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They talk about African traditions, but there is no tradition you can speak of—just double standards.

—Woman in Central Province,  
November 9, 2002

A woman carries firewood through a Nairobi slum, where many women end up living in squalor after their property rights are violated. (c) 2002 Agence France Presse

## **DOUBLE STANDARDS: WOMEN'S PROPERTY RIGHTS VIOLATIONS IN KENYA**

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**KENYA**

**DOUBLE STANDARDS:  
Women’s Property Rights Violations in Kenya**

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## I. SUMMARY

*Shortly after Emily Owino's husband died, her in-laws took all her possessions—including farm equipment, livestock, household goods, and clothing. The in-laws insisted that she be "cleansed" by having sex with a social outcast, a custom in her region, as a condition of staying in her home. They paid a herdsman to have sex with Owino, against her will and without a condom. They later took over her farmland. She sought help from the local elder and chief, who did nothing. Her in-laws forced her out of her home, and she and her children were homeless until someone offered her a small, leaky shack. No longer able to afford school fees, her children dropped out of school.*

—Interview with Emily Owino, Siaya, November 2, 2002

*When Susan Wagitangu's parents died, her brothers inherited the family land. "My sister and I didn't inherit," said Wagitangu, a fifty-three-year-old Kikuyu woman. "Traditionally, in my culture, once a woman gets married, she does not inherit from her father. The assumption is that once a woman gets married she will be given land where she got married." This was not the case for Wagitangu: when her husband died, her brothers-in-law forced her off that homestead and took her cows. Wagitangu now lives in a Nairobi slum. "Nairobi has advantages," she said. "If I don't have food, I can scavenge in the garbage dump."*

—Interview with Susan Wagitangu, Nairobi, October 29, 2002

Women's rights to property are unequal to those of men in Kenya. Their rights to own, inherit, manage, and dispose of property are under constant attack from customs, laws, and individuals—including government officials—who believe that women cannot be trusted with or do not deserve property. The devastating effects of property rights violations—including poverty, disease, violence, and homelessness—harm women, their children, and Kenya's overall development. For decades, the government has ignored this problem. Kenya's new government, which took office in January 2003, must immediately act to eliminate this insidious form of discrimination, or it will see its fight against HIV/AIDS (human immuno-deficiency virus/acquired immune deficiency syndrome), its economic and social reforms, and its development agenda stagger and fail.

This report recounts the experiences of women from various regions, ethnic groups, religions, and social classes in Kenya who have one thing in common: because they are women, their property rights have been trampled. Many women are excluded from inheriting, evicted from their lands and homes by in-laws, stripped of their possessions, and forced to engage in risky sexual practices in order to keep their property. When they divorce or separate from their husbands, they are often expelled from their homes with only their clothing. Married women can seldom stop their husbands from selling family property. A woman's access to property usually hinges on her relationship to a man. When the relationship ends, the woman stands a good chance of losing her home, land, livestock, household goods, money, vehicles, and other property. These violations have the intent and effect of perpetuating women's dependence on men and undercutting their social and economic status.

Women's property rights violations are not only discriminatory, they may prove fatal. The deadly HIV/AIDS epidemic magnifies the devastation of women's property violations in Kenya, where approximately 15 percent of the population between the ages of fifteen and forty-nine is infected with HIV. Widows who are coerced into the customary practices of "wife inheritance" or ritual "cleansing" (which usually involve unprotected sex) run a clear risk of contracting and spreading HIV. The region where these practices are most common has Kenya's highest AIDS prevalence; the HIV infection rate in girls and young women there is six times higher than that of their male counterparts. AIDS deaths expected in the coming years will result in millions more women becoming widows at younger ages than would otherwise be the case. These women and their children (who may end up AIDS orphans) are likely to face not only social stigma against people affected by HIV/AIDS but also deprivations caused by property rights violations.

A complex mix of cultural, legal, and social factors underlies women's property rights violations. Kenya's customary laws—largely unwritten but influential local norms that coexist with formal laws—are based on patriarchal traditions in which men inherited and largely controlled land and other property, and women were “protected” but had lesser property rights. Past practices permeate contemporary customs that deprive women of property rights and silence them when those rights are infringed. Kenya's constitution prohibits discrimination on the basis of sex, but undermines this protection by condoning discrimination under personal and customary laws. The few statutes that could advance women's property rights defer to religious and customary property laws that privilege men over women. Sexist attitudes are infused in Kenyan society: men that Human Rights Watch interviewed said that women are untrustworthy, incapable of handling property, and in need of male protection. The guise of male “protection” does not obscure the fact that stripping women of their property is a way of asserting control over women's autonomy, bodies, and labor—and enriches their “protectors.”

Currently, women find it almost hopeless to pursue remedies for property rights violations. Traditional leaders and governmental authorities often ignore women's property claims and sometimes make the problems worse. Courts overlook and misinterpret family property and succession laws. Women often have little awareness of their rights and seldom have means to enforce them. Women who try to fight back are often beaten, raped, or ostracized. In response to all of this, the Kenyan government has done almost nothing: bills that could improve women's property rights have languished in parliament and government ministries have no programs to promote equal property rights. At every level, government officials shrug off this injustice, saying they do not want to interfere with culture.

As important as cultural diversity and respecting customs may be, if customs are a source of discrimination against women, they—like any other norm—must evolve. This is crucial not only for the sake of women's equality, but because there are real social consequences to depriving half the population of their property rights. International organizations have identified women's insecure property rights as contributing to low agricultural production, food shortages, underemployment, and rural poverty. In Kenya, more than half of the population lives in poverty, the economy is a disaster, and HIV/AIDS rates are high. The agricultural sector, which contributes a quarter of Kenya's gross domestic product and depends on women's labor, is stagnant. If Kenya is to meet its development aims, it must address the property inequalities that hold women back.

Unequal property rights and harmful customary practices violate international law. Kenya has ratified international treaties requiring it to eliminate all forms of discrimination against women (including discrimination in marriage and family relations), guarantee equality before the law and the equal protection of the law, and ensure that women have effective remedies if their rights are violated. International law also obliges states to modify discriminatory social and cultural patterns of conduct. Kenya is violating those obligations.

With a new government in office and a new draft constitution containing provisions that would enhance women's property rights set for debate, this is a pivotal time for Kenya to confront the deep property inequalities in its society. It must develop a program of legal and institutional reforms and educational outreach initiatives that systematically eliminates obstacles to the fulfillment of women's property rights.

This report is based on more than 130 interviews conducted in Kenya in October and November 2002 and prior and subsequent research. The interviews took place in Nairobi, Kajiado district, Kisumu district, and Kiambu district. Human Rights Watch interviewed individual women and men from a variety of locations and ten ethnic groups (Kikuyu, Luhya, Luo, Kamba, Kisii, Meru, Nandi, Maasai, Maragoli, and Asian/Punjabi) as well as government officials, United Nations representatives, nongovernmental organizations (NGOs), lawyers, paralegals, academics, judges, members of law review commissions, religious officials, local traditional leaders, and donor government officials. The names of individual women and men have been changed to protect their privacy unless otherwise indicated. Other identifying information has been withheld where necessary.

## II. RECOMMENDATIONS

### To the Government of Kenya

The government of Kenya should take immediate steps to improve systematically women's property rights in law and in practice and remove obstacles to their realization. Specifically:

#### *Legal Reforms*

- Adopt key provisions in the draft constitution, including those that:
  - prohibit discrimination on the basis of sex and marital status;
  - guarantee women's right to equal treatment with men, including equal rights to inherit, have access to, and control property;
  - prohibit any law, custom, or tradition that undermines women's dignity, welfare, interest, or status;
  - guarantee every person the right to acquire and own property;
  - ensure that every person has the right to adequate housing; and
  - require parliament to enact laws protecting spousal rights to inherit land and laws protecting matrimonial property during and at the termination of marriage.

These constitutional rights should apply equally to women from all religions and ethnic groups: any concessions to religious or customary laws should not diminish women's equal constitutional rights.

- If a new constitution is not adopted in the near future, repeal articles 82(4) and (6) of the current constitution, which sanction discrimination against women in personal and customary laws.
- Amend or repeal all laws that violate women's property rights, including the provisions of the Law of Succession Act which terminate widows' inheritance rights upon remarriage; exempt certain districts from the rules relating to inheritance without wills; and privilege fathers over mothers for inheritance from children. Repeal the amendment to the Law of Succession Act that exempts Muslims.
- Enact legislation that prohibits gender-based discrimination and promotes women's equal property rights, including laws that:
  - create a presumption of spousal co-ownership of family property;
  - establish a presumption that family property should be divided equally upon separation or divorce;
  - require that all marriages be registered in a central registry;
  - promote women's access to and ownership of land;
  - require family consent for transfers of family land and housing;
  - criminalize spousal rape;
  - establish that payment of dowry is not a legal requirement for any type of marriage; and
  - implement and domesticate the Convention on the Elimination of All Forms of Discrimination against Women.

#### *Institutional and Programmatic Reforms and Initiatives*

- Launch awareness campaigns to inform the public about women's property rights. Distribute information in local languages about rights to inheritance and division of family property; writing wills; registering marriages; co-registering property; and the health risks of customary sexual practices tied to property rights, such as the risk of contracting HIV/AIDS. Public service announcements should be aired, such as through the Kenya Broadcasting Company and other radio and television stations with significant reach in the country, that provide information on women's property rights. Establish information centers throughout the country to distribute this information.

- Create and implement programs that address the link between property rights violations and women's vulnerability to HIV/AIDS, including in public education campaigns and other initiatives of the National AIDS Control Council. The programs should be based on consultations with nongovernmental and community-based organizations.
- Address harmful social and cultural patterns of conduct based on the idea of women's inferiority and stereotyped gender roles. In particular, encourage traditional leaders to transform discriminatory customary laws relating to property by emphasizing that, in keeping with their evolving and flexible nature, they should be interpreted to promote women's equality. Support greater participation by women in decision making at the community level.
- Move to end harmful customary practices such as "wife inheritance" and ritual "cleansing" of widows, including by prosecuting rape and forced marriage cases and by providing education on the harmful effects of these practices.
- Improve mainstreaming of women's equal property rights issues in government offices and programs by establishing gender units within ministries and appropriately funding the women's rights activities of the new Ministry of Gender, Sports, Culture and Social Services.
- Provide training for judges, magistrates, police, and relevant local and national officials on laws relating to women's equal property rights and their responsibility to enforce those laws. Include women's property rights in the required curriculum of police training academies and law schools.
- Implement reforms of the court system aimed at eliminating backlogs and corruption and streamlining procedures. Establish family divisions in courts outside Nairobi and ensure that family division judges and magistrates have expertise in family law and women's rights.
- Set up a national legal aid system with the capacity to represent indigent women in civil property matters. Support the activities of nongovernmental organizations that provide legal services to women whose property rights have been violated.
- Establish or fund shelters for women who have suffered domestic violence and ensure that women in those shelters have access to legal, counseling, and medical services.
- Ensure that housing policies and programs address women's specific concerns. Incorporate into housing policies strategies for assisting widows, divorced or separated women, mothers, and HIV/AIDS affected women with their particular housing needs.
- Ensure that private acts that violate women's property rights are investigated, prosecuted, and punished appropriately.
- Commence operations of the Kenya National Commission on Human Rights and ensure that it is independent and has adequate support. This commission should have women's rights experts on staff and should monitor and investigate women's property rights violations, educate women and men throughout the country about those rights, and facilitate resolution of property disputes.
- Collect, maintain, and publish data on property ownership and inheritance, disaggregated by sex.
- The president, members of parliament, and other government leaders should publicly condemn laws and customs that discriminate against women and should strongly support efforts to realize women's equal property rights in law and in practice.

## **To Donors and International Organizations**

- The World Bank, donors, and United Nations agencies must work with the government of Kenya to ensure that development policies and programs are designed and implemented to promote women's property rights and that concrete steps are taken to eliminate discriminatory laws and customs that undermine development efforts, specifically in the area of women's equal property rights.
- The World Bank and the International Monetary Fund (IMF) should press the Kenyan government to abide by its commitments under its current Poverty Reduction Strategy Paper (PRSP) and make the elimination of women's property rights violations a central part of its next PRSP.
- Donors should increase financial and technical assistance to civil society organizations and government offices that combat women's property rights abuses, including those that provide legal services; shelter, educational assistance, food, and medical care; credit; civic education programs on women's property rights; and training of judicial officers on international and domestic laws relating to women's equal property rights. In particular, donors should support organizations that provide information (e.g., through paralegals) to men, women, and traditional leaders in rural areas, and should provide funding for local language translations of laws and informational materials. Both the timeframe for funded projects and the amount of assistance should increase in light of the chronic and widespread nature of women's property rights abuses.
- The United Nations Development Programme (UNDP), the United Nations Development Fund for Women (UNIFEM), the Joint United Nations Programme on HIV/AIDS (UNAIDS), and other international organizations should study the links between women's property rights abuses, poverty, violence, and HIV/AIDS in Kenya.
- The special rapporteur on adequate housing appointed by the United Nations Commission on Human Rights should continue and expand his reporting on women's property rights violations, including by examining how discrimination in inheritance and division of family property impede the realization of women's right to adequate housing.
- The United Nations Commission on Human Rights should continue to adopt resolutions on women's equal ownership, access to, and control over land and the equal rights to own property and to adequate housing; the elimination of violence against women; and the protection of human rights in the context of HIV/AIDS.
- The African Union should improve and adopt the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, including by recognizing women's equal inheritance rights and by removing any termination of such rights upon remarriage.
- Donors should link some funding provided through the New Partnership for Africa's Development (NEPAD) to development initiatives that address women's equal property rights.

### III. BACKGROUND

*The current state of gender relations treats male dominance as legitimate, natural, obvious and inevitable. The effect is to create a social-power hierarchy, in the context of which women are, by-and-large, reduced to powerlessness, economic marginalisation, social vulnerability, and cultural inferiority, without any regard to their actual level of contribution to the processes of social production and development.*

—Report of the Task Force for the Review of Laws Relating to Women, Nairobi, 1998

Women's limited ability to own, acquire, and control property in Kenya is the product of historical, political, legal, and social developments in a society that has only haltingly addressed its extreme gender inequalities.<sup>1</sup> After decades of authoritarian rule under President Daniel arap Moi, Kenya has recently emerged with a new government, an initiative for a new constitution, and a citizenry electrified by the possibility of real social change. In this context, it is critical for women's property rights to be high on Kenya's legislative and policy agendas.

Women's property rights abuses are not exclusive to one social class, ethnic group, religion, or region. This is not to say that no women inherit, own, or control property, but rather that the problems cut across populations. Human Rights Watch interviewed illiterate women and those with advanced degrees, and found their property experiences remarkably similar. Urban women lost their possessions just like rural women, with a slightly greater chance of staying in their (looted) homes. Though western Kenya is notorious for its discriminatory customary practices related to property, women from all over the country told Human Rights Watch of abuses. Rich and poor, in monogamous and polygamous unions, women struggled not just with losing their property, but also with being ostracized by their families and communities if they attempted to assert their rights. While the details varied, women described the same end result: men or in-laws got the property, and women lost out. "Even in middle-class, educated households, women are not able to exercise their property rights," said the head of the government Women's Bureau. "Men are too adamant. It's a tug of war, and women let go."<sup>2</sup> The one notable difference was that more educated and wealthier women, especially those with monetary income, were more likely to hire legal counsel to assert their rights.

Though difficult to quantify, experts say that women's property rights abuses are widespread and increasing. "The problem of women's disinheritance is rampant," said one property lawyer. "I can't even imagine the number of cases."<sup>3</sup> A paralegal who works with widows remarked, "With the increase of poverty there is an increase of disinheritance... Women are disinherited here on a daily basis. From what I know, from

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<sup>1</sup> This background section is intended as a basic introduction to the history of women's property rights in Kenya, and does not attempt to capture the many variations of the different ethnic groups' histories and customs. It is based on a variety of sources, including: Eugene Cotran, *Casebook on Kenya Customary Law* (Nairobi: Professional Books Limited, 1987); Smokin C. Wanjala, *Essays on Land Law: The Reform Debate in Kenya* (Nairobi: Faculty of Law, University of Nairobi, 2000); Abdullahi A. An-Na'im, *Cultural Transformation and Human Rights in Africa* (New York: Zed Books Ltd., 2002); Kivutha Kibwana and Lawrence Mute, *Law and the Quest for Gender Equality in Kenya* (Nairobi: Clairpress Limited, 2000); Marjolein Benschop, *Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa?* (Nairobi: United Nations Human Settlements Programme, 2002); Patricia Kameri-Mbote, "Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences," IELC Working Paper No. 2001-1 (2002); Task Force for the Review of Laws Relating to Women, *Women's Status and Rights in Kenya: Report of the Task Force for the Review of Laws Relating to Women* (Nairobi, 1998); Kenya Human Rights Commission, *Women and Land Rights in Kenya* (Nairobi: Kenya Human Rights Commission, 2000); Human Rights Watch interview with Odenda Lumumba, coordinator, Kenya Land Alliance, Nairobi, October 18, 2002; Human Rights Watch interview with Jennifer Miano, senior program officer (advocacy), Kenya Human Rights Commission, Nairobi, October 16, 2002; and Human Rights Watch interview with Mbugua Mureithi, coordinator, Kituo Cha Sheria, Nairobi, October 26, 2002.

<sup>2</sup> Human Rights Watch interview with Mary Wambua, head, Women's Bureau, Nairobi, November 6, 2002.

<sup>3</sup> Human Rights Watch interview with Ann Njogu, executive director, Centre for Rehabilitation and Education of Abused Women, Nairobi, October 16, 2002.



the year 1990 to now, disinheritance has severely risen.”<sup>4</sup> The customary practices of “wife inheritance” (whereby a widow is “inherited” by a male relative of her deceased husband, often becoming a junior wife) and ritual “cleansing” (involving sex with a man of low social standing to “cleanse” a widow of her dead husband’s “evil spirits”) do not appear to be dying out. According to one women’s rights activist, “Wife inheritance has increased. People don’t care about AIDS.”<sup>5</sup>

### **Historical Context**

Prior to the colonial era, property in Kenya was primarily controlled and allocated at the clan level. Land in particular could not be transferred without approval of clan elders, who were almost always men. Women’s access to most property was through male relatives (usually husbands, fathers, brothers, or sons). In most of Kenya’s ethnic groups, which number over forty, a husband’s clan essentially “absorbed” a woman upon marriage. Marriage resulted from a process involving family negotiations (including dowry payment by the man to the bride’s family) and ongoing social practices, as opposed to a single wedding event. Married women left their parents’ homestead to live and work on their husbands’ clan’s land. Men typically controlled land allocation, yet women were responsible for most aspects of crop production. Although women’s property rights were limited, social structures protected both women and men against exclusion from land, Kenya’s most important asset. “Within the customary tenure structure before the English system was imposed, there were elements of discrimination under the patrilineal system,” said one land rights expert. “But women were guaranteed land use rights. Control was not with men or women, but rather the elders. Everyone accessed the land.”<sup>6</sup>

In most ethnic groups, inheritance was patrilineal. A married woman did not inherit from her parents since her husband’s family was expected to provide for her. Unmarried daughters could expect to inherit something, but not on an equal basis with their brothers. Women did not inherit from their husbands, but if they had sons, they could continue to live and work on the husband’s land, holding it in trust for the sons. Sometimes, women were inherited by male relatives of the deceased husbands.<sup>7</sup>

Customary divorce rules varied among the ethnic groups, but women generally got either nothing, the items their own families gave them, or personal effects and a small portion of the family property (if they contributed to its acquisition). Divorced women normally returned to their parents, who were to provide for and allocate land to the women. Divorce in many clans was contingent on repayment of the dowry.

