

# Changing customary land rights and gender relations in the context of HIV/AIDS in Africa<sup>1</sup>

## L'évolution des droits fonciers coutumiers et des relations de genre dans le contexte de l'épidémie de VIH/SIDA en Afrique

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### Abstract

The effect of prime-age adult death and its consequences on access to land for the survivors has not been fully explored nor incorporated into policy regardless the fact that high adult mortality is now the lived reality in countries affected by HIV/AIDS, particularly in Africa. This paper explores the gendered relationships between adult death due to HIV/AIDS and changes in land rights for the survivors particularly widows. In many African societies, women have traditionally accessed land through marriage. The stability and longevity of marriage guaranteed wife's continued access to land and other productive resources. However, with HIV/AIDS, and consequences of high mortality among prime-age adult men, women's access to land is increasingly becoming tenuous. This is partly due to break-down of rules and institutions (including but not limited to wife inheritance) that have traditionally guaranteed women's usufruct and other forms of access to land. This breakdown of rules and institutions, we argue puts women at higher risks of contracting HIV/AIDS. This is not merely an individual risk, but a societal one, in which the epidemic will continue to perpetuate itself due to overt gender inequalities to ownership and control of land resources.

**Key Words:** HIV/AIDS, Gender, Land, Property, Customary law

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## Résumé

Les conséquences et effets de la mortalité de la population active sur l'accès des survivants à la terre ont été peu explorés et encore moins intégrés dans les politiques. Or, les taux de mortalité très élevés constituent une réalité que l'on ne peut ignorer dans les pays touchés par le VIH/SIDA, particulièrement en Afrique. Cet article met en évidence les relations sexo-spécifiques qui existent entre la mortalité des adultes victimes du VIH/SIDA et les changements qui surviennent dans les droits d'accès à la terre pour les survivants, spécifiquement les veuves. Dans de nombreuses sociétés africaines, les femmes accèdent traditionnellement à la terre à travers le mariage. La stabilité et la longévité de l'union leur garantissent un accès continu à la terre et aux autres ressources de production. Malgré cela, les conséquences du VIH/SIDA sur la mortalité des hommes actifs ont considérablement diminué l'accès des femmes à la terre. Ceci est en partie dû à l'effondrement des règles et des institutions (y compris, mais pas exclusivement, celles relatives à l'héritage des femmes) qui traditionnellement garantissait aux femmes l'usufruit ou d'autres formes d'accès à la terre. Nous soutenons que l'effondrement des règles augmente sensiblement les risques pour les femmes de contracter le VIH/SIDA. Il ne s'agit pas seulement d'un risque encouru par l'individu, mais également d'un risque pour la société toute entière, au sein de laquelle l'épidémie continuera de se propager faute d'égalité concernant l'accès à la propriété et au contrôle des ressources foncières.

## 1. GENDER AND LAND IN SUB-SAHARAN AFRICA

Under both customary and statutory law, the vast majority of women in sub-Saharan Africa depend on men to own or inherit land, housing and other property (Scholtz and Gomez, 2004). In sub-Saharan Africa, land distribution has been particularly skewed along gender lines, with men holding the lion's share of the ownership and other rights to it, including rights to inherit and trade. Numerous traditional institutions have strictly regulated these rights over time. In the majority of the rural areas, these institutions continue to be the principal means of determining access to and ownership of land today even in countries where statutory laws have been changed in order to ensure equality between men and women. Numerous examples show the prevalence of customary systems over statutory ones<sup>3</sup>. A number of internal and external forces are introducing changes regarding land tenure and the gender dimensions of land issues. These include the privatisation of land, scarcity of land in some contexts, the push towards democracy and the social and economic effects of HIV/AIDS, all of which are eroding women's already precarious land rights (Lastarria-Cornhiel, 1997; FAO, 2005).

Institutions that govern land rights are intricately embedded in the economic, political and social environments and in particular in the gender system. The distribution of land rights is clearly gendered and is frequently associated with the institution of marriage. In many parts of sub-Saharan Africa, women's access to land and use rights are determined by marriage. By marrying a member of a clan, women can use the clan's land but when the marriage link is severed, so are these rights. The institution of *levirate*, by which a widow is to marry a brother or other close relative of the deceased upon his death, ensures her continued rights to use the land of the clan. While frequently interpreted as a social safety net that ensures widows the possibility to continue to exercise use rights of clan resources, allowing for their and their children's food security, it is first and foremost an institution that preserves male property rights. In this system, women can never own the land and will always carry an outsider status, temporarily legitimated through marriage, only valid for the duration of it.

