

WORKING PAPER

Property and Inheritance Laws: The Impact on Women and OVC in the Context of HIV

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Background

HIV and AIDS requires national governments to reconsider property and inheritance laws as families, individuals, and communities struggle to cope with economic instability related to epidemic related mortality and morbidity. Additionally, where property laws and inheritance laws are discriminatory they may perpetuate exposure to HIV and limit the ability of people living with HIV to seek care, support, and treatment.

The focus of this paper will be women, girls, and orphans and vulnerable children (OVC). Women, girls, and OVC face formal and informal discrimination and alongside inequality in the context of property and inheritance.² The purpose of the paper is to assess existing evidence for the Global Commission on HIV and the Law in order to forward the Commission's goal of understanding how laws and policies contribute to the vulnerability of women and girls in the context of HIV. Alongside being an identified concern for the Global Commission on HIV and the Law, the need to focus on the discrimination of women and girls in property law and inheritance has been recognized as a core issue in addressing the HIV epidemic by the U.N. Secretary General's Task Force on Women, Girls, and HIV/AIDS in Southern Africa,³ in a host of human rights agreements, by numerous non-governmental organizations, and by governments.

This paper will begin with an overview of the importance of considering property and inheritance law in the context of the HIV epidemic. The paper will go on to assess the particular impact on women and then consider the impact of property and inheritance laws on OVC. The penultimate section of the paper will frame the need to revise property and inheritance laws in the context of human rights agreements. Finally the paper concludes with recommendations for the commissioners. Where necessary the paper will highlight the differences in addressing challenges arising from property and inheritance laws.

1 Prepared by Aziza Ahmed, Assistant Professor of Law, Northeastern University School of Law. This paper was prepared for the Global Commission on HIV and the Law. Thanks to Mandeep Dhaliwaal, Vivek Divan, Joanne Csete, Richard Elliot, Purna Sen, Vitit Muntarhorn, Rashmi Dyal-Chand, and Jason Jackson for helpful feedback.

2 Canadian HIV/AIDS Legal Network. Consultation meeting on draft model legislation on women's rights in the context of Sub-Saharan Africa, Nairobi, Kenya (2006); Canadian HIV/AIDS Legal Network, Respect, Protect, Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS – Volume Two: Family and Property Issues, Module 5 Inheritance, (2009); Legal Assistance Centre, Proposals for law reform on the recognition of customary marriages, Namibia, (1999); See also R--, submission to Global Commission regarding on the discrimination of OVC in inheritance laws in the Ivory Coast; P--, submission from NGO to the Global Commission discussing discrimination of women in property laws in the context of divorce in Malawi.

3 UNAIDS and the Global Coalition on Women and AIDS, Facing the Future Together: Report of the Secretary General's Task Force on Women, Girls, and HIV/AIDS in Southern Africa (2004), http://hivaidsclearinghouse.unesco.org/search/resources/SGs_report__final.pdf

During the course of the paper I will draw on various country examples generated by a review of the literature and from civil society inputs into the regional dialogues. This is not to suggest, however, that there is a one size fits all recommendation on property and inheritance. Rather, it is necessary to carefully examine each property and inheritance legal regime to ensure long term and sustainable redistribution of resources. Additionally it is important to note at the outset that while this paper focuses on women, girls, OVC the evidence generated through the regional commissions also demonstrates the need to focus on property and inheritance in the context of a range of marginalized communities including the lesbian, gay, bisexual, transgender, intersex communities with regard to shifting conceptions of marriage and property co-ownership but also with regard to discrimination in access to property.⁴ All of these forms of discrimination can occur on several axes including race, ethnic background, class, and migration status.

What do we mean by Property and Inheritance Law? Why are Property and Inheritance Laws Important in the Context of HIV/AIDS?

Property and inheritance laws serve a key role in distributing entitlements to assets including land. Property and inheritance legal regimes may distribute property and other assets in a manner that results in deep economic inequalities in turn impacting health and social welfare. In turn, there has been attention and focus on changing property and inheritance laws to mitigate the economic and social conditions that create vulnerability to HIV.

There are many pathways by which loss of property and inheritance impacts outcomes in the context of the HIV epidemic. First, economic disenfranchisement places people at risk for HIV through disabling people's ability to negotiate safe sex or leave violent relationships.⁵ While the relationship between economic dependency and HIV vulnerability has been greatly explored in the context of women's economic dependence on men, becoming economically dependent on others for example may lead to an inability to negotiate safer sex or may prevent an individual of any sexual orientation from leaving abusive partners. Second, where individuals and families lose property and inheritance rights they are less likely to be able to access care, treatment, and support related to their HIV status due to instability and economic disenfranchisement. Marginalized groups are some of the most affected by an inability assert claims to property that arise through property disputes and inheritance. These populations vary by country but in the context of the HIV epidemic most often include women and girls, sexual minorities, sex workers, drug users, orphans and vulnerable children, and migrants. Third, customary practices around property and inheritance may make women more vulnerable to HIV. Property grabbing, wife inheritance, ritual cleansings (that often involve unsafe sex) and other practices often expose women (as well as men) to HIV.

Altering property and inheritance laws to further redistribution of property entitlements with the end goal of equitable ownership, redistribution of wealth, and mitigating the HIV epidemic requires transformation of state laws, cultural and religious codes and laws, and traditional rules on property and inheritance distribution. Rather than take as a granted that formalizing property and inheritance laws will immediately lead to economic stability this paper encourages policy-makers to take a more nuanced approach.⁶ This paper argues that we must examine how property laws distribute entitlements and we must look at the interactions between various legal regimes (i.e. traditional, religious, and civil) to enable the end goal of redistributing property entitlements to reduce the detrimental impact of HIV on women, girls, and orphans and vulnerable children.