After the British colonized Kenya in the late 1800s, communal, clan-based property systems eroded as colonial authorities expropriated land, uprooted many indigenous Kenyans from their ancestral lands, crowded them onto “native reserves,” and later introduced an individual titling system. The land titling system recognized men’s right to allocate land for agricultural use as more akin to ownership, and men gained title deeds. Women’s right to use land received no legal recognition. Their secure land tenure evaporated as land became a commodity that men could sell without clan approval. As the cash economy developed and land grew scarce, men could sell land whether their families agreed or not. Moreover, men as titleholders had sole rights to agricultural surplus although women provided most of the labor. Colonial authorities also introduced piecemeal legislation on marriage, divorce, and inheritance, applying different rules to different populations.

### **Post-Independence Legislative Initiatives**

Kenya gained independence from the British in 1963 after a struggle inspired in part by inequalities in the colonial land regime. In the decades following independence, some colonial-era laws lingered and many new laws were introduced, none of which adequately protected women’s property rights. Women continue to suffer

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<sup>4</sup> Human Rights Watch interview with Eunice Awino, paralegal, Education Centre for Women in Democracy, Siaya, November 2, 2002.

<sup>5</sup> Ibid.

<sup>6</sup> Human Rights Watch interview with Odenda Lumumba, coordinator, Kenya Land Alliance, Nairobi, October 18, 2002.

<sup>7</sup> In some communities, when a wife was inherited, children she had with the inheritor were considered his children. In others, the union was levirate, meaning that children from the union were deemed those of the deceased father.

property discrimination sanctioned by Kenya's constitution, laws, and practices. Legislative reforms have faltered, but the constitutional reform process holds some promise.

Land law reform has been a constant theme of public debate since independence but with an emphasis on ethnic and socioeconomic equality, not gender equality. The extreme gender imbalance in land ownership resulting from the colonial titling system persists. A commission on land laws recently reviewed Kenya's many and somewhat contradictory land laws, but its report was not publicly released as of early February 2003.<sup>8</sup>

Kenya's patchwork of family and inheritance laws was reviewed in the 1960s by commissions that recommended revamping those laws in favor of an integrated system. The recommendations on inheritance resulted in the Law of Succession Act of 1981, which falls short of complete uniformity. Recommendations on family laws, including creation of a central marriage registry and uniform rules for division of family property upon divorce or separation, fell through. Subsequent attempts to reform Kenya's family laws have limped along with few tangible results.<sup>9</sup> A 1985 bill would have created a central marriage registry and a uniform law recognizing spouses' equal rights in division of property but was shelved when members of parliament said it interfered with men's ability to "chastise" their wives.<sup>10</sup>

Kenya's current constitution outlaws discrimination on the basis of sex, but exemptions for discrimination in personal and customary laws eviscerate the nondiscrimination provisions (see Discriminatory Laws in Part V below). A new constitution may be the best hope for legal protection of women's property rights. Kenya's constitutional review process commenced in 1998. After consultations with local people in all provinces, a draft constitution was released in September 2002 and the new government has pledged to commence debates on the draft in the first half of 2003. The draft constitution revamps the bill of rights and includes provisions that would be an enormous improvement over the current constitution in terms of women's property rights.<sup>11</sup> In response to arguments of Muslim leaders that constitutional equality would violate Islamic law, the draft excludes Muslims from the equality provisions of the bill of rights in relation to marriage, divorce, and inheritance, in contradiction of human rights principles.<sup>12</sup>

### **Marriage Laws and Practices**

There are five separate legal systems for marriage in Kenya: civil (under the Marriage Act), Christian (under the African Christian Marriage and Divorce Act and the Marriage Act), Islamic (under the Mohammedan Marriage, Divorce and Succession Act), Hindu (under the Hindu Marriage and Divorce Act), and customary (under customary laws). All types of marriages other than customary must be registered, but there are different and unconnected registries for each type, making it possible to have multiple marriages registered under the different systems, in contravention of the law.

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<sup>8</sup> The Commission of Inquiry into the Land Law Systems of Kenya (also known as the "Njonjo Commission" after its chairman, Charles Njonjo) was appointed in 1999. Its mandate is to review land legislation and customary laws and to make recommendations for a land policy framework. It submitted a report to the government in November 2002.

<sup>9</sup> In 1998, a government-commissioned Task Force for the Review of Laws Relating to Women submitted a report on laws, practices, customs, and policies that constrain women's equal enjoyment of their rights and proposed certain property rights and family law reforms. Bills were drafted on the basis of the task force's recommendations (including bills on equality, domestic violence, and affirmative action), but none have become law.

<sup>10</sup> Janet Kabeberi-Macharia, *Women, Laws, Customs and Practices in East Africa: Laying the Foundation* (Nairobi: Women and Law in East Africa, 1995), pp. 83-84.

<sup>11</sup> The provisions that would improve women's property rights prohibit discrimination on the basis of sex and marital status; guarantee women's right to equal treatment with men, including equal rights to inherit, have access to, and control property; prohibit any law, culture, custom, or tradition that undermines women's dignity, welfare, interest, or status; guarantee every person the right to acquire and own property; ensure that every person has the right to adequate housing; and require parliament to enact laws protecting matrimonial property, including the matrimonial home, during and at the termination of marriage and laws protecting spousal rights to inherit land. Draft Bill of the Constitution of Kenya Review Commission, articles 34, 35, 38, 54, 59, and 235(4)(a)(iv) and (v).

<sup>12</sup> Section 31(4) of the draft constitution provides: "The provisions of this chapter on equality shall be qualified to the extent strictly necessary for the application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance." Muslims are estimated to constitute between 5 and 30 percent of Kenya's population.

Marriages under the civil, Christian, and Hindu regimes are legally required to be monogamous. A spouse who enters into another marriage while married under these regimes commits bigamy under Kenya's criminal law, but this crime is rarely prosecuted. Marriages under the Islamic and customary regimes are potentially polygynous.<sup>13</sup> Islamic law allows a man to have up to four wives; customary laws do not limit the number of wives.

Although cohabitation is not formally recognized under Kenya's statutes, courts have developed the common law principle of presumption of marriage, conferring some marital rights and duties on cohabiting couples meeting certain criteria. The exact criteria vary, but judges generally weigh the length of the cohabitation, whether there are children, and whether the man and woman held themselves out as husband and wife.

The existence of customary marriages can be difficult to prove since they are not registered, but are rather formed through a series of customary steps. The steps vary among the ethnic groups but generally include elements such as dowry payment by the man's family to the woman's family (not to the woman directly); consent of the parties and their families; the slaughter of a ram or goat; and cohabitation. Although women married under customary laws are considered part of their husband's clan, when it comes to property ownership, they are regarded as neither full members of their natal nor their marital clans.

### **Women's Status in Kenya**

By just about any measure, women in Kenya are worse off than men. Their average earnings are less than half those of men.<sup>14</sup> Only 29 percent of those engaged in formal wage employment are women, leaving most to work in the informal sector with no social security and little income.<sup>15</sup> The numbers of women in formal employment are decreasing.<sup>16</sup> Women head 37 percent of all households in Kenya, a number likely to grow as AIDS claims more victims.<sup>17</sup> Eighty percent of female-headed households are either poor or very poor, in part due to their limited ownership of and access to land.<sup>18</sup> Girls receive less education than boys at every level, and women's literacy rate (76 percent) is lower than men's (89 percent).<sup>19</sup> Violence against women is commonplace: 60 percent of married women reported in a 2002 study that they are victims of domestic abuse.<sup>20</sup> In another study

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<sup>13</sup> In Kenya, sixteen percent of currently married women ages fifteen to forty-nine are in polygynous unions. *The World's Women 2000: Trends and Statistics* (New York: United Nations, 2000), p.28. Polygyny is the form of polygamy in which a man has more than one wife. Its counterpart, polyandry (where women have more than one husband) is unknown in Kenya. While the women interviewed for this report did not cite polygyny as a prime cause of their dispossession, it does pose economic challenges for families as they redistribute existing resources. In addition, the U.N. Committee on the Elimination of Discrimination against Women (CEDAW Committee) noted in a General Recommendation that polygamy violates human rights principles. It stated: "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention." CEDAW Committee, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 90 (1994), para. 14. "General Recommendations" are written elaborations of obligations under treaties that are issued by treaty bodies and directed at states parties.

<sup>14</sup> Republic of Kenya, *National Development Plan 1997-2001* (Nairobi: Government Printer, 1997), p. 146. In 1999, the per capita annual income in Kenya was estimated at U.S.\$306. United Nations Development Programme, *Kenya Human Development Report 2001* (Nairobi: UNDP, 2002), p. 30.

<sup>15</sup> Republic of Kenya, *Poverty Reduction Strategy Paper for the Period 2001-2004* (Nairobi: Ministry of Finance and Planning, 2001), p. 36.

<sup>16</sup> Republic of Kenya, *Economic Survey 2002* (Nairobi: Government Printer, 2002), p. 2.

<sup>17</sup> *Ibid.*, p. 8.

<sup>18</sup> Gita Gopal and Maryam Salim, *Gender and Law: Eastern Africa Speaks* (Washington, D.C.: The World Bank, 1998), p. 20.

<sup>19</sup> United Nations Development Programme (UNDP), *Human Development Report 2002* (New York: UNDP, 2002), p. 224.

<sup>20</sup> Tony Johnston, *Domestic Abuse in Kenya* (Nairobi: Population Communication Africa, 2002), p. 10.

published in 2002, 83 percent of women reported physical abuse in childhood and nearly 61 percent reported physical abuse as adults.<sup>21</sup> According to women's rights advocates, there is only one shelter for battered women and their children in the entire country.<sup>22</sup>

Women's land ownership is miniscule despite their enormous contribution to agricultural production. Women account for only 5 percent of registered landholders nationally.<sup>23</sup> The agricultural sector contributes over 80 percent of employment and 60 percent of national income.<sup>24</sup> Women constitute over 80 percent of the agricultural labor force, often working on an unpaid basis, and 64 percent of subsistence farmers are women.<sup>25</sup> Women provide approximately 60 percent of farm-derived income,<sup>26</sup> yet female-headed households on average own less than half the amount of farm equipment owned by male-headed households.<sup>27</sup> Rural women work an average of nearly three hours longer per day than rural men.<sup>28</sup> With so many women working in the agricultural sector and so few in formal employment, it is all the more devastating when women lose their land.

### **HIV/AIDS and Women in Kenya**

Kenya's catastrophic HIV/AIDS prevalence also reflects women's subordinate status.<sup>29</sup> One out of every eight adults in rural Kenya, and nearly one out of five adults in urban areas, is infected, though most do not know it.<sup>30</sup> According to the United Nations, an estimated 2.5 million individuals had HIV/AIDS in Kenya at the end of 2001, including 15 percent of those between ages fifteen and forty-nine.<sup>31</sup> Of those infected, 1.4 million were women and girls between ages fifteen and forty-nine.<sup>32</sup> The HIV infection rate in girls and young women fifteen to nineteen years old is about six times higher than that of their male counterparts in the most heavily affected region<sup>33</sup> and three times higher than males of that age in the country overall.<sup>34</sup> The large number of AIDS deaths has reduced life expectancy from sixty-five years to about forty-six years.<sup>35</sup>

Kenya's failure to eliminate discriminatory property inheritance practices exacerbates the already unimaginable havoc caused by HIV/AIDS. Women with AIDS in Kenya, virtually all of whom were infected by husbands or regular male partners, are essentially condemned to an early death when the women's homes, lands, and other property are taken. They not only lose assets they could use for medical care, but also the shelter they need to endure this debilitating disease. Moreover, the failure to ensure equal property rights upon separation or divorce discourages women from leaving violent marriages. Those women risk exposure to HIV infection due to

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<sup>21</sup> Tony Johnston, *Violence and Abuse of Women and Girls in Kenya* (Nairobi: Population Communication Africa, 2002), p. 12.

<sup>22</sup> Human Rights Watch interview with Anne Kyalo-Ngugi, chairperson, Women's Rights Awareness Programme (WRAP), Nairobi, October 23, 2002. The one shelter in Kenya is operated by WRAP, a nongovernmental organization.

<sup>23</sup> Celestine Nyamu-Musembi, "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights," in Abdullahi A. An-Na'im, *Cultural Transformation and Human Rights in Africa* (New York: Zed Books Ltd., 2002), p. 136.

<sup>24</sup> Republic of Kenya, *Poverty Reduction Strategy Paper for the Period 2001-2004*, p. 39.

<sup>25</sup> Republic of Kenya, *A Gender Analysis of Agriculture in Kenya* (Nairobi: Ministry of Home Affairs, Heritage and Sports, 2000), p. 1 and Gopal, *Gender and Law: Eastern Africa Speaks*, p. 22.

<sup>26</sup> Task Force for the Review of Laws Relating to Women, *Women's Status and Rights in Kenya*, p. 294.

<sup>27</sup> World Bank, *Engendering Development* (New York: Oxford University Press, Inc., 2001), p. 52.

<sup>28</sup> *Ibid.*, p. 66.

<sup>29</sup> For more detailed information on AIDS in Kenya, see Human Rights Watch, "In the Shadow of Death: HIV/AIDS and Children's Rights in Kenya," *A Human Rights Watch Report*, vol. 13, no. 4(A), June 2001.

<sup>30</sup> Republic of Kenya, *AIDS in Kenya* (Nairobi: Ministry of Health, 2001), p. vii.

<sup>31</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS), *Report on the Global HIV/AIDS Epidemic* (Geneva: UNAIDS, 2002), p. 190. The Kenyan government has announced a much lower prevalence of 10.2 percent. Dorah Nesoba, "Women Hardest Hit by HIV/AIDS, Says Health PS," *East African Standard*, November 28, 2002 [online], <http://allafrica.com/stories/200211280190.html> (retrieved January 20, 2003).

<sup>32</sup> *Ibid.*

<sup>33</sup> UNAIDS, *Report on the Global HIV/AIDS Epidemic*, pp. 26-27.

<sup>34</sup> Dorah Nesoba, "Women Hardest Hit by HIV/AIDS, Says Health PS," *East African Standard*, November 28, 2002 [online], <http://allafrica.com/stories/200211280190.html> (retrieved January 20, 2003).

<sup>35</sup> *Ibid.*

the correlation between HIV/AIDS and domestic violence, which often involves coercive sex, diminishes women's ability to negotiate safe sex and condom use, and impedes women from seeking health information and treatment. The Kenyan government only recently outlined how it intends to mainstream gender concerns in its HIV/AIDS strategic plan, and acknowledged its failure to do so to date.<sup>36</sup>

### Customary Laws Today

Since customary laws to this day have a profound impact on women's property rights, it is important to understand their nature, their place in Kenya's legal system, and basic principles. Customary laws are mostly unwritten and constantly evolving norms that exist in parallel with statutory law but derive legitimacy from tradition and custom rather than a government act. There are as many customary laws as there are tribal communities, and each has its own nuances. Kenya's legal system formally recognizes customary laws. The Judicature Act provides that courts' jurisdiction must be exercised in conformity with the constitution, statutes, and other sources of formal law, adding that courts should be guided by customary law so far as it is "applicable and is not repugnant to justice and morality or inconsistent with any written law."<sup>37</sup> Traditional leaders (such as elders) and local authorities (such as government-appointed chiefs) are the primary enforcers of customary laws. Judges and magistrates also apply customary laws in some court proceedings. In terms of their content, customary laws largely follow pre-colonial patterns with regard to women and property rights.<sup>38</sup>

Customary law is fluid and prone to subjective interpretation. This malleability can have advantages for those trying to effect social change through local norms, but one cannot assume that the local norms support women's equality. One legal expert explained, "[Most] customary law is unwritten. Those interpreting it bring their own biases and women-unfriendly notions."<sup>39</sup> Its subjective nature was confirmed by a senior chief, who said, "Customary law is what I describe."<sup>40</sup> Some individual women and advocates are quite critical of customary law. "Custom will suit the person who is complaining," said one divorced woman. "It is not cut and dry. [Officials] take the bits that suit them.... The attitude of custom is still there—women shouldn't complain, shouldn't fight."<sup>41</sup> A lawyer asserted, "Custom is invented today by men as a result of greed."<sup>42</sup> Customary law can also be manipulated at the family level. According to a law professor, "Customary law is really a family thing."<sup>43</sup>

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<sup>36</sup> See Gender and HIV/AIDS Technical Sub-Committee of the National AIDS Control Council, *Mainstreaming Gender into the Kenya National HIV/AIDS Strategic Plan 2000-2005* (Nairobi: Office of the President, 2002), p. 19. This document sets out objectives, including establishing an institutional policy framework for integrating gender into all HIV/AIDS policies and programs; creating a gender responsive legal framework for HIV/AIDS prevention, treatment, and care; and ensuring that adequate human and financial resources are available for gender responsive HIV/AIDS programming. It acknowledges that explicit strategies focused specifically on gender were not included in the development of HIV/AIDS policies and programs in Kenya.

<sup>37</sup> Judicature Act, chapter 8, article 3.

<sup>38</sup> This by and large means that married women do not inherit from their parents; unmarried women inherit less from their parents than their brothers; women with sons may retain their husbands' property, but only to hold it in trust for the sons; women with no children or daughters only are not likely to inherit from their husbands, and the husband's estate is given to male relatives as if he were unmarried; divorced or separated women are expected to leave the conjugal home and return to their parents with nothing more than personal items; unmarried daughters can use land in the paternal household, but only for certain crops; and married women have less control over significant family property than men. Depending on the community, property a wife acquires before and during a marriage is controlled and essentially owned by the husband. In some villages, the hut a widow shared with her husband is destroyed after his death, and her inheritor builds her a new (and often inferior) hut after she is cleansed or inherited. There are many variations among the different ethnic groups and even at the clan and family levels.

<sup>39</sup> Human Rights Watch interview with Dr. Patricia Kameri-Mbote, director (policy research and outreach), African Center for Technology Studies, Nairobi, October 17, 2002.

<sup>40</sup> Human Rights Watch interview with Wilson Tulito Molill, senior chief, Ngong, October 25, 2002.

<sup>41</sup> Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

<sup>42</sup> Human Rights Watch interview with Martha Karua, advocate, Martha Karua & Company Advocates, Nairobi, November 11, 2002.

<sup>43</sup> Human Rights Watch interview with Dr. Patricia Kameri-Mbote, director (policy research and outreach), African Center for Technology Studies, Nairobi, October 17, 2002.

## Wife Inheritance and Ritual Cleansing

The customary practices of wife inheritance and ritual cleansing continue in parts of Kenya with some permutations.<sup>44</sup> The original practice of wife inheritance (known as *ter* in the Dholuo language spoken in western Kenya) was a communal way of providing widows economic and social protection. Since widows were not entitled to inherit property in their own right, being inherited was a way to access land. An inheritor was supposed to support the widow and her children. Although the terms “wife inheritance” and “cleansing” are sometimes used interchangeably, wife inheritance generally refers to the long-term union of a widow and a male relative of the deceased, and cleansing typically refers to a short-term or one-time sexual encounter with a man paid to have sex with the widow. These practices reflect the common belief that women cannot be trusted to own property and the belief that widows are contaminated with evil spirits when their husbands die.