A case study of the Luo of Western Kenya describes the mechanisms that link marriage and land use: a woman who loses her husband should be "inherited" by another man, frequently the elder brother of the deceased or, in his absence, by younger brothers. If there are no brothers, the late husband's family decides on an appropriate "inheritor." The property of the deceased, including his land is then inherited along with the wife and children. Strong social and economic pressures impel women into

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<sup>3</sup> Among the Mossi in Burkina Faso, for example, land tenure systems continue to be dominated by customary tenure with ownership vested in the community and lineages. The customary land tenure system remains strong and is practiced in most rural areas, even though land has been legally owned by the State since 1984 (Platteau et. al in FAO, 2005). In Botswana, in spite of gender equality being specifically stated in the Constitution, under customary law, girls do not have the right to inherit from their father and most of the father's estate goes to the eldest son (Harley and Verbeek, 2005).

being inherited. Widows cannot restart agricultural chores until they are inherited. Women who refuse to be inherited become outcasts and those who have done so attest to enormous difficulties to survive. They lose access to land and in-laws strip them of any other productive resource to reinforce the idea that out of the clan structure they will not be able to make their living. Widows are told that if they are not inherited, they will be in for a number of misfortunes, including that their children will not be able to marry. Male relatives refuse to pay for medical care and funerals of non-inherited women. Not being allowed to own land, inheritance merely grants (widows) access to land and permission to carry out the different parts of the agricultural cycle. As ownership is transferred to the inheritor, many feel that they can be denied access more easily than in marriage and that their sons may not receive their due share of land. In Luo culture land is given to sons but not to daughters as these are seen as belonging to the clan into which they will marry (Villarreal, 2002)<sup>4</sup>.

The type of marriage results in different outcomes regarding women's property and inheritance rights. In Nigeria, for example, three types of regimes: common law, Islamic Sharia (religious law) and customary law have widely different outcomes for women's status both during marriage and in the event of its ending (Emery, 2005).

Many countries have taken action to adopt international instruments or to formulate law which is non-discriminatory regarding gender and other socio-economic issues. However, more often than not, these provisions are not enforced. In particular, in the rural areas, customary law continues to take precedence. In a famous case (Magaya vs. Magaya (1999)), the Zimbabwean Supreme Court ruled that the Legal Age of Majority Act (which provided that all Zimbabweans, male or female, African or white attain full adult status at the age of eighteen) had no effect on customary law and that women could not inherit property as they are perpetual minors under customary law (Annex 3).

In some cases, even when gender equality regarding land issues is sought, the lack of mechanisms to enforce it or to ensure adequate implementation prevents its efficiency. The post-apartheid land reform programme is a case in point. The 1997 guiding document for the land reform programme, White Paper on South African Land Policy, considers gender equality to be essential and explicitly states that women are to be given equal access to benefits deriving from land reform. However, as Walker (2003) pointed out, programme implementation, guideline documents, and procedures do not ensure that gender be integrated into land reform projects. In addition, there is no inclusion of gender-sensitive objectives, or considerations regarding the sensitization of officers or appropriate institutional mechanisms. Consequently there is minimal accountability and monitoring of results to judge the impact of the gender equity policy on women's direct and secure rights to land (FAO, 2005).

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<sup>4</sup> This is the case among many other groups, where exogamous marriage is related to outsider status and impossibility of inheriting land for women (see for example Ikdahl *et al.*, 2005)

## 2. GENDER, LAND, AND HIV/AIDS

HIV/AIDS is creating a major shock in the rural areas of the most affected countries (Eastern and Southern Africa). It is introducing profound changes in the institutions that govern land and land rights. For the most part, these changes are increasing the vulnerability of the most vulnerable and increasing the already stark gender inequality in the access to and ownership of land and other productive resources.

In the future, the impacts of the epidemic are expected to increase. In 2005, an estimated 40.3 million people were living with the HIV virus, 64% of them in Sub-Saharan Africa. The epidemic is spreading very fast to the rural areas and increasingly affecting women. Whereas at the initial stages far more men than women were carriers of the virus, today an estimated 58% of those infected in Africa are women. The deaths due to the epidemic are also increasing. In 2005 the death toll was estimated at 3.1 million lives, more than malaria and tuberculosis combined. Seven countries have prevalence rates of more than 30%. This means that significant segments of the population, usually the most productive, risk disappearing with sizeable effects on all spheres of human activity.

Unlike other diseases, AIDS kills mostly prime-age adults. This leads to severe economic consequences, through the loss of breadwinners at a time when household health expenses rise sharply. In addition, the death of millions of young parents has left millions of orphaned children in an extremely vulnerable situation. To date, an estimated 12 million children have been orphaned by AIDS. Moreover, the worst impact of the epidemic is still expected to come. By 2010, the total number of orphans is expected to climb to more than 18 million in Sub-Saharan Africa (UNAIDS, 2004). Barnett and Whiteside (2002) describe HIV/AIDS as a 'long wave event', arguing that its impact will take place over many decades and can be as long as a century. The full impact of HIV/AIDS will not manifest itself until the next several decades.