A case study completed by the Food and Agricultural Organization in 2002 provides an example of how HIV complicates our understanding of the operation of property and inheritance law. In Lesotho over 80% of the population live in rural areas and rely on subsistence livestock and crop farming as primary economic activities. The HIV/AIDS epidemic has negatively impacted productivity and poverty has often led to families selling land and livestock in order to cover medical expenses. In turn, the loss of property and livelihoods has aggravated poverty. This loss is further exacerbated by the Lesotho Land Act of 1979 which states that "land that lies fallow for two years in succession automatically reverts back to the allocating authority." While this law is meant to incentivize land use people living with HIV/AIDS who are unable to tend to their land due to illness risk losing the land to the government. This risk incentivizes the sale of land before the end of this two year period and further economic disenfranchisement for people living with HIV.⁷

Further, while community level institutions including traditional authorities can impede the realization of property and inheritance rights for individuals close examination of local authorities is important as some local innovations may

4 See C--, Submission to the Global Commission speaking of discrimination in the property with regard to same-sex individuals and family law in Trinidad and Tobago.

5 Julia Kim, Paul Pronyk, Tony Barnett, and Charlotte Watts, Exploring the Role of Economic Empowerment in HIV Prevention, 22 AIDS Supplement 4 (2008).

6 David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*. 1 ACCT, ECON, & AND L. 1-64 (2011).

7 Scott Drimie, Food and Agricultural Organization of the United Nations, *The Impact of HIV/AIDS on Land: Case Studies from Kenya, Lesotho, and South Africa* (2002),

help reduce inequalities.⁸ Lesotho also provides a very useful example of how traditional legal regimes, informal land administration, and cultural norms are both highly context specific and have potential to generate a more useful practice than a civil legal code. In one case, despite the move by the Lesotho government to formalize the land administration process through land boards chiefs may still adjudicate land issues that arise. In this case, through intervening in a state process chiefs have often taken it upon themselves to informally grant concessions to families and individuals suffering from HIV/AIDS. In this case chiefs have rectified an existing challenge in the context of land administration.⁹

The complexities and the context of both the laws and the implementation with regard to property and inheritance must be considered throughout this discussion and in country assessments of property and inheritance laws.

Property and Inheritance Laws: The Impact on Women

In Sub-Saharan Africa 60% of people living with HIV are women. In Asia 35% are women and in Latin America 30% are women. The implementation and existence of property and inheritance laws impacts women's vulnerability to contracting HIV and the ability of women to receive adequate care and support when HIV positive.¹⁰

There are three primary factors affecting women's rights to property and inheritance with regard to law and policy: first, the laws may be drafted to be explicitly discriminatory towards women and girls, second, the rules around property and inheritance might be subject to local cultural and religious norms that are discriminatory towards women, and/or the implementation of the laws (even when non-discriminatory) are interpreted by courts in a manner that is discriminatory towards women and girls.¹¹ These factors are complicated when countries have multiple (sometimes competing) legal regimes including customary, religious, and civil codes. The discriminatory application of law in the civil, traditional, and religious realms has an impact on women's vulnerability to contracting HIV, to the ongoing spread of HIV, and the ability of women to access care, support and treatment related to HIV.¹² It is important to note that a host of other legal issues must be considered alongside property and inheritance law. Contract law, for example, plays a key role in the sale and transfer of both movable and immovable property. This is illustrated in several jurisdictions including Lesotho and Swaziland where married women are seen as legal minors who cannot contract without the consent of their husband.¹³ This could mean that women are never able to contract for property or goods and that all transactions that require contracting remain under full control of her husband. Finally, administrative processes and the accompanying bureaucracies may be a point of discrimination for many.¹⁴ This has been documented with particular regard to assigning land titles.¹⁵

Thus, rather than simply rely on various calls for formalizing property laws to remedy women's unequal access to resources, this paper encourages policy makers to carefully examine property laws, the background rules and conditions which structure property transactions (i.e. contract law and ongoing discrimination), and finally examine the administration of property which may set into motion further challenges for redistribution. A careful localized analysis is necessary in countries particularly given evidence that a simple formalization of property laws without consideration of the background conditions may actually lead to further loss of property entitlements.¹⁶ This may be of particular importance where property law is formalized and eventually sold or collateralized. Collateralization may result in the loss of ownership if an individual loses the land because of debt obligations resulting in economically

8 Laurel L. Rose, Children's Property and Inheritance in the Context of HIV/AIDS in Zimbabwe, Food and Agriculture Organization of the United Nations, Working Paper 4; Scott Drimie, Food and Agricultural Organization of the United Nations, The Impact of HIV/AIDS on Land: Case Studies from Kenya, Lesotho, and South Africa (2002),

9 Scott Drimie, Food and Agricultural Organization of the United Nations, The Impact of HIV/AIDS on Land: Case Studies from Kenya, Lesotho, and South Africa (2002),

10 USAID, Land Tenure, Property Rights and HIV/AIDS: Approaches for Reducing Infection and Enhancing Economic Security (2010).

11 Harvard Law School, Human Rights Program, Draft Report: Women's Rights, Culture, and Health in the Caprivi Region (2010) (unpublished, on file with authors); Human Rights Watch, DOUBLE STANDARDS: WOMEN'S PROPERTY RIGHTS VIOLATIONS IN KENYA (2003); C. Roys, Widows' and orphans' property disputes: The impact of AIDS in Rakai district, Uganda. *DEV. IN PRACTICE*, 346-51 (1995).