Wife inheritance and cleansing practices take a number of different forms depending on the clan. First, there is non-sexual wife inheritance, whereby the coat of an inheritor is placed in a widow’s house overnight to symbolically cleanse her. This generally applies to widows beyond childbearing age. Second, there is inheritance involving long-term sexual relations, typically with a brother of the deceased, in what amounts to a marriage. Third, there is a combination of cleansing and inheritance, whereby a widow first has sex with a social outcast (known as a *jater* in Dholuo) who is paid to have sex with her to cleanse her of her dead husband’s spirits, and is then inherited by a male relative of the dead husband. Fourth, there is cleansing alone, where a widow has sex with a *jater* to cleanse her but is not inherited permanently.

Women’s property rights closely relate to wife inheritance and cleansing rituals in that many women cannot stay in their homes or on their land unless they are inherited or cleansed. According to one women’s rights advocate, “Women have to be inherited to keep any property after their husbands die. They have access to property because of their husband and lose that right when the husband dies.”<sup>45</sup> Women who experienced these practices told Human Rights Watch they had mixed feelings about them. Most said the cleansing and inheritance were not voluntary, but they succumbed so that they could keep their property and stay in their communities.

Wife inheritance is often portrayed as an act of generosity in that the widow will have a man to “look after” her and confer the legitimacy of being in a male-headed household. But men clearly benefit not just from their inherited wife’s labor and childbearing potential, but also from the property the deceased husband leaves behind. A law professor observed, “Wife inheritance is a very common way to access property. If women resist, they are sent out of the household.”<sup>46</sup> Steven Oketch, a forty-three-year-old man from the Luhya ethnic group, told Human Rights Watch that he inherited his cousin’s widow three months after his cousin died. Oketch initially moved into the widow’s house and has since built a home and planted sugar cane on the land.<sup>47</sup> As one widow told Human Rights Watch, a man who inherits a woman “inherits her home.” A paralegal who works with widows added: “Men feel that if they stay with a woman, they will get the dead man’s clothes and property. Younger brothers of a husband feel that since the husband died, now he can take the brother’s belongings. They don’t consider the wife of any consequence.”<sup>48</sup> Thus, even if wife inheritance was originally protective and if cleansing is supposed to be a benevolent way to “purify” widows, these practices are now in many ways predatory and exploitive.

Wife inheritance and cleansing practices also pose frightening health risks. These practices are common in western Kenya, home of Kenya’s poorest province (Nyanza Province has an absolute poverty rate of 63

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<sup>44</sup> These practices are most notorious among the Luo and Luhya ethnic groups, but are not exclusive to those communities.

<sup>45</sup> Human Rights Watch interview with Wambui Kanyi, Collaborative Centre for Gender and Development, Nairobi, October 27, 2002.

<sup>46</sup> Human Rights Watch interview with Dr. Patricia Kameri-Mbote, director (policy research and outreach), African Center for Technology Studies, Nairobi, October 17, 2002.

<sup>47</sup> Human Rights Watch interview with Steven Oketch, Siaya district, November 3, 2002.

<sup>48</sup> Human Rights Watch interview with Eunice Awino, paralegal, Education Centre for Women in Democracy, Siaya, November 2, 2002.

percent<sup>49</sup>) and the most heavily AIDS-affected district (Kisumu district had a prevalence of 35 percent in 2000<sup>50</sup>). According to one news report, one in three widows in western Kenya is forced to undergo the cleansing ritual.<sup>51</sup> Condom use has lagged, in part because cleansing is not considered complete unless semen enters the widow and because women's inequality makes it difficult to demand condom use.

Human Rights Watch learned of the cleansing practices in one village from Guy Udoyi, a jater who has cleansed at least seventy-five widows in the two years he has worked as a jater. He has not been tested for HIV. Udoyi, who is paid in cash (approximately KSh5,000 or U.S.\$63)<sup>52</sup> or livestock (cows, goats, and hens) by widows' in-laws, told Human Rights Watch:

I don't use condoms with the women. It must be body to body. I must put sperm in her.... If no sperm comes out, she is not inherited.... I don't do anything to stop pregnancy. Two widows have had my children. I don't act as the father or give assistance, but I'm considered the father.

I've heard about how you get AIDS. I'm getting scared. You get it by having sex, and you must use a condom to prevent it. But the widows don't want to hear about condoms. They want skin to skin. There are inheritors who are infected with HIV. They don't use condoms.<sup>53</sup>

Udoyi explained that superstitions, which he shares, motivate this custom. He also said that the occupation of jater, though in great demand, is not respected. "People think it's a dirty job," he said. "They look at me as a fool whom the spirits [of dead husbands] won't haunt.... We fear devils. The spirit of the deceased can haunt you." He explained that if a widow is not cleansed, she and her children will have bad luck and be ostracized. "Women are forced to do this," he acknowledged. He said there is no comparable cleansing for widowers.

Fear of HIV/AIDS has not resulted in a drastic reduction of these practices. According to a representative of a women's organization that works with women affected by HIV/AIDS, "The traditions haven't changed much due to HIV/AIDS." She observed:

Widows have gone public with AIDS. Everyone will know she's HIV-positive, but in-laws will still insist that she be inherited. They feel that the evil spirits of the dead husband will follow otherwise.... Few people use condoms. They're not widely accepted. For a woman to try to negotiate condom use, she can be beaten or accused of having other men.

They believe cleansing has to be skin to skin. Before a woman is inherited, she must be cleansed. This is mostly done by drunkards or crazy men. That person won't bother to use a condom.... Widows who refuse to be cleansed or inherited are called "dirty women." Communities put so much pressure on women to be inherited. If they're not inherited, they can't go into other people's homes, their children are threatened with being thrown out of the clan, and they won't dig a grave for the widow if she dies.<sup>54</sup>

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<sup>49</sup> Institute of Economic Affairs, *The Little Fact Book: The Socio-Economic and Political Profiles of Kenya's Districts* (Nairobi: Institute of Economic Affairs, 2002), p. x-xi. "Absolute poverty" is defined by a poverty line that is fixed over time in real terms and is country-specific, based on local consumption patterns and prices. The conventional definition is living on less than U.S.\$1 a day.

<sup>50</sup> Republic of Kenya, *AIDS in Kenya*, p. 4. "Prevalence" is the percentage of people living with HIV at a specific point in time.

<sup>51</sup> Beatrix Nyakisumo, "A vile custom that must go," *Africanews*, May 1997 [online], [http://www.peacelink.it/afrinews/14\\_issue/p6.html](http://www.peacelink.it/afrinews/14_issue/p6.html) (retrieved January 14, 2002).

<sup>52</sup> Throughout this report the exchange rate used is 79 Kenya shillings to the U.S. dollar, the rate on January 6, 2003.

<sup>53</sup> Human Rights Watch interview with Guy Udoyi, Siaya district, November 3, 2002.

<sup>54</sup> Human Rights Watch interview with Alie Eleveld, coordinator, Society of Women against AIDS in Kenya, Nairobi, October 28, 2002.

## Response of the Government and Donors; Recent Political Developments

Government officials have dismissed concerns about women's unequal property rights, with "custom" as their most frequent excuse and lack of resources a close second. Kenya's economy is in ruins and there are indeed other human rights abuses that merit attention.<sup>55</sup> Kenya's absolute poverty has risen to between 52 and 56 percent of the population, up from 40.3 percent in 1994.<sup>56</sup> Economic growth has declined since the mid-1980s, and negative growth was recorded in 2000.<sup>57</sup> These dismal figures do not, however, excuse the government's historic blindness toward women's property rights violations. In fact, according to the United Nations Development Programme, women's insecure property rights are a core cause of Kenya's economic troubles, contributing to low agricultural production, food shortages, underemployment, and little income for most rural residents.<sup>58</sup> The government has sounded obligatory notes of sympathy for women in documents submitted to international financial institutions, acknowledging on paper the links between women's unequal property rights, their poverty, and Kenya's stumbling development. Yet these words on paper have not translated into greater awareness, programs, or action. Officials repeatedly told Human Rights Watch that combating women's property rights violations is not a priority, not part of their jobs. (See Unresponsive Government and Traditional Authorities in Part V below for further detail.)

Kenya's pitiful record on enacting and enforcing laws and policies to promote women's property rights relates to the low representation of women in government office. Prior to the December 2002 elections, women constituted only 4.1 percent of members of parliament.<sup>59</sup> This is in stark contrast to neighboring Uganda and Tanzania, where women hold 25 percent and 17 percent of parliamentary seats, respectively.<sup>60</sup> President Daniel arap Moi, who ruled Kenya for twenty-four years before stepping down at the end of 2002, had no women as full cabinet members and was known to belittle women in public.<sup>61</sup> Prior to the December 2002 elections, only 1.4 percent of government-appointed chiefs were women, and 2.6 percent of all local administrative authorities were women.<sup>62</sup>

When Kenyans handed their new president, Mwai Kibaki, and his National Rainbow Coalition (NARC) party a landslide victory in December 2002, they may have set the stage for progress on women's property rights. President Kibaki promised to complete the constitutional review process quickly and his political party has acknowledged that gender equality is necessary to national development.<sup>63</sup> President Kibaki named six women to his cabinet (three with full ministerial posts and three assistant ministers), and there are now seventeen women members of parliament (constituting 7.66 percent of parliament).

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<sup>55</sup> For an overview of Kenya's human rights record prior to the December 2002 elections, see Human Rights Watch, "Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government," *A Human Rights Watch Report*, vol. 14, no. 10(A), December 2002.

<sup>56</sup> The Republic of Kenya, *Poverty Reduction Strategy Paper for the Period 2001-2004*, p. 13, cites the absolute poverty rate as of 1997 as 52 percent. The Institute of Economic Affairs reported in November 2002 that the absolute poverty rate has increased to over 56 percent. Grace Muiruri, "Poverty the Major Obstacle to Kenya's Growth, Says Economist," *East African Standard*, November 11, 2002 [online], <http://allafrica.com/stories/200211150441.html> (retrieved February 2, 2003). The 1994 absolute poverty rate of 40.3 percent is cited in UNDP, *Kenya Human Development Report 2001*, p. 20.

<sup>57</sup> UNDP, *Kenya Human Development Report 2001*, p. 67.

<sup>58</sup> *Ibid.*, p. 35.

<sup>59</sup> *Ibid.*, p. 25.

<sup>60</sup> *Ibid.*

<sup>61</sup> For example, President Moi publicly remarked in 2001: "You [women] can achieve more, can get more but because of your little minds, you cannot get what you are expected to get." Joseph Warungu, "Outrage at Moi Remark," *BBC News*, March 8, 2001 [online], <http://news.bbc.co.uk/1/hi/world/africa/1209531.stm> (retrieved January 3, 2003).

<sup>62</sup> Directorate of Personnel Management, *Distribution of Administrative Posts by Type of Post and Sex 1999 and 2001* (Nairobi: Office of the President, 2002). Official figures on the new number of women local administrators since the December 2002 elections were not available as of early February 2003.

<sup>63</sup> Mildred Ngesa, "More Women in the Cabinet," *East African Standard*, January 4, 2002 [online], <http://www.newsdirectory.com/go/?f=&r=af&u=www.eastandard.net> (retrieved January 4, 2003).



Many donor governments, the World Bank, and the International Monetary Fund reduced aid and lending to Kenya in the 1990s, citing corruption and mismanagement. Some shifted aid to nongovernmental organizations. For example, several donor governments have provided small grants to NGOs for work on women's property rights.<sup>64</sup> Donor governments and organizations announced plans for new aid programs after the December 2002 elections, including, as of early February 2003, the IMF, the World Bank, the United Kingdom, the United States, Italy, and the European Union.<sup>65</sup>

### **Nongovernmental Efforts to Prevent and Remedy Property Violations**

Where the government has neglected its obligation to end discrimination against women, NGOs have worked to fill the void. Human rights and women's organizations work tenaciously to provide services, information, and advice to women denied property rights. They provide civic education, represent women in legal proceedings, provide them shelter and other basic needs, offer small-scale lending programs, coordinate women-owned housing cooperatives, and advocate for legislative and social change. These organizations operate with virtually no financial and little moral support from the government. On occasion, they suffer threats and harassment. These same organizations are now pushing women's equal property rights as a priority for Kenya's new government.

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<sup>64</sup> The United States Agency for International Development provided small grants to NGOs in Kenya and other countries to support activities relating to property and inheritance rights. This grant program expired in December 2002. The Canadian International Development Agency's Gender Equity Support Programme has also provided funding to NGOs that perform legal services and judicial training relating to property rights.

<sup>65</sup> "Kenya's Leader Hails IMF Thaw," *BBC News*, January 16, 2003 [online], <http://news.bbc.co.uk/1/hi/business/2666285.stm> (retrieved January 22, 2003); John Oyuke, "WB Pegs Aid on Reforms," *East African Standard*, January 23, 2003 [online], <http://www.eastandard.net/business.bsnews2301200304.htm> (retrieved January 23, 2003); "We Will Support You, UK Reassures Kenya," *Daily Nation*, January 22, 2003 [online], <http://www.newsdirectory.com/go/?f=&r=af&u=www.nation.co.ke> (retrieved January 22, 2003); Kevin J. Kelley, "US Pledges to Give Assistance," *Daily Nation*, January 29, 2003 [online], <http://www.nationaudio.com/News/DailyNation/29012003/News/News2901200310.html> (retrieved January 30, 2003); Biketi Kikechi, "EU Offers Kenya Sh14b for Projects," *East African Standard* [online], <http://www.eastandard.net/headlines/news30012003002.htm> (retrieved January 30, 2003); and Eliud Chisika, "Italy to Increase Aid to Kenya," *East African Standard*, February 5, 2003 [online], <http://www.newsdirectory.com/go/?f=&r=af&u=www.eastandard.net> (retrieved February 5, 2003).

#### IV. WOMEN'S PROPERTY RIGHTS VIOLATIONS AND THEIR CONSEQUENCES

Human Rights Watch documented women's property rights violations in Kenya across a range of ethnic groups, social classes, religions, and geographic regions. These violations can occur at any point in a woman's life, but are most frequent and extreme when it comes to inheritance and division or control of matrimonial property. The personal accounts below illustrate property rights abuses suffered by widows from rural and urban areas, women whose parents have died, divorced or separated women, and married women who lack control over their matrimonial property.

##### Widows from Rural Areas

*My in-laws took everything—mattresses, blankets, utensils. They chased me away like a dog. I was voiceless.*

—Theresa Murunga, widow, Nairobi, October 20, 2002

Rural widows told Human Rights Watch that their in-laws took their property, including their land, homes, vehicles, livestock, furniture, and household items, when their husbands died. Many were subsistence farmers who lost their basis of survival when they lost their land. Rural widows, even more than urban widows, are expected to undergo wife inheritance or cleansing rituals. Most of those who did the rituals said they could keep their property. Those who refused not only lost their property but were also ostracized. They often returned to their parents' homes or moved to urban centers, including Nairobi's notorious slums.<sup>66</sup>

Emily Owino, a fifty-four-year-old widow from the Luo ethnic group, lived and farmed on her husband's land from the time she married at age fifteen until her husband died several years ago. With four children, she depended on that land, her simple home, and her meager possessions to subsist. When her husband died, her in-laws took everything. "Things started disappearing from the time of the burial ceremony," she said. "They took farm equipment, livestock, cooking pans, bank records, pension documents, house utensils, blankets, and clothes.... This happened in the three months after my husband died. I was desperate."

Owino's in-laws also pressured her to be cleansed by a jater. They hired a herdsman to cleanse Owino, paying him KSh500 (U.S.\$6). She had sex with this man—against her will and without a condom. "They said I had to be cleansed in order to stay in my home," she recalled. "I tried to refuse, but my in-laws said I must be cleansed or they'd beat me and chase me out of my home. They said they had bought me [with the dowry], and therefore I had no voice in that home." Succumbing to the cleansing ritual did not, however, save Owino from losing her home and land. The situation became unbearable:

I was suffering so much that I went home to my parents for assistance. I had young children who were sick, and no one would assist us. I couldn't buy clothes, we couldn't eat, and I had no cooking pots. When I came back from my mother's home, I saw that my land and last few possessions were taken. I was destitute.<sup>67</sup>

While she was gone, Owino's in-laws rented out her land, which the renter was cultivating, and took the title deed. "The land was supposed to be mine. My husband had verbally willed it to me," Owino said. "There were witnesses. My in-laws knew it was my land, but they didn't care." When Owino complained, her in-laws threatened to assault her. Owino reported the incursion on her land to a village elder. "I told the elder 'I've come from my parents' home and found that someone planted cassava on my land.' The elder asked for a bribe before he would take action. He said, 'If a lady wants assistance, she must pay.' I didn't have the money." She then

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<sup>66</sup> Approximately 60 percent of Nairobi's population lives in slums and informal settlements confined to less than 5 percent of the total municipal residential area. Nairobi's slums are some of the most dense, unsanitary, and insecure slums in the world. United Nations Centre for Human Settlement, "Slum Upgrading: Lessons Learned in Nairobi," *Habitat Debate*, September 2001 [online], <http://www.unhbitat.org/hd/hdv7n3/12.htm> (retrieved January 22, 2003).

<sup>67</sup> Human Rights Watch interview with Emily Owino, Siaya, November 2, 2002.

took her case to the local chief. According to Owino, the chief considered this an inconsequential “family case” and referred Owino back to the elder, who again refused to handle her case. She did not go to the police: “I had no money to go to the police. I was told that unless I have money, I couldn’t go to the police.” She could not afford a lawyer for a court claim.

Since the local authorities were unhelpful, Owino again asked her mother-in-law if she could cultivate part of the land. “My mother-in-law refused, and told me to go back to my parents,” Owino said. “I had to leave my home. I couldn’t stay because I had nothing to eat, no land to till.” Owino moved with her children from place to place until someone offered her a small, leaky hut made of poor-quality grass. None of her children are educated beyond pre-school. Though still young, they work as herders and maids. “If I could have stayed on my property, my children could have gone to school,” Owino said.<sup>68</sup>

Monica Wamuyo, a forty-year-old widow from the Kikuyu ethnic group, said her in-laws evicted her when her husband died in 1996. She and her husband had lived in a spacious house in Nyeri on land where she grew vegetables. Soon after Wamuyo’s husband died, her in-laws pressured her to leave. “My father-in-law would kick my door at night and tell me I should leave because it was his land. He said if I wanted land, I should go to my mother and ask for land.” When Wamuyo protested, her father-in-law demanded that she be his second wife. “I told him I had never heard of such a thing in our tradition,” she said. “I went to the elders because I wanted to continue living there.... The elders said I had to move out.” Wamuyo moved to Nairobi’s Kangemi slum, where she earns money washing clothes. She said she was crushed by losing her land and now struggles to make ends meet: “Sometimes I’m unable to buy food for my children. They haven’t been in school since 1997.... I told my daughters to look for housework.”<sup>69</sup>

Having no sons is a serious liability for rural widows: women with no children or only daughters are often considered worthless and undeserving of property. “I was thrown out of my home when my husband died because I had only given birth to girls,” said Theresa Murunga, a widow from rural Bungoma. Until her husband’s death in 1994, Murunga lived in a hut on her husband’s homestead, where she grew potatoes and maize. She recalled:

When my husband died, his relatives came and took everything. They told me to take my clothes in a paper bag and leave. I left, because if I had resisted they would have beat me up. The relatives identified someone to inherit me. It was a cousin of my husband. They told me, ‘Now you are of less value, so we’ll give you to anyone available to inherit you.’ I didn’t say anything. I just left and went to my parents’ home.... This is customary. If I had married the cousin, I could have lived where I was. I decided not to because he was polygamous—he had five other wives.... I know if a woman is inherited, she is normally mistreated by the one who inherits her.