Several studies have shown the range of impacts and possible outcomes that the epidemic can have on land issues. These include: loss of land rights including inheritance rights, shifts in the use and tenure of land, distress sales and shifts in ownership. Significant decreases in amounts of land cultivated have been documented in different contexts, as well as shifts in the types of crops cultivated, increasing those that are less labour-intensive<sup>5</sup> (FAO, 1995; Yamano and Jayne, 2004). These shifts are due

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<sup>5</sup> In Kenya, there were gender differentiated impacts of mortality on the area and crops cultivated. In the case of the death of females, a significant reduction in area under cereals and tubers was reported. In the case of the death of male household head, a reduction in cash crops (sugarcane, horticulture) was found. (Yamano and Jayne, 2004)

mainly to labour capacity lost through the death of the agricultural labourer or to the time devoted to take care of the sick, which takes away from the availability of household labour<sup>6</sup>.

In some parts of sub-Saharan Africa, at the death of a male household head it is customary that his relatives take possession of the family's property, ranging from the land to livestock, productive assets and even clothes and household objects. This is not a new phenomenon, but with the massive amounts of deaths brought about by AIDS, it is creating significant changes in the structure of property ownership in many rural areas. Stripping of land and other property from widows and orphans has been extensively reported in rural areas where the HIV/AIDS epidemic becomes widespread (Aliber *et al*, 2004; Drimie, 2003; FAO 2003, 2004; Strickland (ICRW), 2004). In addition to formal studies, there is a growing amount of testimonies and anecdotal evidence about land grabbing (Human Rights Watch, 2004; FAO, 2006).

In highly affected areas, it has been found that households in which there are no AIDS cases tend to have significantly more land than those that have been affected by the epidemic. For example, an FAO study in the Northern Province of Zambia (FAO, 2004) found that female-headed households in which there was a person living with AIDS or which were fostering orphans (two indicators of how the epidemic affects households) owned an average of 1.55 hectares, while AIDS-affected male headed households owned about 3.0 ha. In contrast, households that were not directly affected by the epidemic had an average of 4.77 hectares (Figure 1).

The same study showed that households affected by AIDS had more difficulties in participating in the benefits of public policy. The Government of Zambia launched a policy to promote small-scale farm production by the provision of subsidised agricultural inputs. These inputs were distributed through cooperatives. As shown in Figure 2, AIDS-affected households, and in particular those headed by women, were less able to participate in the cooperatives. Among the reasons for this were the fees required to enter a cooperative – unaffordable for poverty-stricken AIDS-affected families – and the lack of information – as it did not reach these marginalised households. In the studied communities, only 5 percent of all female-headed households in the sample areas participate in farming groups, and 7 percent in CBOs. These findings as well as other results point to the fact that HIV/AIDS creates or reinforces mechanisms of marginalisation and inequality. In addition, it shows that policies intended to benefit the poorest or most vulnerable may not be effective unless they address the mechanisms of

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<sup>6</sup> FAO has identified the loss of agricultural labour due to HIV/AIDS as one of the main impacts of the epidemic in terms of food security, agricultural productivity and agricultural production. The most affected countries could lose around 25% of their agricultural labour by 2020. It is estimated that between 1985 and 2000, around 14 million of person-years of labour were lost to the epidemic.

exclusion. In order to be effective, land programmes should address the factors that cause marginalisation from information and exclusion of the intended beneficiaries.

There is growing evidence of the distress sale of land and other assets such as livestock owned by persons who have been affected by HIV/AIDS (FAO, 2003a; Rugadya *et al.*, 2005). Frequently, these sales take place at artificially low prices, given the high amount of supply and the impending need to pay for medical costs and for funerals. These sales affect the land market and may be related to concentration in fewer hands. However, this remains a hypothesis, as supporting evidence is as yet tenuous.

Regarding tenure security, preliminary evidence collected by FAO and the Human Sciences Research Council (HSRC) (2004) using a combination of participatory research techniques, household surveys, and in-depth interviews showed that the AIDS epidemic can result in the undermining of the tenure security of some community members. However, the study also found that threats to tenure security do not usually result in actual or sustained loss of land tenure status. Those who are particularly vulnerable to the loss, or threat of loss, of tenure status, are widows and their children. Young widows are more vulnerable than older widows. The study was conducted in highly affected districts in Kenya (Embu, Thika, and Bondo Districts).

Using the same collected data from the FAO-HSRC (2004) study, Aliber and Walker (2006) caution against isolating HIV/AIDS as the major threat to tenure security. They find that there are no statistically significant differences in land disputes, threatened tenures and tenure loss, between HIV/AIDS affected households and non-affected households. Their findings present fewer examples of property dispossession of widows and orphans than anticipated in light of the existing literature and anecdotal accounts (Drimie *et al.*, 2002, FAO, 2003a). Instead, they argue that HIV/AIDS aggravates tenure insecurity, in conjunction with population pressure, stigmatization, and gendered power relations.