12 Human Rights Watch, Double Standards: Women's Property Rights Violations in Kenya, (2003).

13 Marjolein Benschop, Women's Rights to Land and Property, UN-HABITAT, (June 28, 2012, 10:49 AM) http://www.unhabitat.org/downloads/docs/1556_72513_CSDWomen.pdf.

14 Marjolein Benschop, Women's Rights to Land and Property, UN-HABITAT, (June 28, 2012, 10:49 AM) http://www.unhabitat.org/downloads/docs/1556_72513_CSDWomen.pdf; Women and the Law in Southern Africa Research and Education Trust (WLSA) Zimbabwe and PADARE Men's Forum on Gender, *The Plight of Women Whose Names Do Not Appear on Title Deeds* (June 28, 2012, 10:49 AM), <http://winafrica.org/wp-content/uploads/2011/11/Title-deeds-and-womens-rights.docx>

15 Marjolein Benschop, Women's Rights to Land and Property, UN-HABITAT, (June 28, 2012, 10:49 AM) http://www.unhabitat.org/downloads/docs/1556_72513_CSDWomen.pdf; Women and the Law in Southern Africa Research and Education Trust (WLSA) Zimbabwe and PADARE Men's Forum on Gender, *The Plight of Women Whose Names Do Not Appear on Title Deeds* (June 28, 2012, 10:49 AM), <http://winafrica.org/wp-content/uploads/2011/11/Title-deeds-and-womens-rights.docx>

16 Rashmi Dyal-Chand. *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*. 39 Rutgers L. J. 50-109 (2007).

disenfranchising individuals and families.¹⁷ Finally, simply moving from traditional land schemes to state administered property regimes often does not take into account concerns around gender. In turn the formalization of property rights may set entitlements in a manner that disadvantages women.

The Importance of Customary and Religious Law in the Examination of Property and Inheritance Schemes

Many constitutions provide for customary, traditional, or religious law alongside or intertwined with civil legal codes. Where traditional, customary or religious law takes precedence, arbitration of property claims may happen at the local level where they are often managed over by customary, traditional, or religious leaders. The effect legal pluralism on women's ownership of property varies, however, most attention to dissonance between customary, traditional and religious law versus civil law focuses on the negative consequences. Advocates often highlight how constitutional protections that prevent discrimination may be limited where customary, traditional, or religious property and inheritance laws discriminate against women and negatively impact HIV outcomes.¹⁸

Several examples demonstrate the importance of examining the operation of traditional, religious, and customary law. For example, determining a woman's property rights in India requires an assessment of personal laws, region, caste, and her relationship to the family (i.e. whether she is a wife, daughter, mother, etc).¹⁹ The Hindu Succession Act was recently amended to allow widows who are remarried to inherit the property of their deceased husbands. However, the Act limits the rights of daughters to marital property.²⁰ In many jurisdictions where Muslim law governs vis-à-vis the state or where Muslim law acts as the personal law code implementation of laws Muslim women are subject to an interpretation of divorce that allows a husband to unilaterally divorce his wife which may have implications for women's property ownership. Even where protection exists in religious law, as in the case of Islamic law which mandates maintenance of the wife post-divorce, many women cannot access this support without great difficulty. Women left without entitlements to marital property women often face economic stability and poverty. Poverty and a lack of support structures also restricts women's access to necessary care, support, and treatment services. The discriminatory application and uncodified nature of customary law may pose particular challenges in galvanizing forces for legal change or for strategically directing resources dedicated to bringing about equality.

In some jurisdictions civil courts have chosen to override the decisions of the traditional courts. Recently the courts in Uganda and Tanzania worked to rectify discrimination against women in inheritance and property law. In the Tanzanian case of *Ndossi v Ndossi* in the High Court of Tanzania a widow retained her right to entitle the estate of her husband after she challenged her husband's brother-in-law who had been appointed administrator of the estate. The court rooted its decision in the Tanzanian constitution as well as the anti-discrimination principles in the Convention on the Elimination of Discrimination Against Women and the 'Best Interest of the Child' standard in the Convention on the Rights of the Child.²¹ In the case of *Owagage v. Mudhma* the High Court of Uganda the courts determined that a will granting property to a decedent's wife was valid over holding the property in trust for clansmen.²²

Despite progress challenges remain. Various practices continue to impact HIV outcomes including the repayment of Lobola (bride price) upon divorce which disincentives women from leaving violent or abusive marriages,²³ the distribution of wealth based on patrilineal family structures,²⁴ and inheritance practices that place individuals at physical risk for contracting HIV, including wife inheritance.²⁵

17 Rashmi Dyal-Chand. *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*. 39 Rutgers L. J. 50-109 (2007).

18 S--, Submission to the Global Commission from Zimbabwe discussing discrimination against women in state and customary laws and in the implementation of these laws; A--, Submission to the Global Commission from Kenya discussing the disinheritance of women and orphans in Kenya; A--, Submission to the Global Commission discussing discrimination in cultural and religious laws in Tanzania; K--, Submission to the Global Commission discussing discrimination against women in inheritance in Niger

19 Dipika Jain, Human Rights Law Network, *Women, Property Rights, and HIV/AIDS in India* (2006)

20 Dipika Jain, Human Rights Law Network, *Women, Property Rights, and HIV/AIDS in India* (2006)

21 Sibongile Ndashe and Solomon Sacco, *Watch the Courts Dance: Litigating the Right to Non Discrimination on the Ground of Sex*, THE EQUAL RTS. REV. (2004).

22 International Association of Women Judges, Prepared for the PREM Gender and Development Group, *The Gender and Legal Dimensions of HIV/AIDS: Women's Access to Justice and the Role of the Judiciary*, <http://siteresources.worldbank.org/INTGENDER/Resources/GenderLawHIVRoleJudiciaryJune05.pdf>

23 Harvard Law School, Human Rights Program, Draft Report: Women's Rights, Culture, and Health in the Caprivi Region (2010) (unpublished, on file with authors).

