection with property rights violations.

International human rights law does not address HIV/AIDS directly, but protections against abuses associated with HIV/AIDS are included in numerous treaties. In 1998, the Office of the U.N. High Commissioner for Human Rights and UNAIDS issued "HIV/AIDS and Human Rights: International Guidelines," which provide a framework for governments seeking to incorporate human rights protections related to HIV/AIDS into national law. The guidelines cover a range of issues, such as the need for protection against discrimination and eliminating violence against women, including harmful traditional practices, sexual abuse, and exploitation.<sup>225</sup> According to the Committee on Economic, Social and Cultural Rights (CESCR), the right to the enjoyment of the highest attainable standard of health under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes the right to information and education concerning prevailing health problems, their prevention, and control.<sup>226</sup> Similarly, under the African Charter, states must "promote and ensure through teaching, education and publication" respect for and understanding of human rights.<sup>227</sup> The Kenyan government's failure to combat women's property rights violations as a means of halting the spread of AIDS and its failure to ensure that people in Kenya understand the HIV/AIDS and other health risks associated with women's property rights violations and harmful customary practices violate these rights and obligations.

Women also have a human right to equal legal capacity. CEDAW calls on governments to accord women a legal capacity identical to that of men and the same opportunities to exercise that capacity. It provides that governments must "give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."<sup>228</sup> Similarly, the International Covenant on Civil and Political Rights (ICCPR) provides that everyone has a right to be recognized everywhere as a person before the law.<sup>229</sup> Unlike men in Kenya, women face significant obstacles to realizing their right to administer property, an aspect of the right to equal legal capacity. Moreover, the Human Rights Committee says that this right means that "women may not be treated as objects to be given together with the property of the deceased husband to his family."<sup>230</sup> Wife inheritance in Kenya violates this human right.

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around the world pledged to eliminate all practices that discriminate against women and to assist women to "establish and realize their rights, including those that relate to reproductive and sexual health." In the 1995 Beijing Declaration and Platform for Action, delegates from governments around the world recognized that women's human rights include their right to have control over and decide freely and responsibly on matters related to their sexuality free of coercion, discrimination and violence. See United Nations, *Programme of Action of the United Nations International Conference on Population and Development* (New York: United Nations Publications, 1994), A/CONF.171/13, 18 October 1994, para. 4.4(c) and United Nations, *Beijing Declaration and Platform for Action* (New York: United Nations Publications, 1995), A/CONF.177/20, 17 October 1995, para. 223.

<sup>223</sup> ICCPR, article 9. Article 9 of the ICCPR guarantees to everyone "liberty and security of person." This right, although traditionally applied to conditions of arrest or detention, has been expanded over time to cover non-custodial situations.

<sup>224</sup> ICCPR, article 23 and CEDAW, article 16. See also article 16 of the UDHR.

<sup>225</sup> Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, "HIVAIDS and Human Rights: International Guidelines" (from the second international consultation on HIV/AIDS and human rights, 23-25 September 1996, Geneva), U.N. Doc. HR/PUB/98/1, Geneva, 1998.

<sup>226</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14, The right to the highest attainable standard of health, U.N. Doc. E/C.12.2000.4, paras. 12(b), 16 and note 8.

<sup>227</sup> African Charter, article 25.

<sup>228</sup> CEDAW, article 15.

<sup>229</sup> ICCPR, article 16.

<sup>230</sup> Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 19. The Human Rights Committee is the U.N. body charged with monitoring implementation of the ICCPR.

The “right to property” is guaranteed under the African Charter on Human and Peoples’ Rights (African Charter), which also requires that all rights be implemented in a nondiscriminatory way.<sup>231</sup> The Universal Declaration of Human Rights, which is widely regarded as customary international law, provides, “Everyone has the right to own property alone as well as in association with others.”<sup>232</sup> At a minimum, this right means that men and women must have equal property rights. That is not the case in Kenya, where women have lesser rights than men to inheritance and, in practice, division and control of matrimonial property.