Some of the social institutions related to the access to land, such as *levirate* and wife inheritance, are suffering changes due to the AIDS epidemic. A case in point, among the Luo of Kenya, an increasing awareness of AIDS and its consequences is making remarriage and inheritance more difficult and threatening for some. The suspicion that widows are HIV carriers is leaving a growing number of them without the possibility of being inherited, which leaves them without access to land. In other parts of Kenya, wife inheritance has greatly diminished and among some groups it has virtually

disappeared. However, in Luoland it remains the norm<sup>7</sup> and constitutes a risk factor for HIV transmission (Villarreal, 2002).

Losing land, housing and other assets leads to further impoverishment of households headed by widows. Rural women who have been stripped of their land or have lost access to clan land, have few economic options to secure their livelihoods and those of their children. Often this leaves women with no alternatives but to engage in transactional sex for money, housing or food and puts them at a higher risk of contracting HIV. It also increases the risk for the whole society, for the buyers of these services are also at risk of being infected. The extreme gender inequality in the access to and ownership of productive resources in Africa is becoming a risk factor for entire societies under the HIV/AIDS epidemic (Villarreal, 2005).

The difficulties for women to own or access land and other productive resources in many African societies have been exacerbated by the stigmatisation surrounding the disease. Widows are often blamed for killing the husband by infecting him with HIV and in-laws use HIV/AIDS as a justification to dispossess them. Widows are frequently accused of witchcraft. The stigmatisation associated with AIDS has contributed to widows' insecurity of land rights (Mpahale and Rwambali, 2003; Mbhele and Nzama, 2002). Many of these widows are infected with HIV or living with AIDS, and dispossession, harassment and eviction often takes place when their economic and health conditions are rapidly deteriorating (FAO, 2006). Consequently, such widows and their children are left without shelter, means of livelihood and support networks in the community. After being dispossessed from their land, an FAO study showed that many female-headed households did not seek any legal action due to ignorance about their inheritance rights and also fear of witchcraft accusations:

*“When my husband passed away, his relatives took away everything. I tried to seek assistance through the headman and he tried to talk to the relatives but nothing changed. I was advised to see the Legal Services Foundation but the threat of witchcraft came in. Because I was afraid I withdrew the case. I am now struggling to make ends meet through gardening and beer brewing but before my husband's death we had fishing equipment which enabled us to survive”*

(Source: in-depth interviews with a widow in Mugwi District, cited in FAO (2006))

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<sup>7</sup> A study in Rusinga Island showed that wife inheritance is decreasing due to AIDS, but that as much as 77% of women widowed by AIDS are inherited, mostly by the brother of the husband. (cited in Human Rights Watch, 2001 (p.13), Original Source: Johnston, Ferguson, and Akoth, 1999. *Profile of Adolescent AIDS Orphans*. Nairobi: Population Communication Africa.)



According to the study, some livelihood activities undertaken by households that are meant to provide resilience end up exposing them to even greater vulnerability. For example beer brewing is a quick way of getting money for paying for medical bills among female-headed households but this activity has deprived orphans of the chance to go to school as they spend most of the time collecting firewood and water for the industry.

The lack of security of land tenure is closely related with women's vulnerability to being infected with the HIV virus. Without the fear of losing access to land and therefore to their livelihoods, women would be able to exercise ways of protecting themselves from contracting the HIV virus. Moreover, security of tenure would mean that they do not need to resort to transactional sex in exchange of food and/or access to land. Therefore, property and inheritance rights for women become fundamental not only for their own and their children's livelihood, but also to protect them and their societies from the further spread of the HIV virus.

### **3 INTERNATIONAL INSTRUMENTS REGULATING WOMEN'S PROPERTY RIGHTS**

Many international instruments of differing legal nature and binding value address the issue of women's property and inheritance rights and some of them refer explicitly to land rights. These include:

- Universal Declaration on Human Rights<sup>8</sup>
- International Covenant on Civil and Political Rights<sup>9</sup>
- International Covenant on Economic, Social and Cultural Rights<sup>10</sup>
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>11</sup>
- The Beijing Declaration
- Beijing Platform for Action<sup>12</sup>
- CESCR General Comment No. 4 – The Right to Adequate Housing<sup>13</sup>
- The Habitat Agenda<sup>14</sup>
- African Charter on Human and People's Rights<sup>15</sup>
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>16</sup>

<sup>8</sup> 1948, <http://www.unhchr.ch/udhr/lang/eng.htm>

<sup>9</sup> 1966, [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

<sup>10</sup> 1966, [http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm)

<sup>11</sup> 1979, <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>

<sup>12</sup> 1995, <http://www.un.org/womenwatch/daw/beijing/platform/>

<sup>13</sup> 1991, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument)