If I had sons instead of daughters, they would have apportioned land to me.... When they told me to leave, they said there was no way they could recognize my daughters since they’ll marry and leave the homestead. They said I shouldn’t have given birth at all.... My in-laws took everything—mattresses, blankets, utensils. They chased me away like a dog. I was voiceless.<sup>70</sup>

Murunga’s in-laws expected her to undergo a traditional ritual involving sexual intercourse with her dead husband’s body, but she avoided this because her brothers were there with machetes to protect her. Her in-laws were angry, and they and other villagers harassed her. One night, a group of five men came to her hut shouting threats. She believes that the village elder sent them to punish her for rejecting tribal traditions.

Frightened, Murunga left her home and went to her parents, where she stayed for four years without getting land to cultivate. “I felt like a foreigner in that homestead,” she remarked. In 2001, Murunga was having

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<sup>68</sup> Ibid.

<sup>69</sup> Human Rights Watch interview with Monica Wamuyo, Nairobi, October 28, 2002.

<sup>70</sup> Human Rights Watch interview with Theresa Murunga, Nairobi, October 20, 2002.

so much trouble paying her children's school fees that she went back to her in-laws to ask permission to cultivate her late husband's land. "My brother-in-law sent me away. He said I am no longer his relative and he doesn't know who I am." Murunga now lives in Nairobi in a dilapidated one-room shack without electricity. "Even feeding my children is hard now," she said. She did not seek help from authorities. "Whom could I tell?" she asked. "I felt that if I went to the elders, they wouldn't attend to me because I only have daughters."<sup>71</sup>

Alice Akelo also lost her rural land and household goods because she had no sons. Akelo, a thirty-five-year-old Luo widow, lived on and cultivated her husband's land until he died. Akelo recalled:

My father-in-law told me that he was taking the property because I only gave birth to girls.... He gave my husband's land to a stepbrother.... I was sent away by my brother-in-law. They said I don't have boys, so they could not give me a piece of land to settle on. I went to stay in my parents' home.... All I could take were clothes.<sup>72</sup>

Before Akelo left the homestead, her brother-in-law tried to inherit her. "I didn't want to be inherited because he had other wives and I thought he was not in a position to inherit me," she said. Akelo did, however, undergo the cleansing ritual with a jater. "The ritual involved having sex," she said. "I didn't want to have sex, but I had to because of custom." Her father-in-law paid the jater KSh1,000 (U.S.\$12.50).

Akelo said that, as a woman, she could not protest her eviction from her home and land. "I said nothing because I was feeling helpless. I thought if I had a boy child, he could have resisted." Her family discouraged her from asserting her rights. "My mother advised me against making a formal complaint to the police because that would mean going against my father-in-law." After living with her parents for several years, Akelo moved to a shanty in the Quarry slum in Nairobi, where she hawks groundnuts.<sup>73</sup>

Relatively wealthy rural widows also said that having only daughters contributed to their disinheritance. Wairimu Asha, a forty-five-year-old Luhya widow with three daughters, lived in a modern house on land she and husband purchased before he died. "Since I had only girls and the Bukusu [her husband's ethnic group] do not value baby girls, they said I should marry someone else and have a baby boy," Asha said. "I said I wanted the land, but they said I had to go. Immediately after my husband died, they told me to leave."

Asha's in-laws took her husband's death certificate and some of his property. Her brother-in-law told her he wanted to inherit her: "My brother-in-law said he could take the land because he was my husband's brother... He wanted me to be his wife, but I refused." When Asha rejected him, she said a "war" started:

Early one morning my brother-in-law came with cows and tractors to plow the land. I woke up and heard dogs barking. I found him plowing and asked him what was wrong. He said, 'Don't worry, I'm plowing for you.' The next day at midnight I found him planting. I called the chief to try to stop my brother-in-law.... The chief came along with the elders, but they couldn't stop him.<sup>74</sup>

In an unusual turn of events, the chief reported the brother-in-law's trespass to the police, leading to a criminal case and seven-month jail sentence. After he was released from jail, Asha's brother-in-law came back to Asha's house and threatened to kill her. She recalled:

He came with [machetes]. When he knocked on the door, my daughter opened it. He said if I didn't let him live there, we'd all have to get out. My daughter didn't answer. I asked him what the problem was. He said, "How could you send me to jail? My brother's land belongs to

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<sup>71</sup> Ibid.

<sup>72</sup> Human Rights Watch interview with Alice Akelo, Nairobi, October 21, 2002.

<sup>73</sup> Ibid.

<sup>74</sup> Human Rights Watch interview with Wairimu Asha, Nairobi, October 19, 2002.

me, not you.” He pushed me and wanted to slap me. My daughters came and he ran away. The next day I moved to Nairobi. Before I went, I called the police. The police said my security was not good, and I should not stay in that house.<sup>75</sup>

The police arrested Asha’s brother-in-law, but he was quickly released and never prosecuted. Since then, her brother-in-law has lived in and rented out the house, farmed the land, and sold the contents of the house, all without compensating Asha. “The house is empty,” Asha said. Asha was able to retain a lawyer, and managed to get a judgment confirming that she owns the land and home. She worries that the judgment will not be enforced and about her safety there.<sup>76</sup>

Having sons does not always help women keep their property, at least not all of it. Rimas Kintalel, a Maasai widow with four sons and three daughters, lost all of her cattle and sheep to her brother-in-law. One month after her husband died, her brother-in-law “took twelve cattle and twenty sheep. He said, ‘I want you to go from here because I want my brother’s property.’” Kintalel managed to stay on her land because she and her husband, who worked for her father, lived on her father’s land. Kintalel told her village elders that her brother-in-law had taken her livestock, but they did nothing. Her troubles did not stop there. In 2001, her brother-in-law abducted six of her children. She said he felt entitled to them because she married into his family even though some were fathered by a man other than her late husband. “For Maasais, this doesn’t matter,” she said. “Once you’re married, they consider any children part of the husband’s family.” Kintalel reported the abduction and the earlier property-grabbing to the police. “The police asked if it was possible for me to go live with my brother-in-law, and I said no.” She got her children back, and the brother-in-law was fined two sheep and one cow. She did not get the other livestock.<sup>77</sup>

Lucia Kamene, a thirty-three-year-old widow from the Kamba ethnic group, lived and farmed on land in eastern Kenya with her husband until he died in 1997. After he died, Kamene’s brother-in-law told her and her children to leave, claiming that she was never married and he now owned the land. “He claimed that I wasn’t married to my husband because not all of the customary steps were completed.” Kamene considered herself married, as did her other in-laws, even though a few customary rituals were not done. “Even the clan knew we were married,” she said. “The first time anyone said we were not married was a week after the burial.”

Kamene’s brother-in-law demanded the land title deed and her late husband’s identification card. “He threatened me,” she said. “He told me, ‘I’ll burn you with fire if you don’t put the title and I.D. card on the table right now.’ He told me if I dared talk back to him he’d beat me.” Terrified, she gave him the documents. “I feared that my brother-in-law might attack me. I was afraid for the children.” Soon after that, Kamene moved to Nairobi, taking only clothing for herself and her children and leaving behind livestock and other property. “My brother-in-law took everything,” she said. “He did all this to evict me.... This man was jealous of me because he didn’t have boys. He thought my son would claim the land.” Kamene’s brother-in-law and his wife now live in Kamene’s house.

Although Kamene informed the local chief of these threats, he did nothing. She did not report this to the police, who were far away. To this day, she wishes she could live on her land but fears going back. She now lives with her children and those of her sister (who died of AIDS) in Nairobi’s Mukuru slum. They live in a metal shack with no running water or electricity.<sup>78</sup>

Muslim widows from rural areas also complain that their property rights under Islamic law are infringed as custom supplants their religion.<sup>79</sup> Amina Juma, a Muslim woman from the Kikuyu ethnic group, said that

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Human Rights Watch interview with Rimas Kintalel, Ngong, October 24, 2002.

<sup>78</sup> Human Rights Watch interview with Lucia Kamene, Nairobi, October 20, 2002.

<sup>79</sup> The Koran’s basic intestacy rules provide that a son generally inherits double the share of a daughter. When a husband dies leaving a wife and children, the widow receives one-eighth of the net estate. If there are no children, the widow gets

when her husband died, her in-laws grabbed her property. The property included a pension fund, canoes, fishnets, a house on the island of Rusinga, cows, and household items. Juma explained:

After my husband died, my mother-in-law ...came to the Rusinga house and took things. I never said anything because asking would cause problems because of the culture of that community.... I took my children and came to stay with my father in Kisumu. I didn't take any property. Just clothes for myself and my children.... I was afraid for my life if I pursued my property. I think they would have killed me—definitely. In my ethnic group, women don't hassle over property.

According to Islamic law, Muslim women are entitled to inherit property. This didn't happen in my case because my in-laws are ruthless.<sup>80</sup>

Prior to his death, Juma and her husband lived in a large house with water, electricity, trash pickup, and schools nearby. After her in-laws took her property, she could no longer afford to live there. She now lives in a structure made of iron sheets and mud walls. There is no running water, electricity, or sanitation. Juma can barely pay for basic needs, and one child dropped out of school. "If I had gotten my husband's property, it would have been easier to pay school fees," she said.<sup>81</sup>

Some in-laws physically attack widows to get their property or compel them to be cleansed or inherited. Awino Adipo, a former teacher from Siaya district, said that when her husband died, her in-laws took property (some of which she had purchased) and tried to force her to do a cleansing ritual. "I refused the ritual," she said, "and then they physically attacked me. As a result of the attack, I became blind in one eye." She moved to a Nairobi slum, and now lives in a hovel that "has a gaping hole in the roof and is collapsing. It's made of mud, and has no electricity or running water."<sup>82</sup>

Jiwa Felister, a fifty-five-year-old Luhya woman, said that six months after her husband died in 1991, her brother-in-law brought a jater to her hut to cleanse her. She objected, saying: "I don't know this man's HIV status, and if I die my children will suffer." Her brother-in-law and four cousins pushed the jater into Felister's hut and he raped her. Felister screamed, but the jater covered her mouth. The brother-in-law paid the jater with a cow, some chickens, and Felister's husband's clothing. The jater later built Felister a makeshift hut, and the house she shared with her husband was destroyed. Felister's brother-in-law took over her land and removed furniture from her hut. She reported this to the village elder, who said he would look into the matter but did nothing. Felister, who now has a persistent cough and has lost much weight, fears she contracted HIV from the jater but has not been tested and cannot afford medical treatment.<sup>83</sup>

Susan Jeptoo, a forty-one-year-old widow from the Nandi ethnic group, said her brother-in-law tried to rape her after her husband died. "In March 2002," she recalled, "my brother-in-law came to my house. He said, 'There is no way you can stay here without sex.... I must stay with you because you were married to my brother.'" He grabbed her arm and tried to drag her to her bedroom. Jeptoo pulled away from him, but fell and injured herself as she ran outside. Jeptoo is now concerned about her land. "What is going to happen if my in-laws take that property?" she asked.<sup>84</sup>

Several women said they agreed to be inherited by male in-laws in order to keep their property and stay in their community. Anna Adhiambo, a Luo widow, was inherited by her brother-in-law several weeks after her husband died. "I consented to being inherited in that I wanted to be taken care of," she said. "I feared that if I

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one-fourth of the estate. Wives in polygynous unions share the one-eighth (if there are children) or one-fourth (if there are no children).

<sup>80</sup> Human Rights Watch interview with Amina Juma, Kisumu, November 1, 2002.

<sup>81</sup> Ibid.

<sup>82</sup> Human Rights Watch interview with Awino Adipo, Nairobi, October 28, 2002.

<sup>83</sup> Human Rights Watch interview with Jiwa Felister, Siaya district, November 3, 2002.

<sup>84</sup> Human Rights Watch interview with Susan Jeptoo, Kisumu, November 1, 2002.

refused to be inherited, people would be brought in by force to inherit me. There was no choice to live alone. They would force it on me.”<sup>85</sup> Being inherited does not, however, ensure that a widow can keep her property permanently. Pamela Achieng, a thirty-eight-year-old widow, said her brother-in-law inherited her ten months after her husband died. She could stay in her home because her brother-in-law moved in. When she and the brother-in-law later divorced, she moved back to her parents’ home without any property. Her brother-in-law kept the home, land, and livestock she had shared with her husband. “Inheritors aren’t supposed to give, they’re only supposed to take,” she said. “According to our culture, if you’re inherited, you don’t get things upon divorce.”<sup>86</sup>

Community sympathy sometimes helps minimize women’s property rights violations. Human Rights Watch encountered one case where sympathy for a disabled widow—not respect for her rights—led to reinstatement in her home after an in-law evicted her. Margaret Atieno, a mentally and physically disabled Luo widow, was chased from her home and land when her husband died in 1996. She explained:

When my husband died I was chased from my home by my husband’s cousin.... He came with a club and chased me, running. He said, “A woman that has been bought by cattle can’t stay in his homestead.” He said I should go away so that he could till the land. If I had had a son, he wouldn’t have chased me out of the homestead.<sup>87</sup>

The village elder convened a meeting with Atieno’s in-laws. They decided she could stay because her husband was the first-born son, she could care for other family members’ children, she was disabled, and she had nowhere else to go. Although Atieno’s in-laws initially wanted someone to inherit her, this did not happen because a doctor said sexual intercourse would be fatal due to injuries from a botched operation.<sup>88</sup>

Other women got no such sympathy for their health problems. Imelda Orimba, a twenty-five-year-old widow with AIDS, lost her home, land, and other property in the Bondo district when her husband died in 2002. She told her in-laws that she had AIDS and wanted to stay in the house. They snatched her property anyway and wanted her to be inherited. She recalled:

I told my in-laws I’m sick... but they took everything. I had to start over.... They took sofa sets, household materials, cows, a goat, and land. I said, “Why are you taking these things when you know my condition?” They said, “You’ll go look for another husband.” My in-laws do not believe in AIDS. They said that witchcraft killed my husband.<sup>89</sup>

## Widows from Urban Areas

*My mother-in-law said that since my husband had died I could not stay there. There was no one there to support me. She told me to leave and took away all I had, including my clothes.*

—Caroline Wanjiru, widow, Nairobi, October 21, 2002

Widows living in urban centers when their husbands died described to Human Rights Watch how their in-laws invaded their homes to take household goods and furniture, whether or not the woman had bought them, and transported them along with the deceased husband’s body to his ancestral home (generally in a rural area). In-laws also interfered with urban widows’ access to pensions, death benefits, and bank accounts. Property located in rural areas, such as land, livestock, homes, and household items, was often taken without compensating the widow. Some urban widows were pressured into remaining in their deceased husband’s home village and becoming a junior wife of an in-law. Women told Human Rights Watch that when they protested being inherited

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<sup>85</sup> Human Rights Watch interview with Anna Adhiambo, Kisumu, November 1, 2002.

<sup>86</sup> Human Rights Watch interview with Pamela Achieng, Kisumu, November 4, 2002.

<sup>87</sup> Human Rights Watch interview with Margaret Atieno, Siaya, November 2, 2002.

<sup>88</sup> Ibid.

<sup>89</sup> Human Rights Watch interview with Imelda Orimba, Kisumu, November 4, 2002.

they were attacked and forced to leave. Others acquiesced, citing cultural expectations that prevent women from challenging in-laws.

While many widows Human Rights Watch interviewed were not forced to leave their urban homes, they were impoverished after losing their property. They toiled to feed, clothe, and educate their children after losing virtually everything they owned. Monica Olola, a fifty-year-old Luo widow, said that she and her husband lived on and cultivated land in rural Siaya for fifteen years. They had moved to Nairobi, but kept their land and a small house in Siaya. When Olola's husband died, her in-laws took the rural land, home, and household goods. "My brothers-in-law immediately took everything," she said. "They took land in Siaya, household goods, a radio, bicycle, and cupboards.... One brother moved into the house and started to till the land." Olola told him she wanted the property back. "My brother-in-law told me to go back to Nairobi.... He felt that whatever property my husband had was his." Olola returned to Nairobi and now lives in a slum. She hawks fish in a market to earn a meager living. Her daughters dropped out of school because Olola could not afford school fees.<sup>90</sup>

Adhiambo Nyakumabor, whose husband died of AIDS in 1998 and left her HIV-positive with five children, went from being relatively affluent to destitute after her husband's family took her property. Her in-laws grabbed household items from her Nairobi home and took over her house and land on the island of Rusinga even though Nyakumabor helped pay to construct the house. Soon after her husband's death, Nyakumabor's father-in-law called a family meeting, told her to choose an inheritor, and ordered her to be cleansed by having sex with a fisherman. Nyakumabor refused, causing an uproar. She felt ostracized and quickly returned to Nairobi. A brother-in-law took over her land and livestock on Rusinga without compensating Nyakumabor. She now struggles to meet her family's needs, and her landlord in Nairobi's Kibera slum has threatened to evict her because she cannot always pay rent on time.<sup>91</sup>

Dowry can exacerbate property rights violations: if it is paid, some people consider the woman herself as property, and she has less bargaining power to defend her rights or resist wife inheritance. Patricia Wairium, a thirty-six-year-old widow from the Maragoli ethnic group, lived in Nairobi when her husband died in 1995. Shortly after he died, Wairium's in-laws raided her Nairobi home and stripped it bare. They wanted her to be inherited because they had paid dowry. She recalled:

My in-laws took everything, even wedding presents.... They took the television, furniture, beds, clocks off the walls, a table, stools, a radio, glasses, bed sheets, mattresses, and pans. They carried all this away. All they left in the house were the few things I had locked up.

My brother-in-law said he wanted to inherit me and take all the property [including rural land]. I said in that case I didn't want the land, and I refused the brother. They wanted to kill me.... My brother-in-law said that this is the custom and, out of respect for him, I should accept being inherited. He said he was an old man and I should give him the property and serve as his [second] wife.... My mother-in-law was threatening, too. She said I should take care of her because I married her son and they paid for me. They wanted to make use of the 20,000 shillings [U.S.\$252] they had paid as dowry.<sup>92</sup>

With her Nairobi home empty and her in-laws pressuring her to be inherited, Wairium decided to move back to her parents' home, where she stayed for two years. "I went back to my parents with just the few things that I had locked up," she said. "I had to start over to buy things. My in-laws refused to give me my things."<sup>93</sup>

Stipulating in a will that a widow should inherit property ought to help, but even wills are sometimes disregarded. Caroline Wanjiru, a twenty-seven-year-old Kikuyu mother of four, said that her husband, a bicycle

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<sup>90</sup> Human Rights Watch interview with Monica Olola, Nairobi, October 18, 2002.