Women’s equal right to inherit, while not explicit in international treaties, can be inferred from rights to equality and nondiscrimination. Moreover, several treaty bodies have recognized women’s equal inheritance rights. The Human Rights Committee noted in a general comment, “Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.”<sup>233</sup> The CEDAW Committee, in interpreting women’s right to equality in marriage and family relations, elaborated:

There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband’s or father’s property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased’s property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.<sup>234</sup>

International law also guarantees housing rights, which include equal rights to security of tenure and access to housing and land. The ICESCR recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate ...housing.”<sup>235</sup> CEDAW also requires states to ensure rural women’s right to enjoy adequate living conditions, particularly in relation to housing.<sup>236</sup> The ICCPR prohibits arbitrary or unlawful interference with one’s home<sup>237</sup> and guarantees the right to choose one’s residence.<sup>238</sup> Other international treaties, such as those relating to children, race, and refugees, also include housing as a human right.<sup>239</sup> States must progressively realize the right to adequate housing and immediately end discrimination that creates a barrier to the enjoyment of this right.<sup>240</sup> Women’s insecure tenure in their homes and on their land, as well as the dismal housing conditions they typically experience after their property is grabbed, are evidence of housing rights violations. The government’s failure to remedy discrimination against women with respect to property leads to and exacerbates housing rights violations.

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<sup>231</sup> African Charter, article 14.

<sup>232</sup> UDHR, article 17.

<sup>233</sup> Human Rights Committee, General Comment 28, para. 26.

<sup>234</sup> CEDAW Committee, General Recommendation No. 21, para. 35.

<sup>235</sup> ICESCR, article 11(1). The CESCR interpreted this right in its General Comment 4, which set forth the following factors for analyzing adequacy of housing: (a) legal security of tenure; (b) availability of services, materials, facilities, and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) location; and (g) cultural adequacy. CESCR, General Comment 4, The right to adequate housing (art. 11(1) of the Covenant)(Sixth session, 1991), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 (1994), p. 53.

<sup>236</sup> CEDAW, article 14(2)(h).

<sup>237</sup> ICCPR, article 17.

<sup>238</sup> ICCPR, article 12.

<sup>239</sup> Convention on the Rights of the Child, U.N. Doc. A/44/25, entered into force on September 2, 1990 and ratified by Kenya on July 30, 1990, article 27(3); International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force on January 4, 1969 and acceded to by Kenya on September 13, 2001, article 5(e)(iii); Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954 and acceded to by Kenya on May 16, 1966, article 21.

<sup>240</sup> ICESCR, article 2(1).

Finally, states must not only facilitate women's exercise of their human rights by ensuring that the conditions for such exercise are free of coercion, discrimination, and violence,<sup>241</sup> but they must also provide an effective remedy if human rights are violated and enforce such remedies.<sup>242</sup> The Kenyan government has done almost nothing to create conditions conducive to women's exercise of their property rights, as evidenced by the coercive wife inheritance and cleansing practices, discriminatory laws and customs, and the violence women face if they try to assert their rights. Moreover, the fact that judges, magistrates, police officials, and local authorities outright admit that they do not apply legislation and case law on inheritance and division of property demonstrates that Kenya is violating its obligation to provide an effective remedy to women's property rights violations.

International bodies have expressed concern about discrimination against women with respect to land, housing, and property originating from biased laws, policies, and traditions. For example, the U.N. Commission on Human Rights adopted resolutions on this subject in 2000, 2001, and 2002. Its 2002 resolution affirmed that discrimination in law against women with respect to accessing, acquiring, and securing land, property, and housing constitutes a violation of women's human right to protection against discrimination. It encouraged governments to support the transformation of customs and traditions that discriminate against women and deny them security of tenure and equal property rights.<sup>243</sup> The U.N. Commission on the Status of Women has also urged states to design and revise laws to ensure that women are accorded full and equal rights to own land and other property, including through the right to inheritance.<sup>244</sup>

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<sup>241</sup> United Nations, Programme of Action of the United Nations International Conference on Population & Development, para. 7.3.

<sup>242</sup> ICCPR, article 2(3).

<sup>243</sup> Commission on Human Rights Resolution 2002/49, "Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing," April 23 2002 [online], <http://193.194.138.190/Huridocda/Huridoca.nsf/TestFrame/eef55cf84b8b1fe3c1256baa0052310c?Opendocument> (retrieved January 3, 2003).

<sup>244</sup> Commission on the Status of Women, Resolution 42/1, Human Rights and Land Discrimination, Report on the forty-second session (2-13 March 1998) [online], <http://www.un.org/womenwatch/daw/csw/csw97.htm> (retrieved January 3, 2003).