24 Customary Laws on Inheritance in Namibia, Legal Assistance Centre 2005

25 Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, (2003).

Property, HIV, and Gender Based Violence (GBV)

A recent study conducted by the International Center for Research on Women (ICRW) found that property ownership mitigated violence and lack of control in sexual relationships in South Africa and Uganda.²⁶ There is significant evidence that women face violence upon disclosure of her HIV status.²⁷ This violence often occurs alongside abandonment and is tied to a loss of property entitlements. In many contexts but particularly where agriculture is a main economic activity, land ownership is central to a livelihood strategy.²⁸ Women who had property often felt empowered to leave violent or abusive situations whereas women who did not retain any property entitlements upon divorce were less likely to leave an abusive partner. This in turn may mitigate the impact of the HIV epidemic on women.²⁹

Inheritance laws and Women's Rights

Inheritance laws have particular importance in the context of HIV and AIDS, particularly for women and girls. Several practices must be addressed as a central component of effectively addressing the HIV epidemic.

Widow Evictions/Widow Stripping: In many country contexts, including India and Kenya, the death of a husband results in the loss of property for women because any remaining property goes back to the husband's family. In many cases it is the woman who is blamed for bringing HIV into the home upon the death of the spouse.³⁰ This loss of property often leads to women being economically disenfranchised and women are often placed at increased physical risk of contracting HIV. In particular women who turn to transactional sex may not be able to negotiate condom use.³¹

Widow Cleansing: the practice of widow cleansing has been documented in parts of Sub-Saharan Africa and generally requires a woman to have sexual intercourse with a man after the death of her spouse. This practice places both women and the "cleanser," with whom she has sex, at risk for contracting HIV, particularly since condoms are often not used in the context of the cleansing. Widow cleansing occurs often: in Kenya one in three women is forced to undergo the practice.³² In some cases, a woman cannot stay in her home unless they participated in these cultural practices. In turn, widow cleansing was a way also to acquire property from a woman who refused to participate in the practice.³³

Widow Inheritance: Widow inheritance often results in the practice of cultural or traditional laws that mandate that women whose husbands die marry his close male kin. While such practices may have originated to protect women and guarantee economic stability, the realities of HIV in combination with economic dependence result in an inability to negotiate condom use. In Tanzania, most widows had a sexual relationship with in-laws despite not wanting to, and 97% of widows were denied any ability to inherit their wife's property. Even where women are refusing the practice of

26 International Center for Research on Women, Women's Property Rights, HIV and AIDS, and Domestic Violence: Research findings from two rural districts in South Africa and Uganda, (2007).

27 S. Maman, J. Mbwambo, N. Hogam, G. Kilonzo, J. Campbell, E. Weiss & M. Sweat, *HIV-Positive Women Report More Lifetime Partner Violence: Findings From a Voluntary Counseling and Testing Clinic in Dar es Salaam, Tanzania*, 92(8) AM. J. PUB. HEALTH 1331, at 1331-1337 (2002); See also UN Secretary General, *In-depth Study on All Forms of Violence against Women* (2006); A. Medley, et al., *Rates, Barriers and Outcomes of HIV Serostatus Disclosure among Women in Developing Countries: Implications for Prevention of Mother-to-Child Transmission Programmes*, 82(4) BULL. WHO 299, at 299-407 (2004); World Health Organisation, *Addressing Violence against Women and Girls: What Works?* (2010). See Generally Program on International Health and Human Rights, *HIV/AIDS and Gender Based Violence Literature Review*, available at <http://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=1&ved=0CFAQFjAA&url=http%3A%2F%2Fglobalhealth.usc.edu%2Fen%2Fresearch%2520And%2520Services%2FPages%2F~%2Fmedia%2F7D8345ABB68B40D49087476E99481F37.ashx&ei=t7LsT5X0H4q36QH0242rBQ&usq=AFQjCNFqMViZhVkvBmw24-5wSi8Jiy06gg&sig2=yxbl1RBeVg8cXX2fk2imFA>

28 International Center for Research on Women, Women's Property Rights, HIV and AIDS, and Domestic Violence: Research findings from two rural districts in South Africa and Uganda, available at http://www.hivhousingsummit.org/BriefingBook/FactSheetsAndReports/International%20Center%20for%20Research%20on%20Women_Womens%20Property%20Rights%20HIV%20and%20AIDS%20and%20Domestic%20Violence.pdf

29 International Center for Research on Women, Women's Property Rights, HIV and AIDS, and Domestic Violence: Research findings from two rural districts in South Africa and Uganda, available at http://www.hivhousingsummit.org/BriefingBook/FactSheetsAndReports/International%20Center%20for%20Research%20on%20Women_Womens%20Property%20Rights%20HIV%20and%20AIDS%20and%20Domestic%20Violence.pdf

30 E. Esplen, *Women and girls living with HIV/AIDS: Overview and Annotated Bibliography*, Institute of Development Studies at the University of Sussex (2007); Susan Paxton, Alice Welbourn, et al. *Oh! This one is infected!: Women, HIV & Human Rights in the Asia-Pacific Region* available at <http://www.sophiaforum.net/resources/HOCSophiaThisoneisinfected.pdf>.

