

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Working Group on the issue of discrimination against women in law and in practice; the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on the right to food; and the Special Rapporteur on violence against women, its causes and consequences.

REFERENCE: OL Housing (2000-9) Poverty (1998-11) Food (2000-9) G/SO 214 (89-15)
KEN 2/2014

3 February 2014

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on extreme poverty and human rights; Special Rapporteur on the right to food; and Special Rapporteur on violence against women, its causes and consequences pursuant to Human Rights Council resolutions 15/8, 23/7, 17/13, 22/9, and 23/25.

We would like to bring to the attention of your Excellency's Government information we have received concerning **the 2013 Matrimonial Property Bill**, adopted by the National Parliament of the Republic of Kenya in November 2013 and currently awaiting promulgation by the President of the country. This newly amended Bill effectively denies women the right to marital property upon divorce or death of their spouse, unless they can prove they made a financial contribution to the acquisition of the property during their marriage.

According to information received:

On 12 November 2013, by a majority of 87 votes to 28, the National Parliament in Kenya voted on amendments to the Matrimonial Property Bill (hereinafter referred to as "the Bill"). The Bill, which is intended to define the rights of spouses in relation to matrimonial property, had reportedly previously contained progressive provisions in relation to women's land rights, in keeping with similar provisions set out in Kenya's 2010 Constitution. Article 7 had guaranteed an equal share of assets for women, stating that, in the absence of a prenuptial agreement, "ownership of matrimonial property vests in the spouses in equal shares

irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved” (Kenya Gazette Supplement No. 96: National Assembly Bills No. 12). It is reported that this provision was subsequently amended on 12 November 2013 to stipulate “upon divorce, spouses share property on the basis of the contributions they make in its acquisition.”

Additionally, it has been alleged that the definition of what constitutes marital property under the new legislation may affect a woman’s ability to enjoy an equal share of assets upon divorce or death of a spouse. Article 6 of the previous version of the legislation defined the term to include, among other things, “any movable or immovable property owned by both spouses or either spouse and acquired during the subsistence of the marriage.” The new Bill allegedly limits the matrimonial property to movable and immovable property jointly owned by both spouses.

Furthermore, it has been reported that, in Kenya, a tiny minority of women own land title deeds in their own names, and a small number own title deeds jointly with men. Traditional customary laws regard property as the sole preserve of Kenyan men, and women often struggle to provide for themselves and their children when they are widowed, divorced or separated.

We are deeply concerned that the aforementioned provisions of the amended Bill as adopted by the National Parliament directly discriminate against women upon divorce or death of a spouse, denying them the right to marital property, unless they can prove they made a financial contribution during their marriage. We consider these amendments a serious retrogressive step in the protection of the rights of women to land and property in Kenya and incompatible with international human rights standards on this issue. They are also squarely at odds with provisions set out in the 2010 Kenyan Constitution, whose article 27(4) on Equality and Freedom from Discrimination clearly states that “The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth” and article 40(2) on the Protection of Right to Property, which further states that “the Parliament shall not enact a law that permits the State or any other person ... (b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27 (4).”

According to information received, as only a tiny minority of women in Kenya own land title deeds in their name and only a small number own title deeds jointly with men, under the current legislation due to be enacted, very little, if any land will be considered as matrimonial in nature. Also, considering that it is less common for Kenyan women to work in paid employment and therefore have their own money to contribute to the acquisition of property and, given that the newly amended Bill does not recognize the very significant non-financial contribution of women in the home, few women will be able to demonstrate a financial contribution to family property, including the family

home. Considering that women and girls are concentrated in the informal economy, undertake the bulk of the agricultural work and commit substantially more time than men to unpaid care work, they make a large contribution to the domestic economy and to their families which will not be adequately reflected if this Bill entered into force (the Report of the Special Rapporteur on extreme poverty and human rights, prepared for the 68th session of the UN General Assembly, A/68/293, refers). This will mean that many women will in effect be divested of any family property upon divorce, separation or the death of their husband.