<sup>91</sup> Human Rights Watch interview with Adhiambo Nyakumabor, Nairobi, October 19, 2002.

<sup>92</sup> Human Rights Watch interview with Patricia Wairium, Nairobi, October 22, 2002.

<sup>93</sup> Ibid.



repairman, had orally willed her his tools. He did not write a will because he held the common belief that it would cause him to die young. When he died in 1999, Wanjiru's in-laws took the tools and everything else in her Nairobi home, some of which she had bought. For a time, Wanjiru tried to live with her in-laws in Yatta. Eventually, she said, they called her a prostitute and told her to leave. "My mother-in-law said that since my husband had died I could not stay there. There was no one there to support me. She told me to leave and took away all I had, including my clothes." Wanjiru returned to Nairobi, and now lives in the Quarry slum, where she hawks groundnuts. Her wood and mud shack has no running water or electricity. She sometimes begs for money to buy water.<sup>94</sup>

Many women, particularly in urban areas, cohabit with men but do not complete all steps for a customary, civil, or religious marriage to be definitively recognized. Many of these women consider themselves married and in fact may have enforceable rights under the common-law doctrine of presumption of marriage. Women in this status are prime candidates for disinheritance. In-laws use this hazy marital status along with other excuses, such as having no sons, to disinherit these women. Omwena Omung'ina, a thirty-two-year-old woman from the Kisii ethnic group, lived with her partner for nine years and had two daughters with him but did not marry him. Nonetheless, their families and friends considered them husband and wife while he was alive. That changed when he died. "My husband's family didn't recognize me as his wife because I had just given birth to girls. That was a problem. They said I was a prostitute." She said his family "took everything" the day after he died. She objected, but the family summoned a commander from the army, where her husband worked. The commander said the property must go with the body to the rural home because that is the tradition. Her in-laws took the property and her husband's rural land. She did not attempt to claim the land, saying this would be "suicidal." She explained, "My in-laws have already bewitched me. If I go back they would physically hurt or kill me." Omung'ina never reported this to the police. "I know if I go to the police, they will tell me it's a private matter," she said.<sup>95</sup>

Although urban widows are somewhat less connected to traditions than rural widows, this does not stop their in-laws from threatening violence if the widows refuse to be inherited. It also does not stop women from abandoning their property to flee the danger, nor from silencing themselves so as not to transgress cultural norms. Pamela Adhiambo, a thirty-two-year-old Luo woman, said that after her husband's burial in 2001, she heard rumors that her in-laws wanted her to be inherited. She quickly left her husband's homestead without the livestock and household goods she and her husband kept there. "I heard that if I refused to be inherited, they'd come in a group and rape me.... The elders would look for people to do it. I had heard of this in the vicinity where I was married." Adhiambo was not aware that she might have some right to that property: "I really had no right. As much as they were my husband's belongings, I had no right."<sup>96</sup>

Patrice Nayoke, a forty-three-year-old nurse, lost urban and rural property after her husband died of AIDS in 1999. She and her husband lived in Kisumu but maintained land and a cottage in rural Busia. After Nayoke's husband died, her in-laws took furniture and other items from the Busia cottage. "I asked my brother-in-law where the things were, and he said, 'Don't ask a lot of questions.'" Even though she paid for the household goods, she was afraid to ask for them because her in-laws might have assaulted her. In April 2002, Nayoke's father-in-law demolished her cottage and sold the construction materials she stored there. He did not ask her consent and did not compensate her. "If this happened to a man," she said, "they wouldn't take the property." Several months later, when Nayoke was having trouble raising school fees for her children, she asked her in-laws if she could sell some of the livestock. They refused, and she did not protest. "They are parents," she said. "I couldn't do anything. So I took loans from work and friends to pay the school fees."<sup>97</sup>

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<sup>94</sup> Human Rights Watch interview with Caroline Wanjiru, Nairobi, October 21, 2002.

<sup>95</sup> Human Rights Watch interview with Omwena Omung'ina, Nairobi, October 20, 2002.

<sup>96</sup> Human Rights Watch interview with Pamela Adhiambo, Kisumu, November 4, 2002.

<sup>97</sup> Human Rights Watch interview with Patrice Nayoke, Kisumu, November 1, 2002.

## Women Whose Parents Have Died

*My two brothers inherited sheep, cattle, and all my parents' property. A lady cannot inherit property.*

—Kisarunka Norkishon, Maasai woman, Ngong, October 24, 2002

Although statutory law provides that daughters and sons should inherit equally from parents when there is no will, it is uncommon for women in Kenya to inherit property from their parents on an equal basis with brothers. Daughters typically inherit less, and in some cases nothing, since they are expected to get married and be supported by their husbands.

Married women are even less likely than unmarried women to inherit from their parents because they are deemed to belong to the husband's clan. It is so uncommon for married women to inherit that none of the women Human Rights Watch interviewed tried to get a portion, much less an equal share, of their parents' estate. Susan Wagitangu, a fifty-three-year-old Kikuyu woman, said that when her parents died, her three brothers inherited the family land. "My sister and I didn't inherit," she said. "Traditionally, in my culture, once a woman gets married, she does not inherit from her father. The assumption is that once a woman gets married she will be given land where she got married." This was not the case for Wagitangu: when her husband died, her brothers-in-law forced her off that homestead and took her cows. She said she "never dared to ask" about inheriting her parents' property. "I would like to claim a part of the land left by my father, but I feel so overwhelmed," she said. Wagitangu now lives in a Nairobi slum. "Nairobi has advantages," she said. "If I don't have food, I can scavenge in the garbage dump."<sup>98</sup>

Ndati Muita, a Maasai woman with seven children, inherited nothing when her parents died in 1998. Her brothers inherited sheep and cattle. "I didn't inherit because I got married," she said. "A lady doesn't inherit. If you're a woman and not married, you inherit something small." She said she did not ask for a share of her parents' estate because she "is not supposed to inherit."<sup>99</sup>

Custom not only interferes with women's statutory inheritance rights, but also with Muslim women's already unequal inheritance rights under Islamic law. The chief Kadhi, Kenya's top authority on Islamic law, said, "Disinheritance of daughters is one of the biggest problems I have. I try to show this is not correct. You must allow women to have a share. It becomes acrimonious, and there is violence."<sup>100</sup> Farida Mohammed, a thirty-four-year-old Muslim woman whose father died in 2000, said, "I didn't inherit. There was land that my big brother inherited.... None of the sisters inherited. My brother inherited because he's a man." Two of her sisters are unmarried and live on her late father's land, but still did not inherit.<sup>101</sup> Mona Hassan, a thirty-seven-year-old Muslim woman of Asian descent, said that she and her sisters did not inherit anything when her father died. "My father had land, money, and houses. My brothers got it all. The sisters got nothing." She attributes this to custom:

My problem was custom. In my custom, the estate goes from the father to the son with the understanding that the son should take care of his sisters. My brothers do not take this responsibility seriously. We're a Muslim family but still the tribal customs are so strong. Our negative traditions drag us back. We tend to abide by those systems more than religion.<sup>102</sup>

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<sup>98</sup> Human Rights Watch interview with Susan Wagitangu, Nairobi, October 29, 2002.

<sup>99</sup> Human Rights Watch interview with Ndati Muita, Ngong, October 24, 2002.

<sup>100</sup> Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002.

<sup>101</sup> Human Rights Watch interview with Farida Mohammed, Nairobi, November 8, 2002.

<sup>102</sup> Human Rights Watch telephone interview with Mona Hassan, Nairobi, November 16, 2002.

## Divorced or Separated Women

*There is no one to go to if you want part of the family property. It's hard, because you won't get it back. Elders exist, but they would never give property to a woman. If I dare go back I would be tortured. My husband would beat me. As a wife, you don't own any property.*

—Tipira Kamuye, divorced woman, Ngong, October 24, 2002

Divorced and separated women told Human Rights Watch of leaving their homes with nothing but clothing and never getting a share of the family property. Despite case law establishing that women can be awarded half of the family property, men typically keep the house and almost everything in it, and women leave with practically nothing. Women are expected to go “home” and live with their parents, which is not always an option. Domestic violence victims are hardest hit, often staying in abusive relationships for years because they think it is hopeless to have their husbands leave, and the women have nowhere else to go. “In most cases it’s the women who leave the matrimonial home upon separation.... Lots of abused women are held back by that,” said a lawyer who handles domestic violence and property cases.<sup>103</sup>

Human Rights Watch interviewed women whose husbands had significant property during the marriage, but the women got none of it upon separation or divorce. Many said they had no idea they could claim a share of the family property. Tipira Kamuye, a thirty-five-year-old Maasai woman, was abused by her husband for years before they divorced in 1999. “My husband cut me on the head,” she said. “He was going to kill me.... He told me, ‘I’ll cut your neck,’ and tortured me.” Kamuye and her three children fled to her parents’ home, and her father returned the dowry to her husband. At the time, her husband owned at least two hundred sheep and cattle, but she got none of them. She explained:

When I left my husband’s home, I didn’t try to take property.... In Maasai custom, women are not supposed to go back for property. A woman has to look for new livestock.... If a woman buys property during the marriage or brings it to the marriage, she would leave that with the husband upon divorce.... When I married, my parents-in-law gave me twenty sheep and twenty cattle. These were not really mine, even though they were given to me. I had to leave them.<sup>104</sup>

Kamuye did not try to get a share of the matrimonial property: she believed elders would never allow a woman to keep family property and her husband would attack her if she tried to claim it. When asked whether she considered hiring a lawyer, she laughed. “There’s nothing like that here,” she said. “Maasais don’t have that.”<sup>105</sup>

Some women who suffered domestic violence knew they were entitled to family property, but were so frightened of further attacks, they did not attempt to claim a share. Mary Atieno, a Luhya woman living in Nairobi, separated from her husband in 1998 after his beatings and rapes became life threatening. She had briefly left her husband and reported the violence to police in 1996, but they took no action. Having nowhere else to stay, Atieno went back to her husband:

The police said this was a domestic issue. I went to my parents, but my father said that as an African woman, I should stay with my husband. I received no help from anyone, so I went back to my husband.... It made it worse that my husband knew no one would help me. I was at his mercy.... I had no money to look for a place of my own. If I had money, I would have moved out.<sup>106</sup>

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<sup>103</sup> Human Rights Watch interview with Ann Gathumbi, coordinator, Coalition on Violence Against Women, Nairobi October 17, 2002.

<sup>104</sup> Human Rights Watch interview with Tipira Kamuye, Ngong, October 24, 2002.

<sup>105</sup> Ibid.

<sup>106</sup> Human Rights Watch interview with Mary Atieno, Nairobi, October 28, 2002.

When Atieno left the marriage for good, she did not take property. “I didn’t try to get the property because I was trying to save my life. I don’t even want to dream about getting the property. I want nothing to do with my husband. I won’t bother.” The family property at the time consisted of a commercial plot, money in a bank, a pension fund, household goods, and furniture. Atieno purchased most of the household goods and furniture. The house she shared with her husband had a tile roof, brick walls, cement floor, electricity, and running water. She and her children now live in Nairobi’s Kibera slum in a one-room mud and iron shelter, where they initially slept on cardboard boxes. Her slum shelter has no electricity, water, or sanitation, and there are no public schools nearby. Atieno’s parents would not let her live with them: “To them it was not good that I left my husband and was spoiling tradition. Leaving a husband is like being a prostitute.”<sup>107</sup>

Ellen Achieng, a Luo woman, left her violent husband and the matrimonial home in 2002. Achieng had separated from him for short periods in the past, once reporting his abuse to the local chief. “In spite of all that was happening, I still wanted the house.... The chief said I should go back to my husband if he wanted me to.... So I went back to live with him.” The violence escalated when she returned, but she said she had no alternatives. “I would have left years earlier if I could have,” she said, “but the costs of setting up another home were beyond my reach.” When Achieng left her husband permanently, the matrimonial property included a house, furniture, cash, a pension fund, and rural land. Achieng has none of that property. “When I left home I didn’t take anything—just the clothes I was wearing.... My husband had locked me out with nothing.” Achieng filed for divorce with the assistance of a women’s organization, but did not seek division of the matrimonial property. “I just wanted to leave my husband.... He had said, ‘I’ll kill you,’ even in front of our children.... My major concern is the children. I just want maintenance [child support] for them. I’m not interested in the other property.” Achieng did not realize that under Kenyan case law she could claim property on the basis of a non-monetary contribution. “All the property belongs to my husband. I don’t own anything,” she said. The house Achieng shared with her husband was of solid block construction with electricity, running water, sanitation, schools nearby, and convenient public transportation. Now she and her three children live in a one-room metal shanty with no bathroom, electricity, running water, or sanitation and no school nearby.<sup>108</sup>

Maisy Wanjiku, a forty-six-year-old woman with a graduate-level education, lost her home and virtually all her property when she and her husband separated. After Wanjiku discovered her husband’s infidelity in 1999, he became brutally violent and started threatening to kill her. One night, after Wanjiku’s husband told her, “This is the final threat—it’s the last time I’ll tell you I’m going to kill you,” she fled with her three children, their school clothes, and nothing for herself. She briefly stayed with her brother, who insisted that she return to her husband. She went back to her husband until the day he said, “I hate you. I mean what I’ve told you—I’m going to kill you,” and punched her in the mouth so hard she lost all of her front teeth. She left again with no property. She stayed with her sister until she was pressured by her sister to return to her husband, at which point Wanjiku moved to a small hotel room with her children.

Wanjiku and her husband were well off, but she has none of the matrimonial property. When they separated in 2000, their property included rural land, a modern house on that land, a house in Nairobi, several cars, a beach plot, a commercial plot, shares in companies, money in a bank, a pension fund, furniture, and household goods. Wanjiku was formally employed throughout her marriage and bought most of the household goods and appliances. Her husband paid the mortgages and she paid school fees for the children.

Wanjiku sought help from traditional, governmental, and religious authorities to resolve her marital problems, get some protection from the violence, and obtain maintenance for her children. These attempts ended so disastrously, and her husband is so threatening, that Wanjiku has not dared to pursue this further. When Wanjiku told the police about her husband’s death threats, an officer said, “You women—I always tell you when your husband comes home you should smile and cook good food.” When she talked to a priest, he told her, “God

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<sup>107</sup> Ibid.

<sup>108</sup> Human Rights Watch interview with Ellen Achieng, Nairobi, October 28, 2002. The term “maintenance” under Kenyan law is equivalent to “child support” under U.S. law, when used with reference to children.

is punishing you for giving birth to only three children when you could have had more.” She went to a lawyer, who asked for a deposit of KSh30,000 (U.S.\$377). Wanjiku paid the deposit, but could not afford to pay the lawyer to handle a legal separation. She also sought help from clan leaders in her husband’s rural hometown. A clan meeting was organized, and the elders seemed sympathetic. Yet when Wanjiku asked if she could live in the rural home, her father-in-law left the decision to her husband, who refused. Wanjiku not only lacks the money to pursue a property claim, but also fears for her life if she tried. “I can’t go to the police, a lawyer, the church, or my family. There is no help. All doors are closed,” she said.<sup>109</sup>

Even women who pay for property and have title solely in their name are not immune from property rights violations. Ndunge Ritah, a thirty-four-year-old Kamba woman, was separated from her husband on and off for several years. During one period of separation, she borrowed money, purchased land, and constructed a house, all in her name alone. When she reconciled with her husband in 2001, they moved into the house together. He became violent again, and accused her of sleeping with everyone who helped her construct the house. He threatened to kill her, slashed her face with a knife, and beat her so severely she could not get out of bed for three days. Ritah fled to her mother’s house. She obtained legal services from a women’s organization and filed for legal separation. Ritah’s lawyer sent her husband a letter demanding that he move out of the house, which he ignored. At a preliminary hearing, a judge refused to order Ritah’s husband to vacate the house even though the judge knew that Ritah paid for it herself and had title to the house. Ritah still pays the mortgage while she stays with friends and family, and her husband pays nothing. The experience of losing her home has been demoralizing. “Sometimes I cry until there are no more tears to cry,” she said.<sup>110</sup>

Dowry also impedes women from getting a share of family property upon divorce. For the Maasai, payment of dowry even means that the woman and any children she has or property she acquires for the rest of her life belong to her husband. Unless the dowry is returned to the husband, he can even take children the woman has with other men. Divorced women in such communities do not get family property because the dowry is supposed to suffice, even if the woman does not benefit from the dowry. Naiyeso Samperu, a forty-five-year-old Maasai woman who was forced to marry at age ten, separated from her husband because of his savage beatings. “I was tortured all over my body,” she said, and pointed out scars on her head, legs, and arms. Samperu’s husband had more than one hundred cattle and sheep, but when she ran away from him, she took only the clothes she was wearing. Her husband asked her father to return the dowry, but her father refused. Later, her husband took a child Samperu had had with another man. She reported this to the chief and elders in her village. The elders told her to “let the child stay with him to represent the dowry that was not repaid.... I just cried and left.” The child was two years old at the time, and Samperu has not seen him for the last seventeen years.<sup>111</sup>

Of the sixteen divorced and separated women Human Rights Watch interviewed, only two were able to stay in their home from the time of separation. In one case, the woman was wealthy and thus had resources to afford an expensive court battle to keep her there. In the other, the woman was able to stay because her husband moved out of their dilapidated Nairobi shelter and into a modern Mombasa house. Gacoka Nyaga, a Kikuyu woman with three children, managed to stay in her home when she and her husband separated. “We had lots of property,” she said. “My concern was not to end up without a home. More than anything, I wanted shelter.” Nyaga filed in court for division of family property and later divorce. Although she initially sought half of the family property, she settled for about one-fourth but was able to stay in her home. All told, Nyaga spent approximately KSh8 million (U.S.\$100,645) in legal fees.<sup>112</sup>

Sophie Yusuf, a Muslim woman from the Luhya ethnic group, said her husband abandoned her in 1998. They lived in Nairobi in a two-room, semi-permanent house on her husband’s employer’s land. After they had children, they built a modern, six-room house in Mombasa with running water and electricity. They continued living in Nairobi but visited the Mombasa house on weekends. When Yusuf’s husband left her and their six

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<sup>109</sup> Human Rights Watch interview with Maisy Wanjiku, Nairobi, November 10, 2002.

<sup>110</sup> Human Rights Watch interview with Ndunge Ritah, Nairobi, November 10, 2002.

<sup>111</sup> Human Rights Watch interview with Naiyeso Samperu, Ngong, October 24, 2002.