<sup>14</sup> 1996, <http://www.unhabitat.org/unhcr/english/hagenda/>

<sup>15</sup> 1981, [http://www.achpr.org/english/info/charter\\_en.html](http://www.achpr.org/english/info/charter_en.html)

<sup>16</sup> 2003, [http://www.achpr.org/english/info/women\\_en.html](http://www.achpr.org/english/info/women_en.html)

- Commission on Human Rights Resolution 2003/22 – Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing<sup>17</sup>

All these international instruments provide legal mandates to enshrine the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, income, birth or other status. For instance, Articles 16, 17 and 25 of the Universal Declaration on Human Rights guarantee equal rights for women and men before and during marriage and at its dissolution, recognize every person’s right to own property and to be protected from arbitrary deprivation of property and confirm the right to an adequate standard of living, including housing. Articles 14, 17 and 23 of the International Covenant on Civil and Political Rights, guarantee equality before the courts; prohibit arbitrary or unlawful interference with one’s privacy, family, or home and address equality of spousal rights during marriage and at its dissolution (similar to article 16 of Universal Declaration on Human Rights) (Annex Table 1).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), dating from 1979, developed specific principles to promote and protect women’s property and inheritance rights and pays specific attention to rural women. CEDAW establishes women’s equal rights regarding agricultural credit and loans, equal treatment in land and agrarian reform, and adequate living conditions (Article 14). Furthermore, Article 15 demands that States Parties grant women legal capacity in civil matters equal to that of men including equal rights to end contracts and to administer property and equal treatment in courts and tribunals. Article 16 mandates the same rights for men and women in respect to the ownership, acquisition, management, administration, enjoyment and disposition of property.

The Optional Protocol on Women to the African Charter, a special section of the African Charter on Human and Peoples’ Rights, actually goes further by establishing norms that in theory eliminate any conflict between customary and statutory law. For instance, under the protocol all women (married or not) must have the same rights as men to housing, and all women (regardless of the kind of marriage) must be allowed to inherit from their husbands<sup>18</sup>. In addition, the rights of particularly vulnerable groups of women, including widows, elderly women, disabled women and “women in distress” are specifically recognised.

<sup>17</sup>2003, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.22.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.22.En?Opendocument)

<sup>18</sup> See Article 16: Right to Adequate housing; Article 20: Widow’s Rights; Article 21: Right to inheritance.

The Protocol has been signed by 39 countries (out of 53), ratified by 17 and deposited by another 17. It was adopted in Maputo, Mozambique on 11 July 2003 and it entered into force on 25 November 2005 after its 15th ratification<sup>19</sup>.

In spite of the direct linkages between the lack of property and inheritance rights for women and the spread of the HIV epidemic, it is noteworthy that major international instruments that specifically address the epidemic, and ways of preventing its spread and reducing the vulnerability it causes, make no mention of these rights. In fact, they tend to adopt a medical focus, by which most of the prevention, care and mitigation strategies rely on medical means and on information, education and communication. Two of the most important instruments are the following:

- Declaration of Commitment on HIV/AIDS
- Commission on Human Rights Resolution 2001/51 – The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)<sup>20</sup>

#### **4. CONCLUSIONS AND RECOMMENDATIONS**

While there is a growing amount of evidence on the impact of HIV/AIDS on land issues and on the gender inequality that has traditionally characterised land systems in sub-Saharan Africa, much research needs to be undertaken to improve the evidence base and to understand the nature of the relationship in different contexts and in different systems. Among the problems that have hampered this kind of research is that gender issues, HIV/AIDS and property grabbing are all sensitive issues and it is difficult to obtain solid data on them. However, decisive action can be taken based on the evidence that already exists, which indicates that the very viability of some societies may be at threat due to the AIDS epidemic (Villarreal, 2005). Ensuring adequate property and land inheritance rights for women will contribute to the protection not only of women but of the entire societies. A few (not exhaustive) recommendations for the way forward follow:

***Promote the formulation, adoption and enforcement of statutory law that makes special provisions to ensure gender equality in the access to, ownership of and right to inherit land and other productive resources***

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<sup>19</sup> The countries that have ratified the Protocol as of January 2006 are Benin, Cape Verde, The Comoros, Djibouti, Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo<sup>19</sup>.

<sup>20</sup>2001, [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2001.51.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001.51.En?Opendocument)

Statutory laws that ensure equality between men and women regarding land and other property issues are essential, but are not sufficient to make a real change. A set of mechanisms that will enable effective enforcement needs to be developed and translated into policy. These include: appropriate guidelines and accountability instruments; identification, sensitisation and training of strategic actors for the implementation process (judges, enforcement agencies (police), village chiefs, elders, etc.); formulation of policy in a participatory way, with the involvement of strategic actors and stakeholders; promotion of a radical change in the system of values that sees women as inferior, legal minors or having lesser rights than men; promotion in any other additional way of a long term and solid political will to address the issue.