31 Federation of Women Lawyers and the International Women's Human Rights Clinic Georgetown University Law Center, Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, A Supplementary Submission to the Kenyan Government's Initial Report under the ICESCR, scheduled for review by the Committee on Economic, Social, and Cultural Rights during its 41st session (Nov. 3-21, 2008). : "When women lose their matrimonial property, through divorce or widowhood, they must fend for themselves in their children, often having to start from scratch. Women may also engage in survival sex or be forced to move to the slums because they do not own property and were or dispossessed of or evicted from their homes by their husbands or relatives. Such dire economic circumstances force women into survival sex or sex work, where they are vulnerable to HIV/AIDS infection, physical and sexual abuse, and criminal prosecution. Economic disempowerment acts both as a cause and an effect of survival sex. Women who engage in survival sex have little income, struggle to keep their children in school, and should they contract HIV/AIDS because of their situation, they will lack financial access to life-saving medications."

32 Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, (2003).

33 Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, (2003).

widow inheritance, brothers-in-law often co-opt inheritance and do not provide for the widows.³⁴ A study conducted in Kenya found that women who resist wife inheritance may be forced into the practice.³⁵ Namibia's Land Reform Bill provides that customary land be equally available to men and women. However, Namibian women suffer at the hands of customary law which often dictates that the wife herself may be part of the estate. This logic suggests that the wife, along with all marital property, are made the property of the deceased husband's relatives.³⁶

Polygamy: The practice of polygamy, whether or not sanctioned by any legal frameworks, raises issues around land distribution for widows. It is necessary to consider how polygamy interacts with a distribution of movable and non-movable property in order to ensure economic wellbeing for women. Often second wives and beyond are not recognized as legally married to the husband making it even more difficult to make property claims.³⁷

Discrimination Against Daughters: Many jurisdictions allow for the active discrimination of girls in legal inheritance regimes. Sometimes this discrimination is based on the belief that a daughter does not need to inherit property as she is being cared for by her marital family. In some Latin American contexts cultural attitudes create expectations for a daughter to relinquish her right to inherit land to her brother. Where there are matrilineal systems of property and inheritance in the African context women and girls have been less vulnerable to legal regimes that undermine entitlements to property and inheritance.³⁸ In fact, where there are matrilineal systems in place it is important to note that the formalizing land ownership may in fact assist in expropriating land away from women and the poor. As such it is necessary to consider the cultural and customary norms that are in place with regard to formalizing land reform.³⁹

The Impact of Discrimination in Property and Inheritance Law on Orphans and Vulnerable Children

By 2010 over 25 million children will be orphaned due to HIV/AIDS.⁴⁰ The death of a parent or caretaker often leaves children faced with loss of access to food and health services, stigma and discrimination, and difficulties in continuing to attend school. In addition to these material losses, children also face psychological distress from lack of love, attention and affection, and physical and emotional isolation.⁴¹ Economic hardship often arises with economic disenfranchisement due to loss of inheritance and the burden of the care, support, and treatment necessary to take care of family members with HIV. The inability to support oneself economically often places children at risk for contracting HIV: an ILO study in Zambia found that half of the orphans interviewed engaged in sex work.⁴²

There are several issues often driven by poverty and socio-economic challenges created by the HIV epidemic that complicate the dynamics of inheritance in the case of orphans and vulnerable children.⁴³ In particular, beneficiaries may or may not be capable of administering property on behalf of orphans and vulnerable children or may not administer the property considering the interests of the orphan or vulnerable child. This has led to the ongoing issue of property grabbing or property appropriation. In the case of children, property grabbing occurs when a parent or caretaker dies and the extended family distributes the property amongst them. At times property appropriation results in property being absorbed into a large family structure. This is an unsurprising outcome of the reality that in many contexts including Kenya, for example, where the majority of children are adopted by parents living below the poverty line.⁴⁴ While property might be appropriated with the intent to misuse the funds evidence suggests that economic survival

34 G. Foster and J. Williamson, *A review of current literature of the impact of HIV/AIDS on children in sub-Saharan*, (June 27, 2012, 11:49 AM), Africa <http://www.hsrc.ac.za/index.php?module=pagesetter&type=file&func=get&tid=14&fid=document&pid=2177>

35 Isaac Luginaah, David Elkins, Eleanor Maticka-Tyndale, Tamara Landry, Mercy Mathui, *Challenges of a pandemic: HIV/AIDS-related problems affecting Kenyan widows*, 60 *Social Science & Medicine* 1219a1 Scie(2005). See also G--, *Submission to the Global Commission on the ongoing practice of widow inheritance in Kenya*.

36 Harvard Law School, Human Rights Program, *Draft Report: Women's Rights, Culture, and Health in the Caprivi Region* (2010) (unpublished, on file with authors).

37 Legal Assistance Centre, *Proposals for law reform on the recognition of customary marriages, Namibia*, (1999); Golub S, McInerney T, Organization IDL. *Legal empowerment: Practitioners' perspectives*. International Development Law Organization; 2010.

38 Marjolein Benschop, *Women's Rights to Land and Property*, UN-HABITAT (June 28 2012, 3:19 PM) http://www.unhabitat.org/downloads/docs/1556_72513_CSDWomen.pdf

39 N. Ngwira, *Womens property and inheritance rights and the land reform process in malawi*. Institute for Policy Research and Analysis for Dialogue, Blantyre, (June 28, 2012, 3:20 PM) ([Www.Sarpn.Org/Documents/D0000585/P522_Malawi_Property_Rights.Pdf](http://www.Sarpn.Org/Documents/D0000585/P522_Malawi_Property_Rights.Pdf)).

40 UNICEF, *The Framework for the Protection, Care, and Support of Orphans and Vulnerable Children in a World With HIV/AIDS* (June 28, 2012, 3:21 PM) http://www.unicef.org/aids/files/Framework_English.pdf

41 UNICEF, *The Framework for the Protection, Care, and Support of Orphans and Vulnerable Children in a World With HIV/AIDS* (June 28, 2012, 3:21 PM)

42 International Labor Organization (ILO), *'A RAPID ASSESSMENT ON THE CASE OF THE LUSAKA, COPPERBELT AND EASTERN PROVINCES', HIV/AIDS AND CHILD LABOUR IN ZAMBIA*, Paper No. 5, (2003.)

