

AFRICAN REGIONAL DIALOGUE

SECRETARIAT, GLOBAL COMMISSION ON HIV AND THE LAW

Via email to: info@hivlawcommission.org

June 8, 2011

Dear Commissioners,

RE: SUBMISSION AFRICAN REGIONAL DIALOGUE – PUBLIC - USE OF CUSTOMARY LAW IN KENYA TO ADDRESS INHERITANCE PRACTISES THAT MITIGATE OR SUSTAIN VIOLENCE AND DISCRIMINATION AS LIVED BY WOMEN AND CHILDREN

The Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) is a Kenyan civil society organisation which advocates for the promotion, respect and protection of health and HIV related human rights. KELIN works to develop protective and responsive human rights based laws and policies in the health and HIV sector; challenges laws in court through taking on health and HIV related human rights cases on a pro bono basis, including public interest litigation; and improves the legal situation of people living with HIV by harnessing the power of existing cultural structures and enhancing their effectiveness through community human rights training programs, with a particular focus on HIV-affected widows and girls.

Disinheritance of women and orphans in Kenya and HIV

Although women in Kenya have statutory rights to own property, these rights are rarely upheld due to a patriarchal system in which male traditional leaders and government officials believe women cannot be trusted to own property or are not entitled to do so. This results in an economic dependence on men and a power relationship in which women are unable to negotiate the terms of sex, including consent, fidelity and condom use, and their risk of HIV is increased. In parts of Kenya women and children often become vulnerable to HIV when their husbands and fathers die, due to disinheritance by their families and community which leaves them destitute. Following disinheritance many widows and orphans are evicted from their rural homes and flee to urban areas where they find themselves vulnerable to further violence including physical and sexual abuse which increases their vulnerability to HIV. Often widows and orphans resort to high risk behaviour such as involuntary sex work in order to earn enough money to survive.

In Kenya women have a formal legal right to inherit property after their husbands' death and children have similar rights, under the Law of Succession Act. Although the Act does not stipulate how much property women and children are entitled to, under the Constitution women are entitled to inherit half of their husband's property. However, the physical location of courts and lawyers is beyond the reach of most Kenyans who live in rural areas, and ignorance about the provisions of the law, traditional beliefs among families, lack of access to legal advice, fears of losing custody of their children, and other dynamics are even greater barriers than the proximity and efficiency of courts. For the minority of women and children who manage to secure legal aid services, typical cases take between two and six years to resolve in court, and settlements outside of court are rare, which is discouraging and functionally useless. The adversarial nature of the formal court system also leads to the perception that those who pursue their family rights in court are "enemies," which can mean that even where women 'win' their case in court, they are ostracised and exposed to violence in the community.

KELIN's Cultural Structures Project (CSP) has harnessed the customary legal system in Kisumu and Homabay Counties which is presided over by the Luo Council of Elders (LCE) in Nyando and Muhoroni constituencies; Nyakach Elders group in Nyakach constituency; and Kabondo Elders group in Kasipul Kabondo constituency. Through a series of community dialogue forums and human rights training programs, KELIN has successfully formulated a culturally appropriate legal solution to uphold women's inheritance rights.

This project has succeeded in securing property and inheritance rights for many women, and its approach merits consideration as part of a comprehensive rights-based response to HIV epidemics in Kenya and elsewhere.

The Cultural Structures Project

KELIN's CSP in the Nyanza province of Kenya draws on both the formal and customary legal system in the area to address the abuse of women's inheritance rights. The project was born out of the experiences of the Kenya National Commission on Human Rights (KNCHR) and the Health Policy Initiative (HPI) who collaboratively began working with the LCE in Nyanza and with the Njuri Ncheke elders in Meru in 2004. Both KNCHR and HPI had identified the importance of culture in realising women's access to justice in Kenya, and found that more often than not, the power of culture, rather than any statutory law, determines the extent of a woman's rights, including her rights to own and inherit property.

When she was 34, Rodah's husband died from AIDS. Rodah was left with two girls and a pregnancy that gave her two boys. Rodah is also living with HIV.

After her husband's death, the husband's family evicted her from her home, demolished her house and sold the material used in the construction of the house. This was to signify that she had been disinherited and was no longer part of the family. Rodah had been denied use of the land because her inlaws felt that she was responsible for her husband's death, and also because she refused to be inherited by her husband's brother.