In addition, existing statutory laws need to be revised in order to eliminate any discriminatory provisions. It is necessary to ensure that all measures needed to guarantee that gender-sensitive statutory law will take precedence over customary law will be devised and implemented (Annex Table 2). Policy and decision-makers should be convinced about the need to advance towards gender equality in order to achieve poverty reduction, food security and all other Millennium Development Goals. Likewise, key community actors such as village headmen and others responsible for interpreting and applying customary law should be made aware of the importance of equal rights for men and women for the protection and the progress of their communities.

Strategic litigation may be effective in a range of contexts where specific cases create precedents for rulings. In these situations it will be useful to build up cases strategically, making sure that the judges have been sensitised and that appropriate evidence is produced.

### ***Ensure equal rights regardless of the type of marriage***

It is necessary to make provisions that will ensure that all types of marriage grant equal benefits and that they ensure equality between men and women regarding property and inheritance rights. Therefore, customary and/or religious marriages should be made subject to civil law, should be registered (for example, through witnesses) and should ensure that neither husband nor wife have marital power over the other. Documentary proof of the marriage should be given to both wife and husband. Furthermore, all property should be registered under both husband's and wife's names and documentary proof of registration given to both. Inheritance rights should be ensured for both, and for both male and female children regardless of the type of marriage (customary, religious or statutory).

***Promote the ratification, adoption and enforcement of the Optional Protocol on Women to the African Charter on Human and Peoples' Rights and other international instruments***

The countries that have not ratified the Optional Protocol and more specifically those where HIV prevalence is high and/or have strong inequalities regarding property and inheritance rights should be encouraged to ratify, deposit, adopt, adapt and effectively implement it.

CEDAW is a legally binding instrument that has not been used to the maximum of its potential. In particular, countries should be held accountable for their efforts in the implementation of Article 14 (or the lack thereof).

Furthermore, advocacy efforts should be undertaken for UN member countries to insist in including property and inheritance rights for women as part of the efforts in the fight against AIDS in the relevant international instruments.

***Improve public policy to reach more effectively the most vulnerable***

It has been shown that AIDS-affected households suffer more from exclusion and marginalisation than non-affected households. In order for public policy to be effective, the mechanisms that create this exclusion need to be understood and addressed in policy.

***Community-based measures: Promote the legal empowerment of rural women and orphans***

A number of simple but effective legal instruments should be made available to rural women in order to contribute to their legal empowerment. FAO's experience regarding the promotion of will-writing, paralegal training and the promotion of basic land titles has been very positive. These are cost-effective measures that can have a decisive impact on rural widows' and orphans' lives and livelihoods. A few workshops or relatively short (six weeks) paralegal training sessions can build people's capacity to protect their property from being grabbed. Wills can be legitimised through witnesses and registered with local authorities. In addition, local authorities can be trained in gender-sensitive dispute resolution.

Community members, and in particular women, should be informed about their citizen rights and about statutory law and available means at their disposition to enforce them (legal counselling services, etc.). A FAO study showed, for example, that in rural Namibia few people knew about legal assistance centres, even if located in a neighbouring district. There was a fatalistic attitude towards

property dispossession. Moreover, there was a lack of local capacity to implement existing legal Acts (FAO, 2003a).

***Promote community based approaches that create or reinforce self-esteem and other life skills***

FAO's very successful Farmer Field Schools (FFS) and Junior farmer field and life schools (JFFLS) are being used to empower farmers and children made vulnerable by HIV/AIDS through participatory learning processes. Set up by FAO and the World Food Programme (WFP), the JFFLS equip children with the agricultural skills and knowledge they will need for their future livelihoods and food security and which they will not be able to get from the parents who have died of AIDS. Participatory learning of life skills is another pillar of the curriculum and children learn self-awareness, assertiveness, and HIV/AIDS prevention. They improve their knowledge on human rights and develop gender-equal attitudes. Given that gender inequality is one of the driving forces of the AIDS epidemic, this will help to prevent further transmission of the epidemic in the future.

In a recent example, orphans who participated in these schools were able to claim land rights, as the village tradition requires that people who are granted access to land are able to cultivate it. By demonstrating this ability and exercising their newly acquired negotiation skills, adolescents convinced the village chiefs that they were legitimate users of the land. Both the adult and the junior schools can play a significant role in helping widows and orphans advocate for their rights and getting community support, instead of suffering the consequences of stigma associated with the HIV virus. They are a good instrument to provide information on land rights and to promote equality.