<sup>112</sup> Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

children, she stayed in the Nairobi dwelling (thanks to the largess of her husband's employer) and he moved into the luxurious Mombasa house with a new wife, whom he married without Yusuf's consent. Yusuf asked for a divorce and hoped for some amount of maintenance. He refused the divorce and did not give her maintenance or any other property. Yusuf went to an imam<sup>113</sup> for help. The imam summoned Yusuf's husband, but he did not appear. The imam said there was nothing more he could do, and Yusuf did not pursue this further. "I was tired of the whole thing.... But if I die today, I don't know what will happen to my children."<sup>114</sup>

Some Kenyans say that divorced women should not get property because they can go back to their parents. With the transformation that community and family structures have undergone since pre-colonial days, this is not always an option or the desire of the woman. Women who do turn to their families are often ordered to go back to their husbands, even when they are abusive. Women who have lost their property have a hard time contributing to costs in their families' homes and are considered an unwelcome economic burden. Mary Abudo, a fifty-four-year-old Luo woman with eight children, said that when she and her husband separated, he kept all of the property, including vehicles, the land she cultivated, household goods, furniture, and bicycles, and she received nothing. Her violent husband forced her out of their home, and she went to her parents. They wanted her to return to her husband, but he would not take her back. Abudo stayed in her mother's hut, but was forced out when her mother died:

A daughter is not supposed to stay in her parents' homestead [after the mother dies], so I became homeless.... I wanted to stay there, but there was so much pressure from the clan that I should move out. My relatives set upon me and beat me viciously. I was afraid I'd die.... I fled after the attack. I went to Nairobi, but even there I didn't have a place to stay.... Now I'm thrown out by my husband and I'm landless.... My major desire is to get a house of my own to live in.<sup>115</sup>

Abudo did not try to claim any matrimonial property: "I didn't dare to go back. My husband had issued threats." He told Abudo's sister that if he saw Abudo he would "kill her, and he was certain the government wouldn't do anything to him." Abudo, who now has HIV, lives in a Nairobi slum and cannot afford medical treatment.<sup>116</sup>

Divorced and separated women from all social classes and ethnic groups experience property rights violations. In several cases, educated, formally-employed women who married men with high salaries and ample property told Human Rights Watch that they were evicted and left empty-handed just like poorer women. These women had enough knowledge of their rights to pursue legal claims, but had only limited success. Ruth Odish, a forty-eight-year-old Luo woman, endured years of beatings and death threats from her husband. She often reported this to police and her local chief, but they did nothing. In 1997, she went to the only shelter in Nairobi for battered women. Odish's husband owned eight modern houses in Nairobi and had a high salary as a company manager. Odish obtained legal counsel from a women's organization, and her lawyer sent a letter to her husband demanding maintenance and a share of the property. Her husband did not respond, and no case was ever filed in court. Odish now lives in a dangerous part of Nairobi's Kayole slum.<sup>117</sup>

Priscilla Echaria, a university-educated woman who worked as a teacher, lived in a modern house on a tea plantation that she and her diplomat husband purchased and operated together. Echaria said her husband was so physically and psychologically abusive that in 1987 she and her children moved to her father's house and she filed for divorce. Echaria then rented a bare, simple house, and her husband continued to live in their modern home. Echaria hired lawyers to seek division of the property and a divorce. She wrangled in and out of court for years before regaining possession of her house and half the property. Even then, several years elapsed before the

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<sup>113</sup> An imam is a Muslim spiritual leader.

<sup>114</sup> Human Rights Watch interview with Sophie Yusuf, Nairobi, October 20, 2002.

<sup>115</sup> Human Rights Watch interview with Mary Abudo, Nairobi, October 29, 2002.

<sup>116</sup> Ibid.

<sup>117</sup> Human Rights Watch interview with Ruth Odish, Nairobi, October 28, 2002.

judgment was enforced. As of February 2003, fifteen years after filing the lawsuits, an appeal is still pending. Often on appointed hearing dates, her case would be missing from the court calendar and a new date would be set for a year later. The ordeal took a toll on Echaria:

This was a very expensive case. I don't have running water because of paying lawyers. It cost five million shillings [U.S.\$62,893].... By the time the case is done, it may be three or four million more. I also wasted lots of time. It's like an obsession.... I'd be abandoning myself if I abandoned this.... It's not in my nature to take nonsense.... Most women would give up. It's so difficult to live this way.

They talk about African traditions, but there is no tradition you can speak of—just double standards.<sup>118</sup>

### **Married Women's Lack of Control over Property**

*My husband hits me if I say the property was mine and shouldn't be sold.*

—Ndati Muita, Maasai woman, Ngong, October 24, 2002

Married women in Kenya often have little control over family property. According to the customary laws of some ethnic groups, all property a woman acquires before or during the marriage belongs to her husband, who can sell it without her consent. Kenyan law recognizes women's right to own separate property during marriage, but there is no legal presumption of co-ownership of matrimonial property. To stop a husband from disposing of family property, wives must rely on legal maneuvers (such as arguing that the property is held in an implied trust), which only help in limited circumstances.

Ndati Muita, a Maasai woman with seven children, said that her alcoholic husband sold cow after cow until they were gone and the family was destitute. Muita's husband did not ask her consent before selling the livestock, and beat her when she complained:

My husband sold the livestock. I didn't consent. He sold them when I wasn't there.... I didn't go to the elders or police. I fear my husband. If I report, maybe my husband will abuse me.... My husband hits me if I say the property was mine and shouldn't be sold. He beats me—specifically when I talk about the sheep and the cattle.... As a woman, you have nothing to do with property.<sup>119</sup>

Naiyeso Samperu, a Maasai woman with six children, explained how limited married women's rights are to livestock, an important asset in the Maasai community. "Women don't have rights to cows or sheep during marriage—only the milk," she said. "We just take care of the sheep and cows."<sup>120</sup>

Gacoka Nyaga said that before she and her husband divorced, he sold family land and invested the proceeds in company shares in his name. "I didn't have access to the property," she said. "I told him I wanted my name on the investment, but he refused." When Nyaga initiated a division of property case, her husband threatened to sell everything. Nyaga says she was only able to prevent him from doing so because she had an attorney.<sup>121</sup>

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<sup>118</sup> Human Rights Watch interview with Priscilla Echaria, Central Province, November 9, 2002. Echaria authorized Human Rights Watch to use her real name in this report and noted that her case has been covered in the press.

<sup>119</sup> Human Rights Watch interview with Ndati Muita, Ngong, October 24, 2002.

<sup>120</sup> Human Rights Watch interview with Naiyeso Samperu, Ngong, October 24, 2002.

<sup>121</sup> Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

## Consequences of Women's Property Rights Violations

As the accounts above illustrate, when a woman's property rights are violated, the consequence is not just that she loses assets. The repercussions reverberate throughout women's lives, often resulting in poverty, inhuman living conditions, and vulnerability to violence and disease for women and their dependents. Each of these consequences is amplified by Kenya's high HIV/AIDS rates: with increasing AIDS deaths, there are more widows who face potential property grabbing and its consequences. HIV infected and affected women and their dependents experience the hardships of losing property all the more intensely.

Living in squalor is one common consequence of women's property rights violations. The housing women resort to when evicted by their relatives is often decayed, cramped, and unsafe. In the case of women with HIV/AIDS, these conditions can lead to earlier death. As reflected in many of the testimonies above, women whom Human Rights Watch interviewed consistently described being forced to live in substandard housing: the physical structures are dilapidated; services (including running water, energy, and sanitation) are unavailable; and the locations (in terms of schools, health-care facilities, and safety) are bad. For example, Mary Adhiambo was forced to leave her rural home and land in 1998 after her husband beat her and demolished her home. "Where I live now is a bad place in the Kibera slums," she said. "It's a very small room. When it rains, water comes through the roof. I have no money for a better house. I have no electricity. I buy water from a stand pipe, but when I have no money, I have no water."<sup>122</sup> Josephine Omuga, a widow from Siaya district, said that after her husband died in 1997, her in-laws took her land and other property, forced her to have sex with a jater, and evicted her from the homestead. Before her husband died, she lived in a solid three-room hut. Now she lives in a small barn that she shares with cows and goats.<sup>123</sup>

Women who lose their property lose their economic base and often descend into abject poverty. Many of the women Human Rights Watch interviewed said the property rights violations left them poor and struggling to pay school fees, buy food and water, obtain medical treatment, and meet other subsistence needs. Some were poor before the property rights violations but became infinitely poorer when their possessions, and especially their land, were taken from them. The traditional solutions to this dilemma—being inherited by a male in-law, remaining with an abusive husband, or returning to a father's homestead—keep women economically dependent on men and preserve their inequality. The poverty resulting from women's property rights abuses affects children, too. A teacher said: "It's very common for children to drop out of school when their mothers are disinherited.... Some drop out because of general poverty, but when it comes to widows, it's even more serious.... I know a lady whose husband had built a house, but her mother-in-law came after the husband died and grabbed it. The child dropped out of school last week because the mother couldn't pay the school fees."<sup>124</sup>

Violence is another by-product. Some women said they stayed in violent relationships for years because they believed no court or other authority would give them a share of the family property or remove the abusive partner from the home. Some women were beaten, threatened, and harassed by husbands or relatives when they protested property rights violations. Women are also abused for trying to learn about their property rights. A paralegal who offers trainings on property rights said, "Husbands have threatened, 'don't ever go [to a training] again or I'll kick you out....' One woman was beaten senseless for coming to our meeting."<sup>125</sup>

Property rights violations also threaten women's health. Women who succumb to customary practices like wife inheritance and cleansing are vulnerable to all types of sexually transmitted diseases. An expert on HIV/AIDS and the law said women's property rights violations increase their vulnerability to HIV/AIDS:

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<sup>122</sup> Human Rights Watch interview with Mary Adhiambo, Nairobi, October 28, 2002.

<sup>123</sup> Human Rights Watch interview with Josephine Omuga, Siaya, November 3, 2002.

<sup>124</sup> Human Rights Watch interview with Doris Adem, teacher, Siaya, November 3, 2002. President Kibaki declared in January 2003 that his government would comply with the legal requirement under the Children's Act of 2001 that primary schools not charge fees. If consistently enforced, this will help many dispossessed women. Andrew Teyie and Ben Agina, Primary Education is Free from Monday, Says Kibaki," *East African Standard*, January 4, 2003 [online], <http://www.eastandard.net/headlines/news0401200304.htm> (retrieved January 4, 2003).

<sup>125</sup> Human Rights Watch interview with Samson Michura, paralegal, Education Centre for Women in Democracy, Nairobi, October 25, 2002.



“Because women do not own property as such, men have more say over them. They can’t negotiate safer sex, and this increases infection.”<sup>126</sup> Many women with HIV/AIDS are likely to die sooner because of their unequal property rights, depriving them of the resources and shelter they need to survive. Women who have lost their property often cannot afford medical treatment.

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<sup>126</sup> Human Rights Watch interview with A.D.O. Rachier, advocate, Nairobi, November 11, 2002.

## V. CONTRIBUTING FACTORS

Women's property rights violations in Kenya are caused and aggravated by a blend of discriminatory laws, customs, and attitudes combined with ineffective institutions, official disregard, widespread ignorance of rights, and other obstacles to their enforcement.

### Discriminatory Laws

*The law right now is not very women-friendly. We're trying to come up with legislation and trying to sensitize the judiciary. I don't think the impact is significant yet.*

—Njeri Mwangi, senior state counsel, Office of the Attorney General, Nairobi, November 11, 2002

Kenya's constitution outlaws discrimination on the basis of sex, but exemptions largely eviscerate the nondiscrimination provisions. Article 70 of the constitution provides that all Kenyans are entitled to fundamental rights and freedoms, whatever their sex. Article 82(1) prohibits any law that is "discriminatory either of itself or in its effect" and article 82(3) defines discrimination to include discrimination on the basis of sex. However, article 82(4) exempts certain laws from the discrimination prohibition. It permits discrimination "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" and with respect to "the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons."<sup>127</sup> In other words, in areas vital to women's property rights, such as marriage, inheritance, and the application of customary law, discrimination is sanctioned. In addition, article 82(6) provides that if an official body controlling transactions in agricultural land (such as a land control board) gives or withholds consent to a transaction, this decision may not be deemed discriminatory. Thus, if a land control board permits a man to sell family agricultural land, a woman cannot challenge that decision as discriminatory. As one lawyer observed, the current constitution "gives with one hand and takes away with the other."<sup>128</sup>

The Law of Succession Act of 1981, which attempted to bring some uniformity to succession in Kenya, should have improved women's inheritance rights. However, it contains several discriminatory provisions. This law governs both testamentary and intestate succession (succession with or without a will). Where there is no will, female and male children should inherit from their parents equally. If there is one surviving spouse and a child or children, the surviving spouse is entitled to (i) an absolute interest in the deceased's personal and household effects and (ii) a life interest in the rest of the estate. This means the surviving spouse becomes the absolute owner of personal and household items and can use other property (such as land and houses) during the spouse's lifetime. The spouse cannot dispose of the second category of property without court permission. If the surviving spouse is a woman, her interest in the property terminates if she remarries. A surviving husband's interest does not terminate upon remarriage. When the surviving spouse dies (or, in a woman's case, remarries), the estate goes to the children. The intestate succession rules also provide that if one dies without a spouse or children, the estate goes first to the father, and if the father is dead, to the mother. Thus, even though women have inheritance rights under this act, men have greater rights.

Exceptions and misinterpretations also undermine the Law of Succession Act. The act was amended in 1990 to exempt Muslims, who protested the equality provisions.<sup>129</sup> In addition, Section 32 of the act exempts agricultural land, crops, and livestock in certain "gazetted" districts (districts designated in a legal notice in the official gazette) from the intestacy rules. In those districts, customary law applies.<sup>130</sup> Although the Law of

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<sup>127</sup> Constitution of Kenya, article 82(4). The constitution was last amended in 1998.

<sup>128</sup> Human Rights Watch interview with Ann Njogu, executive director, Centre for Rehabilitation and Education of Abused Women, Nairobi, October 16, 2002.

<sup>129</sup> Act No. 21 of 1990. Muslims are subject only to Islamic laws on succession. See n. 79 above for a description of some of the relevant provisions.

<sup>130</sup> The following districts are exempted: West Pokot, Turkana, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado, and Narok. Pastoral communities predominantly inhabit these districts. Legal Notice 94 of 1981.

Succession Act is clear about the exceptions, some judges and magistrates assert that all rural land, not just land in gazetted districts, is exempt from the act. A justice on Kenya's highest court told Human Rights Watch, "The Law of Succession Act can't apply [to rural land] because women are supposed to be married and go away."<sup>131</sup> A magistrate in Siaya district (which is not a gazetted district) said, "The Law of Succession Act is applied only by the educated.... If it's in the rural area, we don't want to interfere with the community set-up."<sup>132</sup>

Statutory law on division of family property remains so undeveloped that lawyers must resort to England's 1882 Married Women's Property Act<sup>133</sup> and Kenyan case law interpreting that act. Case law establishes that women are entitled to half of the family property if they can prove contribution. This principle applies even to customary and Muslim marriages. However, the absence of a statute regulating division of property makes the application of this case law uneven. Two statutes, the Matrimonial Causes Act and the Subordinate Courts (Maintenance and Separation) Ordinance, govern spouses' rights and duties following judicial separation, but do not regulate division of family property. "The gap in the law is glaring," said one women's rights lawyer. "Why are we using an 1882 Act forty years after independence?"<sup>134</sup> Moreover, when Human Rights Watch discussed family property division with local officials, many had no idea that women could be entitled to anything, much less half of the family property, upon separation or divorce. For example, one local administrator said that a woman could not get land or other property upon divorce. He added that a woman "wouldn't get cows because the woman was paid for [with dowry]."<sup>135</sup>

Land laws in Kenya, while not discriminatory on their face, have exacerbated women's inequality by recognizing men's traditional allocation rights as worthy of registration while ignoring women's user rights to clan land. Moreover, although a non-binding administrative decree instructs land control boards—bodies with authority to approve certain land transactions—to take families' interests into account, this guideline is not always effective. Men have reportedly bribed land control boards, fraudulently brought imposter "wives" to the boards to consent to land transfers, and threatened their wives with violence or eviction if they withhold consent.<sup>136</sup> A land officer in western Kenya said that land control boards encourage men to get their wives' consent before selling land, but confessed, "At times we find that a man sells without getting consent."<sup>137</sup>

Finally, customary property laws, as described above (see Background), overtly discriminate on the basis of sex by giving men greater rights than women to own, inherit, acquire, manage, and dispose of property. With the drastic changes in family and social structures since pre-colonial times as well as the health risks of HIV/AIDS and other diseases that thrive on women's subordination, this gender differentiation and the profound inequalities it produces are no longer justifiable.

## Biased Attitudes

*A woman and the cows are a man's property.*

—Wilson Tulito Molill, senior chief, Ngong, October 25, 2002

Many men—and some women—in Kenya believe that women should not be entitled to property rights, at least not on an equal basis with men. These attitudes influence the interpretation of customary laws, and vice versa. This cycle legitimizes women's subordination and inequality.

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<sup>131</sup> Human Rights Watch interview with Justice Richard Otieno Kwach, Court of Appeal, Nairobi, November 7, 2002.

<sup>132</sup> Human Rights Watch interview with Francis Makori Omanta, senior resident magistrate, Siaya, November 4, 2002.

<sup>133</sup> The MWPA applies in Kenya as a statute of general application pursuant to a 1971 High Court decision.

<sup>134</sup> Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

<sup>135</sup> Human Rights Watch interview with a local administrator in the Lake Victoria region, November 3, 2002.

<sup>136</sup> Human Rights Watch interview with Akinyi Nzioki, gender program officer, Royal Netherlands Embassy, Nairobi, November 7, 2002 and Human Rights Watch interview with Mary Wambua, head, Women's Bureau, Nairobi, November 6, 2002.

<sup>137</sup> Human Rights Watch interview with assistant land officer, Kisumu, November 5, 2002.

Traditional leaders and local government officials, whose views are influential in their communities and form the basis of customary laws, were candid with Human Rights Watch about their attitudes toward women and their property rights. A government-appointed senior chief in Kajiado district spelled out women's status as chattel: "A woman and the cows are a man's property," he said. "The Maasai believe that the property within their homestead is theirs—the children, the wife, the cows, the land—is all a man's property. There are no disputes." He explained women's rights with respect to cattle: "A wife cannot sell a cow without her husband's consent. She cannot slaughter [cows] unless she has clearance from the man. If a cow is given away, the man decides, never the woman." When asked whether a woman could take cattle if there was a divorce, he laughed and said, "No, that is wrong.... I'd never allow this. I've never heard of such a case.... There are things we Maasai have never experienced."<sup>138</sup>

A village elder in Kajiado district told Human Rights Watch: "When you marry, you show the woman which livestock is hers, but the man knows very well the livestock belongs to him. The woman can milk the cows but she can't slaughter or sell them. She 'owns' them in his trust.... In Maasai culture, a woman is not supposed to own property." The elder said his cows belong to him, not his wife. "In my village," he said, "there are more than one hundred homesteads, but not more than five women own property." This elder has had some human rights training from NGOs, and has since intervened several times to allow women to inherit property. When he did so, the villagers were "utterly perplexed." Despite the training, the elder was not aware that spouses could share family property upon divorce. "A woman is not supposed to take property when there is a divorce," he said. He has never seen a man leave the family home upon divorce: "That doesn't happen because the home belongs with the man.... We would not let the property go with a woman because she can go marry again." If there are disputes in divorce cases in his village, the man's family has the final word.<sup>139</sup>

An elder in rural Siaya district said he has never heard of a divorced woman taking property, and only a man's name can go on a land title deed. He said he knows the Law of Succession Act applies in his village, but in practice, only sons inherit. He said, "In the case of land, you can't let girls and boys inherit equally because girls may marry. Even fifty years from now it should be that way." When asked whether these customs should change, he replied, "While making changes, women shouldn't be given freedom because they will misuse property."<sup>140</sup>

Individual men revealed similar attitudes. Kotet ole Supeyo, a Maasai farmer, said "In Maasai land, a woman can't have property on her own." He has given his sisters livestock during hard times, but their husbands, not his sisters, actually own the livestock. "The husband has to own the property because the wife belongs to the husband," he explained. "The husband owns the wife." He elaborated: "Most women are not literate. They can't do anything by themselves. So in Maasai land, women have to rely totally on men.... A woman can't sell property without consulting her husband. But he can sell without consulting his wife." In terms of land, he said, "We don't trust women. Women could go and sell the land." He said some people give land to unmarried daughters, but he has not done so. Moreover, if he ever tried to co-register his land in his wife's name, he thinks his sons would stop him. Ole Supeyo did acknowledge that a few groups of women now own land in collectives. "Nowadays you see groups of women who own land, but they're the only kind of women who own property.... It can't be possible here for a single woman to own property."<sup>141</sup>

Steven Oketch, a farmer in Siaya district, chuckled when asked if women take property upon divorce. "If there is a divorce, the woman returns to her parents," he said. "When she goes, she leaves everything. It would be funny to hear of a woman leaving with property." When asked if a divorced man would ever leave the family home, he replied, "Here it is the woman who leaves. It is the man who brought the woman to the ancestral land.... Even if they don't live on ancestral land, it is the woman who leaves." He thinks this would happen even if a woman bought the land, but added, "Actually, a woman has never bought land. It never happens that a woman

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<sup>138</sup> Human Rights Watch interview with Wilson Tulito Molill, senior chief, Ngong, October 25, 2002.