43 See also J—Submission to Global Commission discussing inheritance as an issue affecting children; R—, *Submission to the Global Commission discussing dispossession of property for an OVC in the Ivory Coast*;

44 Geoff Foster and John Williamson, *A Review of Current Literature of the Impact of HIV/AIDS on children in Sub-Saharan Africa*, 14 *AIDS* 2000 Supplement 3 (2000) available at <http://www.hsrc.ac.za/index.php?module=pagesetter&type=file&func=get&tid=14&fid=document&pid=2177>.

may often take precedent over individual ownership.⁴⁵ For example, in a study conducted by the FAO in Zimbabwe caretakers of land or movable property (i.e. cows) sold the cows belonging to a child to retrieve money for the deaths of other relatives.

Many states also have laws that discriminate against certain classes of children. For example, under the existing legal regime in St. Lucia children born out of wedlock do not have the same entitlements to inheritance. The Civil Code Ordinance provides that a child born out of wedlock may not inherit. This has a grave impact on children in St. Lucia where only one quarter of the children are in homes with married parents. This restriction exists to ensure that only children born in marriage are entitled to the property after the death of a parent.⁴⁶

Uneven Access to Process and Legal Services

Discrimination with regard to property and inheritance laws results in disenfranchisement of already marginalized populations. This in turn leads to HIV vulnerability and/or an inability to maintain HIV care and treatment. In particular, marginalized communities tend to have little access to legal services or knowledge of the procedures that protect entitlements. In various countries these marginalized groups may differ but in most they include sex workers, drug users, sexual minorities, migrants, women, and racial minorities. These are often groups that are also most vulnerable to contracting HIV and least likely to maintain access to care, support and treatment. The challenges that arise through formal discrimination include a lack of participation in policy and law making bodies, an inability to access legal services, a lack of awareness about rights related to property, and lacking capacity to engage in administrative procedures to demand rights to land.

Working Towards Equality in Property and Inheritance

There are several examples of legal transformations or movements that have been successful in raising awareness around property and inheritance issues.

Rwanda⁴⁷

In 1999 the Rwandan government passed the Law on Matrimonial Regimes, Liberalities, and Successions which guaranteed women's rights to inherit land, giving equal rights to "legitimate"⁴⁸ children (male or female) to inherit from their father, and allowing legally married women to inherit from their husbands. This legal change was seen as a victory for women who were previously unable to inherit land and were often disinherited after the death of a husband. This was particularly relevant given the genocide in Rwanda. The change in the law is credited to a coalition of forces that included the Forum for Rwandan Women Parliamentarians, UN agencies, and civil society. Work still remains to be done however, as there are gaps in the current legislation that fail to address ongoing challenges including inheritance rights for "illegitimate"⁴⁹ children and address challenges created by the mandatory registration of marriages in the context of polygamous communities.⁵⁰

Regional and National Advocacy

Civil society organizations have actively mobilized to alter property and inheritance laws to decrease discrimination against women and girls. The Federation of Women Lawyers (FIDA) in Kenya and Women and Law in Southern African Research and Educational Trust (WLSA) Malawi are coordinating partners of the Legal Network for Women's Property and Inheritance Rights of Southern Africa.⁵¹ November 2011 marked a victory for women's rights in Malawi as the Parliament passed the Deceased Estates Act which protects the spouse's and children's share in inheritance. Further, the law enacts financial penalties for property grabbing. The law comes as the result of 12 years of advocacy.⁵²

45 Laure L. Rose, Children's Property and Inheritance in the Context of HIV/AIDS in Zimbabwe, Food and Agriculture Organization of the United Nations, Working Paper 4ftp://ftp.fao.org/docrep/fao/010/ai499e/ai499e00.pdf

46 Jacqueline Sealy-Burke, *Protecting Children Affected by AIDS in the Caribbean: Recommendations for Legal Reform in Saint Lucia*, (June 28, 2012, 3:27, 2012), <http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1132695455908/LegalReformRecomm-OVC-GRENADA-July24.pdf>

47 As documented in S. Golub, T. McInerney, *Legal empowerment: Practitioners' Perspectives*. International Development Law Organization, (June 28, 2012, 3:30 PM), http://www.idlo.int/documents/legal_empowerment_practitioners_perspectives_book.pdf

48 Language used in the report.

49 Language used in the report.

50 S. Golub, T. McInerney, *Legal empowerment: Practitioners' Perspectives*. International Development Law Organization, (June 28, 2012, 3:30 PM), http://www.idlo.int/documents/legal_empowerment_practitioners_perspectives_book.pdf

51 Federation of Women Lawyers, Legal Network for Women's Inheritance and Property Rights, (June 28, 2012, 4:00 PM) <http://fidakenya.org/legal-network-for-womens-inheritance-and-property-rights/>

52 Tamar Ezer, Victory for Women in Malawi, Women's Inheritance Now, (June 28, 2012, 4:00 PM), <http://winafrica.org/2011/11/victory-for-women-in-malawi/>

Other Efforts for Legal Change

Other initiatives include, but are not limited to, the Gender and Poverty Project by the Women's Legal Aid Centre (WLAC) in Tanzania and the Women's Property Ownership and Inheritance Rights Project (KWPOI) in Kenya. The AIDS Support Organisation (TASO) actively include education and empowerment programs with regard to property rights for women seeking HIV care and treatment.⁵³