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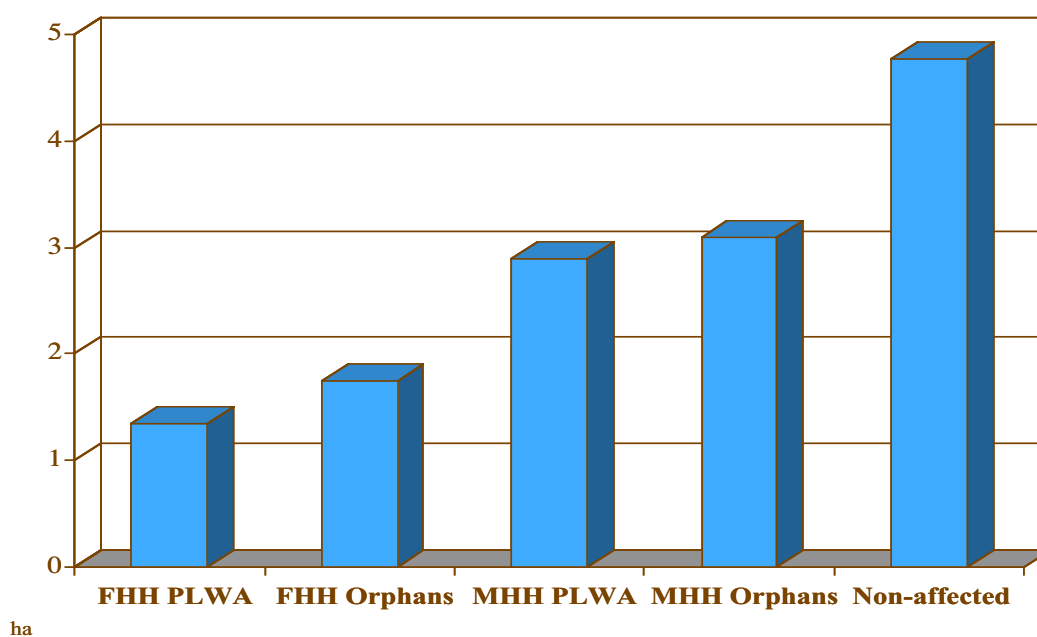
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Figure 1. Average land by household type (in ha.), northern Zambia, 2004



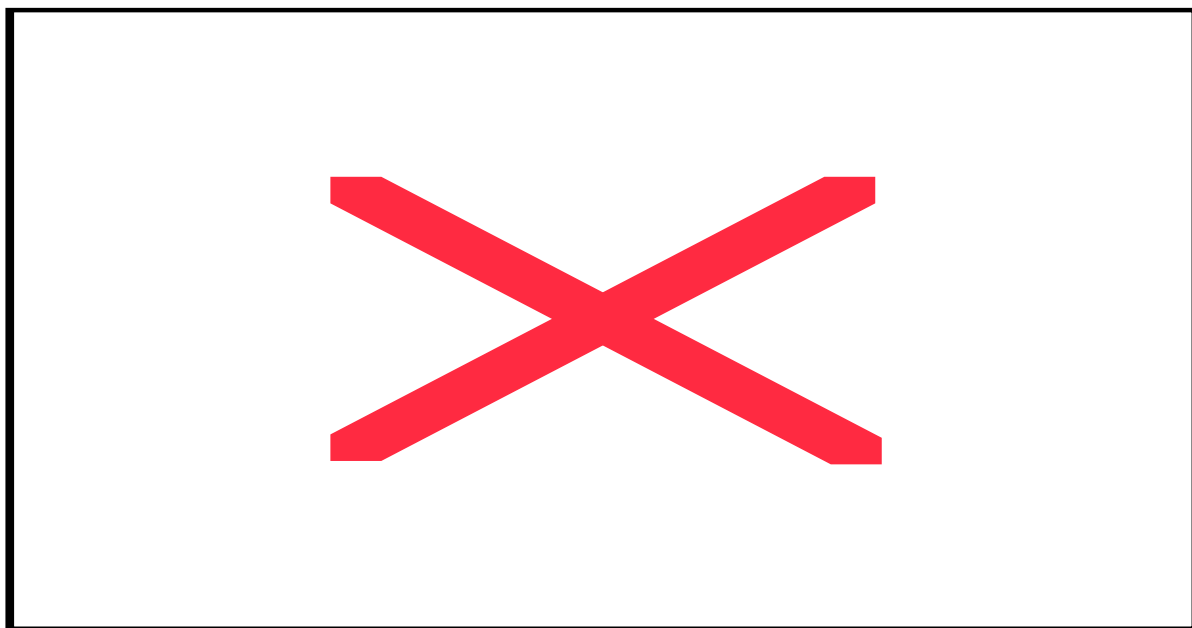
Source: FAO (2004)

FHH PLWA: Female-Headed Households with a person living with HIV/AIDS

FHH Orphans: Female-Headed Households fostering orphans

MHH: Male-Headed Households

Figure 2. Membership in cooperatives, by household type, northern Zambia, 2004



Source: FAO (2004)

FHH PLWA: Female-Headed Households with People living with HIV/AIDS

FHH Orphans: Female-Headed Households living with orphans

MHH: Male-Headed Households

Annex Table 1. Status of international treaties in some countries in Eastern and Southern Africa