<sup>139</sup> Human Rights Watch interview with Daniel Kusero, elder, Kajiado district, October 25, 2002.

<sup>140</sup> Human Rights Watch interview with Thomas Ojuang, elder, Siaya district, November 3, 2002.

<sup>141</sup> Human Rights Watch interview with Kotet ole Supeyo, Kajiado district, October 25, 2002.

buys land.” In terms of women independently owning property, he said this was impossible because “they would automatically commit adultery.” The only reasons to change customs like wife inheritance and ritual cleansing, in his opinion, are the risk of HIV/AIDS and the influence of religion, not women’s rights. “Diseases will force change.... Every tribe has its own customs. If we talk about changes, it’s only because of disease or religion. Otherwise we should continue our tribal culture.”<sup>142</sup>

Thomas Funga, a man from western Kenya who says he advocates women’s rights in his village, described his mixed attitude. He said that wife inheritance should end because of the HIV/AIDS risk. He thinks daughters, but not wives, should inherit when a man dies: “In the case of land, if a husband dies and has no children, then the brother-in-law can take the land. If there are children, the land should go to the children—even girls.” Nonetheless, when he dies, he said only his son will inherit his land. “According to the customs, women should not inherit,” he said. “Just because of laws women pursue inheritance.... People feel women are greedy if they pursue inheritance. It makes people not respect women.”<sup>143</sup>

Some women are resigned to having inferior property rights, and others even oppose the idea of women having equal property rights. Anna Adhiambo, a Luo woman from Kisumu, said, “I didn’t inherit from my parents because when parents die, daughters do not get anything. Boys inherit, but girls do not.... This started much earlier. No one bothers to question it. We’re born into it.” This is true even for her children: “As much as I want to see change, it will be difficult. If I die, I know my son won’t share with my daughters.”<sup>144</sup> A women’s rights lawyer said an elderly woman recently told her, “If we give land to a woman... she will be arrogant and won’t serve her man.”<sup>145</sup> An NGO representative attributes this attitude to socialization:

Very few women have property registered in their name. Why? Patriarchy. The message is always reinforced that women can’t own property. Even some women believe this. Women are socialized in many ways to think that this is the domain of men.... Even well educated women fall in the same trap.<sup>146</sup>

Not everyone is against women’s equal property rights, but many supporters have a hard time realizing such rights in their own families. A fair number of individuals and officials expressed concern about the property rights violations perpetrated against women, yet few had co-registered property with their wives or written wills to ensure that wives and daughters would inherit. A district officer in the Rift Valley Province said that cultural limitations on women’s property ownership stunt their development, but then said, “All my property is in my name. I don’t see any reason to put it in my wife’s name. It’s cultural.”<sup>147</sup> One former minister, who said “a lot needs to be done to change attitudes and values in society” and supports women’s equal property rights, acknowledged that he has not co-registered his property with his wife and has no written will to protect her from disinheritance.<sup>148</sup> An official in the Women’s Bureau clearly supports women’s equal property rights, but she and her husband have not co-registered their property: “We bought land, and it’s not in my name. We put up a small house, and my husband called it ‘his’ house. My contribution is not considered.”<sup>149</sup>

Some individuals hide their positive attitude toward women’s equal property rights to avoid community scorn. Steven Maina, a taxi driver in Nairobi who is originally from Nyeri, said that title to the family car is in his wife’s name, and their land is in his name. He said his family would ridicule him if they knew the car was in his wife’s name:

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<sup>142</sup> Human Rights Watch interview with Steven Oketch, Siaya district, November 3, 2002.

<sup>143</sup> Human Rights Watch interview with Thomas Funga, Siaya district, November 3, 2002.

<sup>144</sup> Human Rights Watch interview with Anna Adhiambo, Kisumu, November 1, 2002.

<sup>145</sup> Human Rights Watch interview with Judy Thongori, then deputy head of litigation, International Federation of Women Lawyers (FIDA-Kenya), Nairobi, October 16, 2002.

<sup>146</sup> Human Rights Watch interview with Ann Gathumbi, coordinator, Coalition on Violence against Women, Nairobi, October 17, 2002.

<sup>147</sup> Human Rights Watch interview with [name withheld], district officer, Rift Valley Province, October 25, 2002.

<sup>148</sup> Human Rights Watch interview with [name withheld], [title withheld], Nairobi, November 7, 2002.

<sup>149</sup> Human Rights Watch interview with [name withheld], Women’s Bureau, Nairobi, November 6, 2002.

I haven't told anyone that my wife owns the car.... If I let my family know, they'll say my wife is in charge and controlling me. Especially in Nyeri, you're not supposed to say your wife owns anything.... This is because of the belief prevalent in that area. Women should never be ahead of a man.... My opinion is different from men in Nyeri.<sup>150</sup>

This fear of community scorn stops some families from respecting women's property rights. "Even if a father is enlightened and wants his daughter to inherit," said one property lawyer, "he won't do this because he will be looked down on by his community. Society dictates this."<sup>151</sup> According to one women's organization representative, "Neighbors would laugh at a man if he left property to his daughter."<sup>152</sup>

### **Unresponsive Government and Traditional Authorities**

*The problem with the police is that they don't like these cases of disinheritance of widows. They say it's normal.*

—Eunice Awino, paralegal, Education Centre for Women in Democracy, Siaya, November 2, 2002

Since many women in Kenya never make it to court to claim property, they often turn to local authorities, both governmental and traditional, to resolve disputes. Although informal dispute resolution can help limit the financial and social costs of claiming property rights, local officials are more apt to apply customary law than statutory law, which can disadvantage women. Women told Human Rights Watch that local authorities were occasionally helpful but more often unresponsive or ineffective. "We have poor local leadership," one NGO representative remarked. "They're not responsive to the community."<sup>153</sup> Moreover, police and central government officials acknowledged that women do not have equal property rights in Kenya, but officials do not consider this a pressing issue.

Many local officials are loath to get involved in women's property cases, which they justify as a desire "not to interfere with culture."<sup>154</sup> Lydiah Wanza, a thirty-seven-year-old Kamba widow, told an elder that her brothers-in-law took her land in Meru when her husband died. The elder "kept quiet and said he would answer later," but nothing happened.<sup>155</sup> Ellen Achieng, a Luo woman whose husband beat her, went to her local chief to ask if she could live in the matrimonial home and have her husband move out. The chief told her to go back to her husband.<sup>156</sup> Monica Wamuyo, a widow whose in-laws forced her out of her home, told village elders that she wanted to remain in her home. "The elders said I had to move out," she said.<sup>157</sup>

Women seldom go to police about property problems—unless their children are endangered—because they believe the police will turn them away, dismissing them as family or clan disputes. "The problem with the police is that they don't like these cases of disinheritance of widows," said a paralegal in western Kenya. "They say it's normal."<sup>158</sup> A police official acknowledged: "Women can't come here [for property cases]. We can't go into family cases on inheritance. Each tribe has its custom. Unless the law is changed to come to the criminal point, [we can't get involved]. For now, the elders sit together and decide.... When it comes to physical harm, we

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<sup>150</sup> Human Rights Watch interview with Steven Maina, Nairobi, November 12, 2002.

<sup>151</sup> Human Rights Watch interview with Jane Michuki, partner, Kimani & Michuki Advocates, Nairobi, November 6, 2002.

<sup>152</sup> Human Rights Watch interview with Rose Mary Moraa, program manager, Maendoleo Ya Wanawake Organization Nairobi, November 7, 2002.

<sup>153</sup> Human Rights Watch interview with Elijah Agevi, regional director, Intermediate Technology Development Group, Nairobi, October 20, 2002.

<sup>154</sup> Human Rights Watch interview with Wilson Tulito Molill, senior chief, Ngong, October 25, 2002.

<sup>155</sup> Human Rights Watch interview with Lydiah Wanza, Nairobi, October 20, 2002.

<sup>156</sup> Human Rights Watch interview with Ellen Achieng, Nairobi, October 28, 2002.

<sup>157</sup> Human Rights Watch interview with Monica Wamuyo, Nairobi, October 28, 2002.

<sup>158</sup> Human Rights Watch interview with Eunice Awino, paralegal, Education Centre for Women in Democracy, Siaya, November 2, 2002.

step in.... Evictions [by families] are handled under customary law.”<sup>159</sup> Police corruption can also make women’s property problems worse. Gacoka Nyaga said that while she and her husband battled in court over dividing their family property, her husband influenced the police to harass her with spurious trespass (on her own property) and motor vehicle charges. “The police stopped me all the time,” she said. “My husband paid off the police to punish me. I wasted a lot of time in police stations.”<sup>160</sup>

Overall, the Kenyan government has not made women’s property rights a priority. Human Rights Watch interviewed officials in ministries and other government departments who could play a role in preventing or redressing property rights violations, or at least in alleviating the hardships victims endure. These officials could not identify any program aimed specifically at alleviating women’s property rights violations. The government conducts no civic education on women’s property rights and does not fund NGOs that do.<sup>161</sup> There is no government legal aid system (other than for murder and treason cases) and no women’s shelters funded or operated by the government.<sup>162</sup> A Ministry of Lands official said that he has “not come across” any policies on women and land, and the ministry has made “no conscious effort to encourage women to own land.”<sup>163</sup> Another said the Ministry of Lands should provide civic education on women’s property rights, but said, “At the moment, it’s not one of our core functions.”<sup>164</sup> An official in the Office of the Attorney General said that although they train top-level officials on human rights, they have “not gotten to specifics on women’s rights,” much less women’s property rights. She also said that the Attorney General’s office has “no one responsible for women’s rights.... There is no gender desk. We were supposed to have one, but it never kicked off.”<sup>165</sup> The former minister of agriculture said, “[We have] no programs targeting women.”<sup>166</sup> Moreover, the Ministry of Finance has not yet accomplished gender budgeting, which could improve other ministries’ ability to undertake programs on women’s property rights.

Lower-level departments, which could theoretically have a direct impact on property rights violations and their consequences, have not made this a priority. For example, an official in the Department of Housing said that although women—especially those whose property has been grabbed—have specific housing needs, the department’s declining budget and staff has forestalled initiatives on women and housing. She explained, “So far, [the department] has not addressed issues of women specifically.... There is no gender unit in the Department of Housing, but we need one.” Moreover, she said, “There are no direct housing loan programs aimed at women. I don’t see it happening.” The official acknowledged that inheritance laws are not enforced, and women are evicted from their homes as a result. “This is only a problem for women, not men,” she said. “We have no program to stop evictions [by families].” Finally, she noted that women head most slum households, but the department has not made consulting women a priority when planning slum-upgrading projects. “I can’t say we go out of our way

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<sup>159</sup> Human Rights Watch interview with P.O. Etyang, officer in charge, Police Division, Siaya, November 4, 2002.

<sup>160</sup> Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

<sup>161</sup> Human Rights Watch interview with Njeri Mwangi, senior state counsel, Office of the Attorney General, November 11, 2002.

<sup>162</sup> Human Rights Watch interview with Mary Wambua, head, Women’s Bureau, Nairobi, November 6, 2002. The government pledged in January 2003 to establish a legal aid program for victims of human rights abuses. News reports indicate that the legal aid will be provided primarily to those who suffer abuses due to corruption. Although only minimal information was available about the plans as of early February 2003, there is no indication that the legal aid program will have the capacity to provide women who have suffered property rights discrimination assistance in civil or criminal actions. Mugo Njeru, “State Pledges Legal Aid to Victims of Rights Abuse,” *Daily Nation*, January 28, 2003 [online], <http://www.nationaudio.com/News/DailyNation/Today/News/News81.html> (retrieved January 28, 2003).

<sup>163</sup> Human Rights Watch telephone interview with Chiboli Shakaba, deputy secretary, Ministry of Lands, Nairobi, November 12, 2002.

<sup>164</sup> Human Rights Watch interview with Benson O. Akungo, provincial physical planning officer, Ministry of Lands, Kisumu, November 5, 2002.

<sup>165</sup> Human Rights Watch interview with Njeri Mwangi, senior state counsel, Office of the Attorney General, November 11, 2002.

<sup>166</sup> Human Rights Watch interview with Bonaya Godana, then Minister of Agriculture, Nairobi, November 8, 2002.

to make sure women are involved. We don't look for them. We talk to the chief and whoever is involved in the day to day running of the slums."<sup>167</sup>

Government offices that perform human rights education do not focus on women's property rights. The Women's Bureau conducts "gender sensitization" trainings for government officials but does not offer civic education on women's property rights.<sup>168</sup> The Standing Committee on Human Rights has a human rights education program but does not specifically address women's property rights.<sup>169</sup>

Even with the Kenyan government's increasing attention to the AIDS pandemic, official efforts to curb customary practices like wife inheritance and ritual cleansing, both of which can cause HIV transmission, have been inadequate. A UNAIDS official said that Kenya has not done enough to address women's property rights and their vulnerability to HIV/AIDS. "Women's disinheritance in Kenya is terrible, a tragedy," he remarked. He said the government should discourage traditional rituals, which are "shrouded in secrecy, and [require] that if a man dies, the woman has to sleep with a scum of society."<sup>170</sup> An NGO representative said government officials put tradition over health concerns: "I've not seen many government efforts to educate people about the HIV risks of widow inheritance and cleansing practices. I was at a meeting of government and religious leaders where they said a cure should be found first because these traditions should continue."<sup>171</sup> Even the government-sponsored National AIDS Control Council acknowledges that Kenya's serious policy and strategic gaps relating to women's rights have contributed to the spread of HIV/AIDS.<sup>172</sup>

### Ineffective Courts

*The courts and judiciary are strong arms to disinherit women.*

—Ann Njogu, executive director, Centre for Rehabilitation and Education of Abused Women, Nairobi, October 16, 2002

Lawyers and individual women complain that Kenya's courts are biased against women, slow, corrupt, and often staffed with ill-trained or incompetent judges and magistrates. These perceptions discourage women from using courts to assert property claims.

"There are biases on the bench," observed a lawyer at one women's NGO. "Access to justice is lacking, but actually biases against women in the court are worse than anything else.... We see bias in both succession and marriage cases."<sup>173</sup> Another lawyer agrees: "The worst bit is the attitude of the courts [toward women].... Our

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<sup>167</sup> Human Rights Watch interview with Jane Mwangi, acting chief housing officer, Department of Housing, Nairobi, October 29, 2002.

<sup>168</sup> Human Rights Watch interview with Mary Wambua, head, Women's Bureau, Nairobi, November 6, 2002.

<sup>169</sup> Human Rights Watch interview with Thuita Mwangi, executive director, Standing Committee on Human Rights, Nairobi, November 8, 2002. Mr. Mwangi said that the new Kenya National Commission on Human Rights, which is to become operational in 2003, should have a department for women's rights and could undertake this type of awareness raising.

<sup>170</sup> Human Rights Watch interview with Dr. Warren Naamara, country programme adviser, UNAIDS, Nairobi, October 31, 2002.

<sup>171</sup> Human Rights Watch interview with Alie Eleveld, coordinator, Society of Women against AIDS in Kenya, Nairobi, October 28, 2002.

<sup>172</sup> A National AIDS Control Council (NACC) publication identifies the following gaps: a lack of strategies to implement inheritance rights; lack of specific interventions to address property ownership and inheritance by women in female-headed households; lack of interventions to address women's land ownership; lack of appropriate guidelines for marriage, separation, divorce, and ownership of property; and failure to outline measures to eliminate harmful cultural practices such as wife inheritance. Gender and HIV/AIDS Technical Sub-Committee of the National AIDS Control Council, *Mainstreaming Gender into the Kenya National HIV/AIDS Strategic Plan 2000-2005* (Nairobi: Office of the President, 2002), pp. 4-5. NACC also confirmed in this publication that losing family property when a husband or father dies and practices such as wife inheritance increase widows' vulnerability to HIV infection. *Ibid.*, pp. 8-9.

<sup>173</sup> Human Rights Watch interview with Judy Thongori, then deputy head of litigation, FIDA-Kenya, Nairobi, October 16, 2002.



courts are failing us.”<sup>174</sup> Some say judges embody the attitude that women are inferior to men. “Judges are men who were brought up to believe less in the rights of women,” said one property rights lawyer. “Judges say, ‘Why should women get property?’”<sup>175</sup> Even a government official who handles succession matters admits: “Men judges do not apply the law. Our men are men whether they are judges or not. [Men judges] may believe a wife should not inherit.”<sup>176</sup>

Individual women also feel the bias when their cases reach court. Gacoka Nyaga, a woman who went to court for division of property, said: “Male judges sympathize with men [in property cases]. Judges think this could happen to them.”<sup>177</sup> Ndunge Ritah, who lost a motion asking a court to order her abusive husband to leave the home she bought, believes she lost because she is a woman.<sup>178</sup>

Kenya’s courts are also slow. The obvious culprit is the courts’ backlog, but some say corruption plays a part. Gacoka Nyaga, whose division of property and divorce case took almost a decade, said, “My husband paid a High Court judge to drag out the cases. We’d go and the judge would be gone, sick, or not available. This went for years and years.... My court files were lost twenty times over.... This would delay the case for three to six months [each time].” She says her husband “paid the clerks to hide the files.”<sup>179</sup> Other women, such as Priscilla Echaria (whose property division case is still ongoing after fifteen years), blame backlogs and ineptitude for the courts’ crawling pace.