Human Rights Framework

Lack of access to property rights implicates many human rights obligations including the right of women to be live free from discrimination, the elimination of harmful traditional practices, the right to housing, and the right to health. These rights are protected in several international agreements including the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of Discrimination Against Women (CEDAW),⁵⁴ the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁵⁵ and the International Covenant on Civil and Political Rights (ICCPR). Regional agreements including the African Charter on Human and People's Rights also highlights the need to develop access to property in a manner that is non-discriminatory.⁵⁶

A human right based approach can move country laws and implantation towards greater equality and fairness in the context of property. This includes the right to receive inheritance and the right to contract. With specific regard to women, international and regional agreements protect the rights of women to act as equals under the law. CEDAW Article 15 articulates that "states parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall given women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."⁵⁷ The 2005 United Nations World Summit Outcome Document, states that "property contract enforcement and respect for property rights and the rule of law" as well as "guaranteeing the free and equal right of women to own and inherit property and ensuring secure tenure of property and housing by women."⁵⁸ The International Guidelines on HIV and Human Rights states that:

Anti-discrimination and protective laws should be enacted to reduce human rights violations against women in the context of HIV, so as to reduce vulnerability of women to infection by HIV and to the impact of HIV and AIDS. More particularly, laws should be reviewed and reformed to ensure equality of women regarding property and marital relations and access to employment and economic opportunity, so that discriminatory limitations are removed on rights to own and inherit property, enter into contracts and marriage, obtain credit and finance, initiate separation or divorce, equitably share assets upon divorce or separation, and retain custody of children.

Regional human rights instruments have also made strong statements about women's rights in the context of inheritance. For example, the Women's Rights Protocol of the African Charter on Human and People's Rights explicitly states that "A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it."⁵⁹ Further, many of the practices that comprise inheritance practice traditionally including widow inheritance can be considered a harmful traditional practice. Further, CEDAW requires states to modify legal and cultural systems to ensure gender equality. CEDAW article 5(a) states that "States Parties shall take all appropriate measures ... 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." Many inheritance practices perpetuate gender inequality. Unfortunately many states have made reservations to Article 5 (a) specifically on cultural or religious grounds. These reservations directly undermine the commitment of the state

53 S. Golub, T. McInerney, *Legal empowerment: Practitioners' Perspectives*. International Development Law Organization, (June 28, 2012, 3:30 PM), http://www.idlo.int/documents/legal_empowerment_practitioners_perspectives_book.pdf

54 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981., article 15.

55 Committee on Economic, Social and Cultural Rights (CESCR), International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12.2000.4,

56 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts., article 14.

57 Convention on the Elimination of All Forms of Discrimination Against Women G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981. Article 15(2)

58 Mary Robinson, *Property Rights are Women's Rights* available at <http://www.undp.org/legalempowerment/pdf/EI%20Pais.6.1.English%20version.pdf>

59 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts., article 14.

towards gender inequality in the context of property and inheritance law where cultural, religious and traditional rules and norms usually govern.

The Convention on the Rights of the Child guides the state response to OVC. While the CRC states that it the family has the primary responsibility to care and protect the child, governments also have the responsibility to support the child-family relationship particularly when children are permanently deprived of their family environment. As articulated in Article 20: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."⁶⁰

The impact of property and inheritance laws and implementation impact a states ability to achieve commitments under international human rights treaties as well as the Millennium Development Goals (MDG). Countries will not be able to meet MDG 1 to end poverty and hunger, MDG 2 to end gender inequality, MDG 3 on improving child health, or MDG 6 to combat HIV/AIDS without a reconsideration of property and inheritance law.

Recommendations: Laws, Policy, and Process

Property and inheritance laws have the ability to act as a mitigating force against the harsh effects of the HIV epidemic. This protection includes granting economic security, land for livelihood support and production, and security against interpersonal violence. States can take several steps to rectify deficiencies in land tenure systems that work to increase vulnerability to HIV and decrease the ability of people to access care, support, and treatment in the context of the HIV epidemic. This is especially the case for marginalized communities including women and girls. Beyond formal structural discrimination, gender inequality affects the unequal distribution of land through women's ability to negotiate property rights, in the adjudication of land disputes after divorce or death, and during the adjudicatory process.

This section of this paper outlines key recommendations for working towards a property legal regime that protects individuals and the most marginalized in particular from the impact of HIV/AIDS.

Legislation and Laws Pertaining to Property and Inheritance

While much of the property and inheritance rules are determined locally and by cultural norms it is necessary to have a strong legal framework that prevents discrimination. Discrimination against vulnerable communities can lead to further disenfranchisement, vulnerability to HIV, and an inability to access care, support, and treatment services. A core review of laws must include the following:

- Property and inheritance laws should be assessed for formal discrimination against women, girls, and other marginalized groups including individuals in same-sex partnerships.⁶¹ At minimum, those laws that are facially discriminatory should be amended to eliminate discriminatory language.
- Legal regimes that impact the outcome of property entitlements including contract laws and the ability to contract must also allow for equality in contracting.
- Legal and policy guidelines to ensure protection of OVC in the context of property and inheritance.
- Specific social and health protection should be enacted to support people living with HIV/AIDS. This is particularly true of women and children living with HIV whose experience with the loss of property and inheritance may result in abandonment, loss of a social structure, and inability to access (or maintain access to) treatment and other related health services.
- It is necessary to link aspects of the property and policy reform with other legal policy reform initiatives including potential reform of contract law.

Law and Policy Reform for People Living with and Affected by HIV/AIDS

The needs of people living with HIV/AIDS, particularly members of vulnerable communities including women, girls, and OVC, must be a central concern in the design of laws and policies related to property and inheritance. To ensure this the following steps should be taken:

⁶⁰ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

⁶¹ See C--, Submission to the Global Commission speaking of discrimination in the property with regard to same-sex individuals and family law in Trinidad and Tobago.