Rodah believed that her husband's relatives who had disinherited her would respect the authority of the village elders. She thus requested KELIN to present her case to the elders as a widow who wanted to feel accepted within the home and who wanted to cultivate part of the ancestral land. Her case was presented to the elders who mediated the dispute between her and her in-laws within a period of three months. Since then, her life has been more peaceful and she is able to use her portion of the ancestral land.

The CSP recognises that every community in Kenya at one time had its own functioning dispute resolution system, but since colonialism these systems have become less functional. In Nyanza the dispute resolution system took the form of a community court, which was presided over by elders in the community who were respected and sought to maintain a degree of impartiality. Village elders now work under chiefs who are government employees, inherited from the colonial system of administration. Some of the elders appointed by these chiefs became corrupted over time due to lack of regulation and lack of education, and because customary laws are not codified, the old value system was lost. The traditional culture was patriarchal, so widows were not allowed to inherit title deeds to property, but rather would hold the property in trust for their family, to be inherited by their sons. However, widows were not evicted from the land, and the patriarchal system was based on a genuine value system that involved men taking responsibility for the women.

As traditional dispute resolution mechanisms, the community courts have recognition under Kenyan's Constitution as alternative forms of dispute resolution. Customary law is also applicable but only insofar as it is not in conflict with the Bill of Rights in the Constitution. Clearly using customary law to deny women equal access to property would conflict with the socio-economic rights contained in the Bill of Rights.

KELIN is working with elders in Nyanza through the community court system to address the problem of disinheritance of widows and children and their consequent vulnerability to HIV. The practise of evicting widows and leaving them destitute developed over time, and it is not a part of the community's culture that was accepted by the elders. The old culture was manipulated by men so that women were chased away from the land when their husbands died, on the basis that the women had no rights over the land. KELIN trained the elders and the wider community on human rights, including the Bill of Rights, and relevant land laws, highlighting that the law gives women inheritance rights on an equal basis with men. Cultural practises that contribute to the violation of the rights of widows and orphans and expose them to the risk of HIV infection were highlighted and denounced. Through this training the elders were empowered to tackle the violations of women's and children's rights in their community. In addition the widows and orphans received training and were empowered by knowledge about their rights, and by the recognition of these rights by their community and in their customary legal system.

Since the CSP started in 2008 KELIN has taken on 84 cases involving disinheritance, of which 43 cases have been resolved in favour of the women, and 41 cases are still ongoing. In many instances the widows have won their cases before the community courts, but have only been awarded bare land, and have not had the resources to build a home for themselves on this land. KELIN has been able to facilitate the construction of 11 semi-permanent houses for the most vulnerable widows. The construction serves as a way of bringing the community together and involves them in the reparation process, as the community provides the labour. Through this process fulfilment of the women's social right to housing has created conditions for fulfilment of their civil and political rights to gender equality, security of the person, and access to justice. The success of this approach has created an increasing demand in other communities to address other cultural practices that expose women and girls to a higher risk of HIV infection. This has informed the development and launch of a tool on working with cultural structures which outlines a simple guideline for implementation in any community where harmful cultural practises that have a negative impact on HIV exist.

The Formal Legal System

The CSP is not a replacement for Kenya's formal legal system, and it is important to recognise that by choosing to adjudicate their property claims under customary law, women and children do not forfeit their rights to later refer their cases to court. Not all of the cases that come before the community courts are resolved to the satisfaction of the women and children concerned, and in such cases KELIN calls upon a pool of pro bono lawyers to take up the cases in a formal court. Even where women are successful in securing their inheritance rights, they then need to register their title deeds in their own name in court, which requires legal assistance, and the payment of filing fees. The formal legal system is an integral part of the success of the CSP and forms an important check on the customary legal process. However, access to the formal legal system, even for simple administrative matters, is a challenge for most widows and orphans and increased funding is desperately needed in this area.

Conclusion

The International Development Law Organisation (IDLO) and UNAIDS in their report *Scaling Up HIV-Related Services, Report of Case Studies: Ukraine, Kenya and India*, assessed KELIN's CSP and found it to be an effective mechanism that could be used to address not only violations of property and inheritance rights, but also other traditions at village level that breach human rights and contribute to HIV risk and vulnerability, such as female genital mutilation, polygamy, and child marriage. The project would need to be scaled up nationally to address different issues in different regions, and always requires the buy-in from those who preside over customary legal systems to ensure that human rights are promoted and respected.

Yours faithfully

Kenya Legal and Ethical Issues Network on HIV and AIDS