<b>Treaties</b>	<b>Kenya</b>	<b>Tanzania</b>	<b>Uganda</b>	<b>Zambia</b>	<b>Zimbabwe</b>
International Covenant on Economic, Social and Cultural Rights (ICESCR)	Acceded: 1972	Acceded: 1976	Acceded: 1987	Acceded: 1984	Acceded: 1991
International Covenant on Civil and Political Rights (ICCPR)	Acceded: 1972	Acceded: 1976	Acceded: 1995	Acceded: 1984	Acceded: 1991
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Acceded: 1984	Signed: 1980 Ratified: 1985	Signed: 1980 Ratified: 1985	Ratified: 1985	Ratified: 1991
African Charter on Human and People's Rights (ACHPR)	Signed: no data Ratified: 1992	Signed: 1982 Ratified: 1984	Signed: 1986 Ratified: 1986	Signed: 1983 Ratified: 1984	Signed: 1986 Ratified: 1986
Convention on the Rights of the Child (CRC)	Signed: 1990 Ratified: 1990	Signed: 1990 Ratified: 1990	Signed: 1990 Ratified: 1990	Signed: 1990 Ratified: 1991	Signed: 1990 Ratified: 1990

Annex Table 2. Status of legislation on women's rights to land, housing, and property in five Sub-Saharan African countries, as of 2005

<b>Legislation</b>	<b>Tanzania</b>	<b>Kenya</b>	<b>Uganda</b>	<b>Zambia</b>	<b>Zimbabwe</b>
Gender-based discrimination prohibited	Yes	Yes	Yes	Yes	Yes
Application of customary laws that discriminate against women prohibited	Yes	Partly: only if it denies women lawful access to ownership, occupancy, or use of land	Yes	Partly: when the Intestate Succession Act (1989) gives remaining spouses rights of inheritance and supersedes customary law.	No (Magaya Vs. Magaya (in 1999 at the Supreme Court))
Women's equal right to acquire land and housing	Yes; explicitly recognized in Section 3(2) of the Land Act and the Village Land Act	Yes; implicitly recognized in the Married Women's Property Act and Registered Land Act	Yes; implicitly recognized in Article 26 of the Constitution	Partly: Customary law denies women rights to family property while statutory law provides for the sharing of property between spouses.	Yes
Spousal co-ownership presumed	Yes; (Section 161 of the Land Act)	No	No	No	Yes; (the Matrimonial Causes Act (1985))
Women's equal inheritance rights (for widows)	No	No	No	No	No (under the customary law)

Adapted from UN Habitat (2002); COHRE (2004); UN Millennium Project Task Force on Education and Gender Equality (2005)

### **ANNEX 3 : THE CASE SUMMARY- Venia Magaya v. Magaya 1999 in Zimbabwe**

“Venia Magaya was the eldest daughter of Lennon Magaya, from his first wife Emma. On the strength of his marriage to Emma, Lennon Magaya had acquired a municipal house on a rent-to-buy scheme in one of Harare’s high-density suburbs. Then he took a second wife. After he died, the house was to be transferred to his heir. Venia, the eldest daughter, applied to be her father’s heir. At the community court (which was presided over by a female officer), Venia was indeed appointed as heir to the estate of her father. However, Venia’s half-brother from her father’s second wife and other male relatives then contested this appointment. They went to the magistrate’s court and argued that customary law does not permit a daughter to inherit from her father’s estate. The magistrate agreed with this argument and substituted one of the half-brothers as heir. Venia then appealed to the Supreme Court, which dismissed the appeal with the argument that the appointment of male heirs to estates of deceased African males remains unaffected by the Legal Age of Majority Act. The judge, reading the judgement, found that the Legal Age of Majority Act had no effect on customary law and could not grant women rights that they did not enjoy under customary law. Moreover, the judge found that the woman’s inability to inherit was partly due to the fact that women were perpetual minors under customary law, and more importantly, that Zimbabwe’s society was patrilineal and patrilocal. The court found further that, although the practice of preferring males is discriminatory, it did not contravene the Zimbabwean Constitution, as it does not forbid discrimination based on sex in the distribution of a deceased person’s estate under customary law. The Magaya case took Zimbabwean women’s rights 100 years back – advocacy around this issue is continuing. WLSA Zimbabwe has published a small book on the case (Venia Magaya's Sacrifice - A Case of Custom Gone Awry), hoping to get more attention from women and the international community about this issue. They are also making a documentary on it. But the Supreme Court is the highest decision making body, so there was no appeal within Zimbabwe. Venia died in 2000.”

Source: UN-Habitat (2002) Conference Proceedings, African Regional Civil Society Consultation on Women and Adequate Housing, 31 October 2002, Nairobi, Kenya. (p.11)