- People living with HIV/AIDS, especially members of vulnerable and marginalized communities, orphans and vulnerable children, women and people most at risk must have access to justice in the area of property and inheritance rights, including legal and technical assistance and capacity-building to enable them to make optimal use of judicial and administrative mechanisms.
- Governments should establish child-specific adjudication bodies that safeguard the rights of children, including girls and children living with and affected by HIV.
- Laws and policies must combat stigma and discrimination against people living with HIV/AIDS including in the creation and administration of property and inheritance laws.
- Laws and policies must be assessed to ensure that they facilitate on-going access to care treatment and support for PLWHA especially widows, OVC, and others evicted from homes, suffering loss of property, or disinherited.
- Legal capacity building for HIV positive individuals must include succession planning and will drafting.

Customary and Traditional Laws and Adjudication

Property and inheritance laws are often adjudicated at the local level through traditional, religious, and cultural laws. It is necessary to evaluate these mechanisms to ensure that vulnerable groups are not further disenfranchised through traditional, religious, and cultural laws. Part of this assessment should look at how and where traditional and local adjudicatory mechanisms might have corrected for failures in civil legal codes in their interpretation of cultural or religious laws. The following recommendations should be considered:

- In many countries individuals opt for or are directed to traditional adjudicatory mechanisms rather than the formal courts. In these contexts, it is necessary to educate and inform traditional leaders about the importance of protecting the property and inheritance rights of women, girls and OVC.
- Where national law makes exemptions for religious and cultural law or where national law is founded on religious norms, it must ensure that the rights of women and girls are not violated. Moreover, traditional, religious or cultural adjudicatory mechanisms must not further harmful religious, cultural, and traditional practices, including widow inheritance and widow cleansing.
- Some of the traditional mechanisms have provided relief from challenges embedded in state laws as in the example of Lesotho. It is necessary therefore to survey the informal adjudicatory mechanisms to ensure that the best practices are adopted into the legal frameworks.

Focusing Lawmakers, Government Administrators and Judges

A lack of awareness about HIV (often despite a high prevalence in a particular country) alongside human resources constraints makes it necessary to build the capacity of lawmakers, government administrators, and judges. It is therefore necessary to ensure that all Members of Parliament, state and judicial officers and administrators be trained on:

- The importance of protecting women's rights and the rights of OVC with regard to property and inheritance with particular.
- Judges and administrators in courts and state based institutions in particular must be sensitized to the issues of women's equality in the context of property and inheritance and to the various forms of discrimination facing marginalized communities in general. Judges must also be trained in the sensitivities of vulnerable children to property loss and the impacts of inheritance loss.
- Orphans and vulnerable children must also be given equal access, information, and education with regard to legal services and the laws governing property and inheritance.
- Although laws are in place to prevent discrimination based on sex in many countries this often does not translate into the administrative procedure. It is therefore necessary to ensure that administrative bodies recognize legal changes that increase the rights of women in property and inheritance.

Administrative Process

Administrative processes play an important role in ensuring entitlements given by property and inheritance law. Administrative procedures can be especially daunting to women and OVC if they are unaccustomed to engaging with state administrative processes. Therefore it is important that:

- States should play an active role in increasing knowledge of and access to legal remedies, defining and supporting services for victims of rights violations, and providing legal aid.
- Administrative procedures must be made available and accessible to individuals and families particularly from marginalized groups and communities.

Human Rights

A human rights based approach should be central to the HIV response. Several guidance documents have been developed to ensure that laws and policies in the context of HIV/AIDS have a rights based focus. The following recommendations help guide states to bring human rights more central to the laws and policies regarding property and inheritance laws:

- Laws and policy must be inline with the standards determined by human rights agreements to ensure redistribution of property entitlements to mitigate the economic impact of the HIV epidemic.
- All discriminatory provisions must be eliminated and where necessary the law must make provide for substantive support to eliminating inequalities.
- Lawmaking and implementation must be a transparent process that full involves marginalized communities and people living with HIV/AIDS in the design and implementation process.

Vulnerable Groups including Women, Girls, and OVC

In thinking about law reform with regard to property and inheritance laws it is necessary to consider the perspectives of the most vulnerable groups to ensure that the law is not further marginalizing those most affected by the HIV epidemic. Alongside the other recommendations made here states must make an effort to:

- Train children and their caretakers on relevant laws with regard to property and inheritance laws.
- Children must be able to exercise legal capacity in order to assert their rights or to advocate for a broader set of entitlements with regard to property and inheritance.
- Establish legal protection for the most vulnerable children including disabled children, children with no documentation of birth or citizenship, children who are HIV positive must be protected.
- OVC must be directly engaged in the response to HIV in the policy, advocacy, and legal context.
- Assessments must be completed with other marginalized groups including sex workers, men who have sex with men, and sexual minorities to understand how social and legal marginalization has impacted the ability to access property and receive inheritance.

Conclusion

Amending property and inheritance laws to redistribute property and maximize economic security for vulnerable communities helps mitigate the harsh effects of the HIV epidemic. In order to accomplish the goal of economic stability for the purposes of appeasing the impact of the HIV epidemic country governments must first evaluate the current distribution of property through a careful and contextual analysis of the role of informal and formal property laws in setting property entitlements. This may require an examination of the interaction between legal regimes in legally plural states and a close examination of the background rules and conditions that impact the ability for individuals to negotiate and enforce laws. Finally, these laws should be examined closely for their impact on women, girls, and OVC for whom economic instability increases vulnerability to HIV and decreases the capacity to receive necessary care, support, and treatment.