

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.¹ 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."² 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."³ 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

¹ 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.

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

³ 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.”⁴ 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.”⁵

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.”⁶

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.⁷

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

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

⁵ Ibid.

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

⁷ 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 2003.⁸

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.⁹ 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.¹⁰

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.¹¹ 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.¹²

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.

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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).

¹² 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.¹³ 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.¹⁴ 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.¹⁵ The numbers of women in formal employment are decreasing.¹⁶ Women head 37 percent of all households in Kenya, a number likely to grow as AIDS claims more victims.¹⁷ Eighty percent of female-headed households are either poor or very poor, in part due to their limited ownership of and access to land.¹⁸ Girls receive less education than boys at every level, and women's literacy rate (76 percent) is lower than men's (89 percent).¹⁹ Violence against women is commonplace: 60 percent of married women reported in a 2002 study that they are victims of domestic abuse.²⁰ In another study

¹³ 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.

¹⁴ 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.

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

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

¹⁷ *Ibid.*, p. 8.

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

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

²⁰ 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.²¹ According to women's rights advocates, there is only one shelter for battered women and their children in the entire country.²²

Women's land ownership is miniscule despite their enormous contribution to agricultural production. Women account for only 5 percent of registered landholders nationally.²³ The agricultural sector contributes over 80 percent of employment and 60 percent of national income.²⁴ Women constitute over 80 percent of the agricultural labor force, often working on an unpaid basis, and 64 percent of subsistence farmers are women.²⁵ Women provide approximately 60 percent of farm-derived income,²⁶ yet female-headed households on average own less than half the amount of farm equipment owned by male-headed households.²⁷ Rural women work an average of nearly three hours longer per day than rural men.²⁸ 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.²⁹ 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.³⁰ 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.³¹ Of those infected, 1.4 million were women and girls between ages fifteen and forty-nine.³² 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 region³³ and three times higher than males of that age in the country overall.³⁴ The large number of AIDS deaths has reduced life expectancy from sixty-five years to about forty-six years.³⁵

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

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

²² 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.

²³ 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.

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

²⁵ 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.

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

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

²⁸ *Ibid.*, p. 66.

²⁹ 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.

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

³¹ 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).

³² *Ibid.*

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

³⁴ 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).

³⁵ *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.³⁶

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."³⁷ 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.³⁸

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."³⁹ Its subjective nature was confirmed by a senior chief, who said, "Customary law is what I describe."⁴⁰ 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."⁴¹ A lawyer asserted, "Custom is invented today by men as a result of greed."⁴² Customary law can also be manipulated at the family level. According to a law professor, "Customary law is really a family thing."⁴³

³⁶ 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.

³⁷ Judicature Act, chapter 8, article 3.

³⁸ 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.

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

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

⁴¹ Human Rights Watch interview with Gacoka Nyaga, Central Province, November 9, 2002.

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

⁴³ 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.⁴⁴ 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.”⁴⁵ 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.”⁴⁶ 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.⁴⁷ 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.”⁴⁸ 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

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

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

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

⁴⁷ Human Rights Watch interview with Steven Oketch, Siaya district, November 3, 2002.

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

percent⁴⁹) and the most heavily AIDS-affected district (Kisumu district had a prevalence of 35 percent in 2000⁵⁰). According to one news report, one in three widows in western Kenya is forced to undergo the cleansing ritual.⁵¹ 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)⁵² 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.⁵³

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.⁵⁴

⁴⁹ 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.

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

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

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

⁵³ Human Rights Watch interview with Guy Udoyi, Siaya district, November 3, 2002.

⁵⁴ 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.⁵⁵ Kenya's absolute poverty has risen to between 52 and 56 percent of the population, up from 40.3 percent in 1994.⁵⁶ Economic growth has declined since the mid-1980s, and negative growth was recorded in 2000.⁵⁷ 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.⁵⁸ 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.⁵⁹ This is in stark contrast to neighboring Uganda and Tanzania, where women hold 25 percent and 17 percent of parliamentary seats, respectively.⁶⁰ 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.⁶¹ 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.⁶²

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.⁶³ 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).

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ UNDP, *Kenya Human Development Report 2001*, p. 67.

⁵⁸ *Ibid.*, p. 35.

⁵⁹ *Ibid.*, p. 25.

⁶⁰ *Ibid.*

⁶¹ 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).

⁶² 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.

⁶³ 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.⁶⁴ 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.⁶⁵

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.

⁶⁴ 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.

⁶⁵ "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).