The new Family Division of the High Court (sometimes called the “Family Court”), which currently sits only in Nairobi, should help to speed up family law cases.<sup>180</sup> “We wanted to set up a Family Division in every province,” said the head of the Family Division, but this has not happened.<sup>181</sup> Some advocates are critical of the Family Division. “The Family Court is a big letdown,” said one women’s rights advocate.<sup>182</sup> Another lawyer complained that it has not done enough to streamline procedures: “Nothing has been done to simplify the rules for Family Court. The rules committee could do this easily, but it hasn’t taken this seriously. It’s made of men from the Court of Appeal who don’t see the urgency.”<sup>183</sup> She acknowledged that some succession rules were revised, but said, “They’re still complex.”<sup>184</sup>

Sometimes, courts simply do not enforce laws that could protect women’s property rights. “Most law is in writing, not in practice. The courts are far behind.... I don’t think the courts enforce the law per se,” said one government official.<sup>185</sup> This can happen if they think they have no jurisdiction, as exemplified by the remarks of a magistrate who, when asked if a court could order a man to leave the family home upon divorce, said: “A woman can’t come to court if she wants her husband to leave rather than her.... We don’t interfere with the community setup.”<sup>186</sup> It may also be due to ignorance of the law, although the head of the Family Division said she trained all judges and magistrates on family law. There is also a risk that judges’ personal beliefs could interfere with application of the law. One Court of Appeal justice said that the Law of Succession Act should not apply to any

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<sup>174</sup> Human Rights Watch interview with Martha Karua, advocate, Martha Karua & Co. Advocates, Nairobi, November 11, 2002.

<sup>175</sup> Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

<sup>176</sup> Human Rights Watch interview with Mary Njoki Njuya, principle state counsel, Office of the Attorney General, Nairobi, November 11, 2002.

<sup>177</sup> Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

<sup>178</sup> Human Rights Watch interview with Ndunge Ritah, Nairobi, November 10, 2002.

<sup>179</sup> Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

<sup>180</sup> The Family Division of the High Court began operating in 2001. Its jurisdiction covers adoption, child custody, matrimonial property, succession, divorce, separation, maintenance, and other family law matters.

<sup>181</sup> Human Rights Watch interview with Justice Joyce Aluoch, head, Family Division, Nairobi, October 30, 2002.

<sup>182</sup> Human Rights Watch interview with Martha Karua, advocate, Martha Karua & Company Advocates, Nairobi, November 11, 2002.

<sup>183</sup> Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

<sup>184</sup> *Ibid.*

<sup>185</sup> Human Rights Watch interview with Mary Njoki Njuya, principle state counsel, Office of the Attorney General, Nairobi, November 11, 2002.

<sup>186</sup> Human Rights Watch interview with Francis Makori Omanta, senior resident magistrate, Siaya, November 4, 2002.

rural land. He so firmly believes that customs sufficiently protect women that he denied women suffer property rights violations. He said:

It's idiotic to say that women can't get land in Luo land [in western Kenya]. If a woman says she's having difficulty getting land, it's crap. She ought to know that clan land can't be inherited by a woman. It has been this way since time began. If a [husband] dies, the widow has a life interest. It has nothing to do with women's human rights.... Brothers-in-law don't interfere. There is no room for interference....

A daughter would not inherit [rural land] under any circumstances.... Suppose I give [land] to my daughter and son, and then [my daughter] marries a Nigerian?... The Law of Succession Act can't apply [to rural land] because women are supposed to be married and go away.... Clan land must stay where it is. Urban property [can be inherited by women], but not rural land.... If you don't control the transmission of clan land, you'll bring in strangers from other cultures that undermine the culture protected by customary law.... The Law of Succession Act is useful because it covers people like us. Rural communities must be protected. It's in the interest of everyone that rural communities are governed by their rules.<sup>187</sup>

Some judges are also openly hostile to the idea of requiring a man to leave the matrimonial home upon separation or divorce. In one High Court ruling, the judge wrote:

I will pause here and deal with this issue of husbands vacating matrimonial homes for the wives. Of late a number of applications have been filed in this court seeking orders that husbands vacate the matrimonial homes for the wives. In a Kenyan context this issue has to be approached with extreme caution. We should not blindly ape the English as we have done in almost all our laws. It should be remembered that a wife is married into the husband's clan. The matrimonial home in most cases lies within the clan land. It would therefore not be in keeping with our culture for the husband to be made to vacate the clan land for the wife.<sup>188</sup>

Secular courts are not the only ones with problems. Kadhis' courts—religious courts that determine questions of Islamic law relating to personal status, marriage, divorce, and inheritance where all parties are Muslims—are also accused of being inept, slow, and costly. One lawyer who handles property cases for Muslim women said she prefers the secular High Court for divorce cases. “A Kadhis' court is like a kangaroo court. It's frustrating to litigants and lawyers,” she said. “Kadhis are insensitive to women's issues.... More often than not, Muslim lawyers go to civil courts to advocate for rights of women.”<sup>189</sup> In some areas, the pull of custom is so strong that the Kadhis have difficulty applying Islamic law. Kenya's Chief Kadhi said, “Where custom is strong, it may be hard for a Kadhi because people will be hostile to him if he judges according to Islamic law, so they encourage some sort of settlement. Sometimes this may not be beneficial for women.”<sup>190</sup> A Muslim member of the constitutional review commission said, “Some Kadhis don't apply the Koran. The Digo [ethnic group] has their own customary laws which in practice supercede Islamic law.”<sup>191</sup> Enforcing Kadhis' court judgments is also hard: “The government can enforce Kadhis' judgments, but there is no enforcement. No one fears the Kadhis' courts.”<sup>192</sup>

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<sup>187</sup> Human Rights Watch interview with Justice Richard Otieno Kwach, Court of Appeal, Nairobi, November 7, 2002.

<sup>188</sup> Ruling in the case of Agness Wanjiku Mbugua v. James Mbugua Macharia, Separation Cause No. 50 of 1997, High Court of Kenya at Nairobi, copy on file with Human Rights Watch.

<sup>189</sup> Human Rights Watch interview with Abida Ali-Aroni, lawyer, Nairobi, October 23, 2002.

<sup>190</sup> Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002.

<sup>191</sup> Human Rights Watch interview with Maimuna Abdallah Mwidau, program officer, Constitution of Kenya Review Commission, Nairobi, October 23, 2002.

<sup>192</sup> Ibid.

## Obstacles to Women Claiming Property

Obstacles to women asserting their property rights in Kenya abound. The most serious are women's lack of awareness about their legal rights, the time and expense of pursuing property claims, violence, social stigma, poverty, and harassment of NGOs working on women's property rights.

Kenya's pluralistic legal system is complex and confusing even for those with high levels of education and access to information. For women not in that privileged position, it is unusual for them to know their legal rights. "Women are not educated to know their rights," said the head of one NGO. "They don't know they're supposed to get land and property."<sup>193</sup> Many women interviewed by Human Rights Watch had not heard of laws relating to property at all or knew little of their content. A fraction had a clear understanding of their property rights. These women were among the most educated and wealthiest women Human Rights Watch interviewed or had attended trainings on property rights conducted by women's rights organizations. Anna Adhiambo, a Luo widow, said, "I'm not aware of a law on inheritance. I know that brothers-in-law grab what the deceased leaves behind. They take the land and the vehicles and they go."<sup>194</sup> Amina Juma, a widow in Kisumu, has a vague awareness of the Law of Succession Act, but said, "I don't know anyone who has been assisted by this law."<sup>195</sup> Some women know they have legal rights to property, but do not know how to claim them. Caroline Wanjiru, a widow living in Nairobi, said she never went to court or other authorities about the property her in-laws seized because she "didn't know whether such places existed. I didn't know where to go."<sup>196</sup>

The time it takes to pursue property claims, especially in court, is an obstacle for many women. "Many women give up going to court because it takes so long," said the head of a women's organization.<sup>197</sup> A lawyer specializing in women's rights cases added, "It's time consuming to pursue your rights. Being bogged down with day-to-day challenges, women generally don't go to court."<sup>198</sup>

The cost of claiming property rights is another deterrent. If a woman initiates a legal case, lawyers are her biggest expense. Of the women Human Rights Watch interviewed, two whose cases went the furthest had to pay legal fees of approximately KSh5 million (U.S.\$62,893) and KSh8 million (U.S.\$100,645), respectively. "To go to court you just pay," said Patrice Nayoke, a widow from western Kenya. "You're wasting money."<sup>199</sup> An NGO representative concurred: "[Going to court] is a technical, tedious process, but you can't get property without it. Many women don't have the money to do this. If they want to get a lawyer in private practice, it's expensive."<sup>200</sup> Accessing Kadhis' courts poses similar problems. The Chief Kadhi told Human Rights Watch: "Most women who come to the Kadhis' courts are economically empowered. It is often impossible to reach courts because of the cost of lawyers."<sup>201</sup> Local dispute resolution, such as arbitration by elders or chiefs, can also be unaffordable. Susan Wagitangu, a widow from central Kenya, said, "If you want to be assisted, you have to produce money. Even to go to the chief or the land department, they will always ask for money."<sup>202</sup> A women's rights educator who trains local officials said, "[Informal] village courts are harsh to women. In most cases, widows spend a lot of money trying to pay a bribe to the elders to handle their [property] cases."<sup>203</sup>

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<sup>193</sup> Human Rights Watch interview with Tabitha Seii, executive director, Education Centre for Women in Democracy, Nairobi, October 22, 2002.

<sup>194</sup> Human Rights Watch interview with Anna Adhiambo, Kisumu, November 1, 2002.

<sup>195</sup> Human Rights Watch interview with Amina Juma, Kisumu, November 1, 2002.

<sup>196</sup> Human Rights Watch interview with Caroline Wanjiru, Nairobi, October 21, 2002.

<sup>197</sup> Human Rights Watch interview with Tabitha Seii, executive director, Education Centre for Women in Democracy, Nairobi, October 22, 2002.

<sup>198</sup> Human Rights Watch interview with Martha Koome, Martha Koome & Co. Advocates, Nairobi, November 6, 2002.

<sup>199</sup> Human Rights Watch interview with Patrice Nayoke, Kisumu, November 1, 2002.

<sup>200</sup> Human Rights Watch interview with Ann Gathumbi, coordinator, Coalition on Violence Against Women, Nairobi, October 17, 2002.

<sup>201</sup> Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002.

<sup>202</sup> Human Rights Watch interview with Susan Wagitangu, Nairobi, October 29, 2002.

<sup>203</sup> Human Rights Watch interview with Zedekia Ouma, paralegal, Education Centre for Women in Democracy, Siaya, November 4, 2002.

Threats of violence also inhibit women from pursuing property claims. Many divorced and separated women told Human Rights Watch that they feared their husbands would attack or kill them if they pursued their property rights. These women were also willing to tolerate abuse because their housing alternatives were limited. Some widows also said they feared violence from their in-laws if they tried to regain their property.

Social stigma discourages women from claiming their property rights. Women who pursue property claims are often considered greedy traitors of custom. The near certain alienation they face from their families and communities stops many women from asserting property claims. According to an official who works on women's rights for the Supreme Council of Kenya Muslims, "Women are indoctrinated since childhood not to pursue their rights. If I were to ask for a share of my father's estate, it would be a big issue. People would ask, 'why is she acting like this?'... If a woman tries to pursue her rights, it looks like she's gone haywire. It's not just Muslim women—it's women in general in Kenya."<sup>204</sup>

The stigma is especially strong if women attempt to use courts to protect their rights. "Going to court is a deviation," said a teacher in Siaya district. "It's not accepted. Divorced women fear they will be seen negatively in the community if they pursue their rights in court."<sup>205</sup> A magistrate confirmed that communities would condemn a woman going to court for property as a "bad woman."<sup>206</sup> According to a local administrator in western Kenya, such women would be "outcasts."<sup>207</sup> An NGO representative added, "When you're seen going to court, people think you're going to jail.... If a woman went to a chief [about property], he would say, 'Why are you bothering me?' The chief would see her as defiant for not following the norms."<sup>208</sup>

Poverty not only contributes to women's property rights violations, it also discourages women from claiming their rights. Some women simply cannot afford to pay what it takes to pursue property claims. Poverty can also increase the strain on families, leading to perceptions that a woman pursuing her rights is competing against her male relatives. An activist in Nairobi remarked: "In a city like ours, you're fighting over crumbs. When women try to fight for property it is hard because men are also going for the crumbs. But if everyone reaches a certain level, they won't all be against women."<sup>209</sup> A commissioner on the Constitution of Kenya Review Commission said that in their community consultations, more young men objected to women having property rights than older men. She attributes this to poverty: "Many young men were the first ones to oppose recognizing women's property rights. Older men were more willing to recognize them. Brothers are competitors, and seeing their sisters inherit is considered part of their deprivation. When there is poverty and a lack of jobs, it looks like daughters are encroaching if they inherit."<sup>210</sup>

Finally, activists' and NGOs' ability to help women claim their property rights is jeopardized by harassment they face for doing their work. A paralegal who conducts civic education on women's property rights was once threatened after holding a training in a village: "I received a call on my cell phone with a man's voice saying 'If you ever set your foot in this place again, then you will not leave here alive. You will know there are men in charge here, not women.'... I felt threatened. I thought I was going to lose my life."<sup>211</sup> Another paralegal who works on inheritance cases said, "The villagers get angry. Brothers who want to take widows' property say

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<sup>204</sup> Human Rights Watch telephone interview with Nazlin Rajput, national deputy secretary for women affairs, Supreme Council of Kenya Muslims, Nairobi, November 16, 2002.

<sup>205</sup> Human Rights Watch interview with Doris Adem, teacher, Siaya, November 3, 2002.

<sup>206</sup> Human Rights Watch interview with Francis Makori Omanta, senior resident magistrate, Siaya, November 4, 2002.

<sup>207</sup> Human Rights Watch interview with Joseph Kisangau, senior district officer, Siaya, November 4, 2002.

<sup>208</sup> Human Rights Watch interview with Odenda Lumumba, coordinator, Kenya Land Alliance, Nairobi, October 18, 2002.

<sup>209</sup> Human Rights Watch interview with Professor Wangari Maathai, Green Belt Movement, Nairobi, October 18, 2002.

<sup>210</sup> Human Rights Watch interview with Professor Wanjiku Mukabi Kabira, commissioner, Constitution of Kenya Review Commission, Nairobi, October 23, 2002.

<sup>211</sup> Human Rights Watch interview with Samson Michura, paralegal, Education Centre for Women in Democracy, Nairobi, October 25, 2002.

'I'm going to kill you' or that they'll do a witchcraft curse."<sup>212</sup> He said that people criticize him for helping women. "Women's relatives say I am interfering with the culture and misleading the women. They say I'm a bad man, and I should let culture go on. I refer them to the law."<sup>213</sup>

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<sup>212</sup> Human Rights Watch interview with Zedekia Ouma, paralegal, Education Centre for Women in Democracy, Siaya, November 4, 2002.

<sup>213</sup> Ibid.

## VI. INTERNATIONAL LEGAL STANDARDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VII. CONCLUSION

*Women's property issues touch deeply the ways people live, think, and organize their social and economic lives. It's not just a matter of getting a few women in parliament. People feel threatened.*

—Professor Yash Pal Ghai, chairman, Constitution of Kenya Review Commission, Nairobi, October 23, 2002

Property rights abuses inflicted on women in Kenya should be recognized for what they are: gross violations of women's human rights. Discriminatory property laws and practices impoverish women and their dependents, put their lives at risk by increasing their vulnerability to HIV/AIDS and other diseases, drive them into abhorrent living conditions, subject them to violence, and relegate them to dependence on men and social inequality.

Despite the slow recognition that property rights violations harm not just women and their dependents but Kenya's development as a whole, little has been done to prevent and redress these violations. Averting these abuses in a country where dispossessing women is considered normal will be difficult. A concerted effort is needed not just to improve legal protections, but to modify customary laws and practices and ultimately to change people's minds. With extreme poverty, a moribund economy, rampant violence, and catastrophic HIV/AIDS rates, Kenya can no longer afford to ignore women's property rights violations. Eliminating discrimination against women with respect to property rights is not only a human rights obligation; for many women, it is a matter of life and death.

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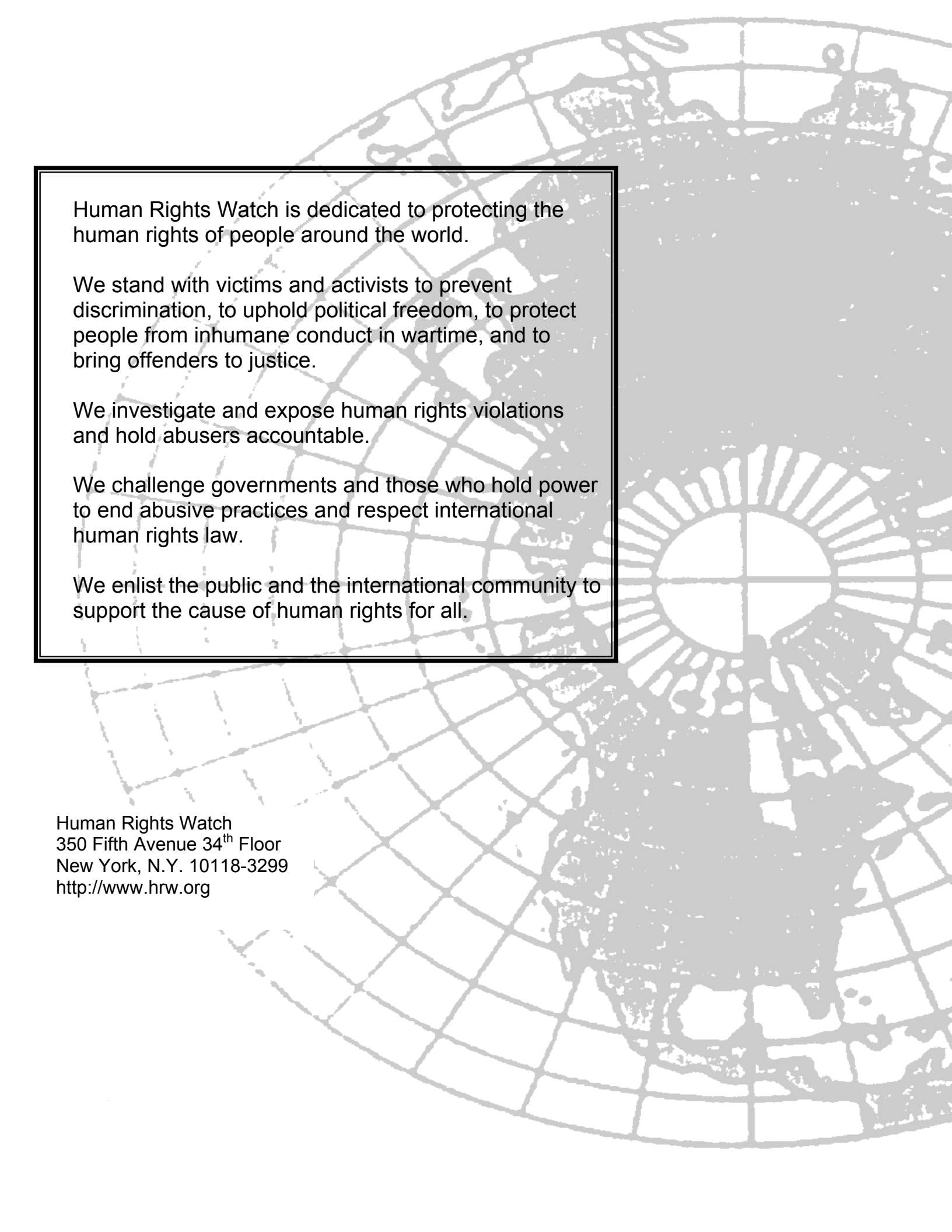
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