We are also concerned that, if enacted, this Bill will have broader implications on the right to food, the right to adequate housing and the right to an adequate standard of living of women and men, girls and boys in Kenya as amply demonstrated including by the Special Rapporteur on the right to food in his report on women's rights and the right to food (A/HRC/22/51). Rural women in Kenya rely on land not only to produce food or to house themselves and their families, but also to generate family income and therefore to support the health care, educational, and nutritional needs of their families. Enactment of the Bill could result in many Kenyan women losing access to the lands where they live and farm, thereby negatively affecting the livelihoods and welfare of rural women, their families and their communities. These impacts become all the more detrimental considering that according to the World Bank, about a third of rural households are female-headed, and two-thirds of them have no male support, in other words, headed by widowed, divorced or separated women with children.

Furthermore, we wish to express our concern at the low levels of women's political participation in Kenya and that women still lack the voting strength to elect representatives who will put issues of concern to them on the agenda as well as lack of power to influence and mobilize Parliamentarians and public opinion on solutions to these concerns.

In this connection, we would like to take this opportunity to draw the attention of your Excellency's Government to the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, acceded to by Kenya on 9 March 1984: article 2, which condemns all forms of discrimination against women; article 5, which requests the modification of social and cultural patterns of conduct in order to eliminate prejudices based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women; article 14, which emphasizes the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy and; article 16, which requires the adoption of all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

We also take this opportunity to recall similar equality provisions such as article 2 (non-discrimination); article 3 (equality before the law) and article 18(3) (elimination of discrimination against women) in the 1982 African Charter on Human and Peoples' Rights, ratified by Kenya on 23 January 1992 and; article 7 (separation, divorce and annulment of marriage), article 8 (equal protection before the law), article 13 (recognition

of the economic value of the work of women in the home), article 15 (right to food security), article 16 (right to adequate housing) and article 21 (inheritance rights) in the 2000 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol"), to which Kenya is a signatory. We also refer to the recent resolution of the African Commission on Human and Peoples' Rights (ACHPR/Res.262 (LIV) 2013) on women's rights to land and productive resources which urges States parties to "repeal discriminatory laws and adopt legislative measures to sanction customary practices that limit or have a negative impact on women's access to, use of and control over land and other productive resources" and "ensure widows' rights to inheritance, including the right to inherit the movable and immovable property of their husbands, as well as their right, irrespective of the matrimonial regime, to continue to live in the matrimonial house."

We would further like to recall paragraph 32 of the General Recommendation No. 21 on Equality in Marriage and Family Relations from the Committee on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW Committee"), where the Committee has noted that "in some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight". Further, paragraph 33 of the aforementioned General Recommendation notes that property accumulated during a de facto relationship is often not treated in law on the same basis as property acquired during marriage and invariably, if the relationship ends, the woman receives a significantly lower share than her partner. In this regard, the CEDAW Committee recommends that "property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged."

In its most recent General Recommendation No. 29 (2013), on the Economic Consequences of Marriage, Family Relations and their Dissolution, the Committee has specifically recognized that "property distribution and post-dissolution maintenance regimes often favour husbands regardless of whether laws appear neutral, because of gendered assumptions relating to the classification of marital property subject to division, insufficient recognition of non-financial contributions, women's lack of legal capacity to manage property, and family roles." It further notes that "laws, customs and practices relating to post-dissolution use of the family home and chattels clearly have an impact on women's post-dissolution economic status" (para. 43). The Committee has reminded States that they are "obligated to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage" and they "should recognize the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during the marriage (para. 46)."

Similarly, the Guiding Principles on Extreme Poverty and Human Rights, (contained in document A/HRC/21/39), adopted by the Human Rights Council by

consensus at its 21st session (resolution 21/11) state that women are disproportionately represented among the poor owing to the multifaceted and cumulative forms of discrimination that they endure. States are obliged to eliminate both *de jure* and *de facto* discrimination against women and put in place measures to achieve equality between men and women (Guiding Principle 23). States must ensure women's full and equal legal capacity to own, control and administer economic resources such as land, credit and inheritance (Guiding Principle 27). Policies must promote gender equality in marriage and family relations, and ensure that women's decision-making, including regarding the number and spacing of children, is free and unconstrained and that food and other resources are equally distributed within the household (Guiding Principle 29).

In this connection, we also make reference to the 2009 report of the Special Rapporteur on violence against women, its causes and consequences (A/HRC/11/6), which highlights that property is a livelihood sustaining asset that can generate income as well as security for women. Owning land gives women economic rights and opportunities to avoid situations where they are vulnerable to violence. Furthermore, it increases their leverage within the family and society at large. In this sense, women's independent ownership of property plays a crucial preventative role in deterring domestic violence. The report also stresses that failure to ensure equal property rights upon separation or divorce discourages women from leaving violent marriages, as women may be forced to choose between violence at home and destitution on the street.

Under article 3 of the International Covenant on Economic, Social and Cultural Rights, which Kenya acceded to on 1 May 1972, States parties undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights, including the right to an adequate standard of living, the right to food and the right to adequate housing. Article 2(2) of the Covenant also guarantees that the rights enunciated in it will be exercised without discrimination of any kind, including sex, property and other status.

As the Committee on Economic, Social and Cultural Rights underlines in its General Comment on the right to adequate food, the progressive realization of the right to adequate food for all, requires that States adopt national strategies which give particular attention to the need to prevent discrimination in access to food or resources for food, including "guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology" (E/C.12/1999/5, para. 26). Similarly, according to the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the 127th Session of the United Nations Food and Agricultural Organization Council in 2004, States should "implement gender-sensitive legislation providing women with the right to inherit and possess land and other property" (Guideline 8.6). In addition, article 2(1) of the ICESCR imposes a prohibition on taking deliberately retrogressive measures. As stated by the Committee on Economic, Social and Cultural Rights, "any deliberately retrogressive measures, which result in a decline in the current enjoyment of rights, require the most careful consideration and would need to be fully justified by reference to

the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.” (General Comment No.3 para. 9.)

The Committee in its General Comment No. 4 has also stressed that the right to adequate housing should be seen as the right to live somewhere in security, peace and dignity, and has underscored that “within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal”. The Special Rapporteur on adequate housing also wishes to draw particular attention to her report to the Human Rights Council(A/HRC/19/53) on the question of women and their right to adequate housing, where she recommends, amongst others, that States amend or repeal domestic legislation related to family and marriage which discriminates against women, so as to ensure that women and men have equal powers in all matters related to housing and land (paragraph 64).

There is a growing body of evidence of the positive impact on women, children and communities that can be achieved by ensuring in law and practice, that women have secure rights to land, property and productive resources. In our view, the Matrimonial Property Bill, 2013 currently awaiting Presidential assent, threatens to undermine the potential for advancing women’s equality, improving food security and alleviating poverty in Kenya.

At this important juncture, when the State is in the process of adopting new legislation, we would like to stress the importance of enacting legislation which is fully in compliance not only with CEDAW but all international and regional obligations stemming from treaties to which Kenya is party and thus contribute to the development of good practices in this regard. We therefore urge your Excellency’s Government not to assent to the Bill in its current form and to continue with Kenya’s advances towards full equality between men and women as established in the 2010 Kenyan Constitution.

Taking into account the aforementioned concerns, we wish to inform your Excellency’s Government that we may express these concerns publicly in order to inform public opinion in Kenya.

We would appreciate receiving a reply to this letter seeking a constructive dialogue with your Excellency’s Government on the issues outlined above within 30 days.

We undertake to ensure that the response of your Excellency’s Government is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Raquel Rolnik

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Frances Raday
Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice

Maria Magdalena Sepúlveda Carmona
Special Rapporteur on extreme poverty and human rights

Olivier De Schutter
Special Rapporteur on the right to food

Rashida Manjoo
Special Rapporteur on violence against women, its causes and consequences