

Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation

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I. INTRODUCTION

The following Human Rights Report was prepared by students and faculty of the International Women's Human Rights Clinic at Georgetown University Law Center, in partnership with lawyers from FIDA-Kenya. FIDA requested the assistance of Georgetown students to investigate whether current Kenyan law on intestate succession effectively protects the equal rights of women and conforms to international law. After extensive background research on the law of intestacy in Kenya as well as the law of intestacy in several other legal systems and relevant international legal conventions, students from Georgetown traveled to Kenya between March 29 and April 8, 2008, to hear about the lives of some of the people who have been affected by the inheritance system in Kenya, as well as the people who administer the law and advocate for legal reforms in Kenya. More than 80 interviews in total were conducted by the Clinic and FIDA-Kenya, covering a wide range of the population of Kenya, including rural farmers, lawyers, non-governmental organizations [NGOs], judges, religious leaders, government officials, Parliamentarians, academics, ministers, and many others, both in the city of Nairobi and in the smaller towns of Meru and Nanyuki, Kenya.

A central finding from all these interviews is that the women of Kenya are some of the most responsible, hard-working, intelligent, creative and productive members of Kenyan society. The women of Kenya do the majority of the agricultural labor. They take primary responsibility for the family, for the maintenance of the family home, and for the raising and educating of children. Women in Kenya play an important and an increasingly direct role in the Kenyan economy. They are starting businesses, investing in property, starting schools, investing in their education and that of their children, working to improve the environment, and working on public health projects. In the words of journalist Mildred Ngesa, in Kenya, "Women carry the whole world."¹

Unfortunately, another central finding in this report is that women in Kenya continue to face enormous obstacles to achieving equality. Women are the majority of Kenya's population; they perform 70% of the agricultural labor, but they own less than 1% of the land, and control very little of the income produced by their labor.² According to Lily Murei of the Kenya Land Alliance, "[T]he majority of the women are the ones who actually provide either in terms of labour, either in terms of livestock herding; it's the women that provide the labour, but to a larger extent, they don't benefit from anything accruing from land."³ The general counsel of a major bank in East Africa added "Women do all the backbreaking work but it is the men who get the funds from the cash crops."⁴

1. Interview with Mildred Ngesa, Journalist, Nation Newspaper, in Nairobi, Kenya (Apr. 3, 2008).

2. INT'L FINANCE CORP. [IFC] & WORLD BANK, VOICES OF WOMEN ENTREPRENEURS IN KENYA 1, 6-7 (May 2006), available at <http://www.ifc.org> (search the "Search IFC Site" field for "Voices of Women Entrepreneurs in Kenya;" then follow the "[PDF] Voices of Women Ent_Kenya.cdr" hyperlink).

3. Teleconference Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance, conducted in Washington, D.C. (Feb., 26, 2008).

4. Interview with General Counsel of an East African bank, in Nairobi, Kenya (Apr. 2, 2008).

This inequality is perpetuated by the continued widespread discrimination against women in the inheritance of property. Despite provisions of the Law of Succession Act that apparently give some protection to women, the interviews found that in practice, many women are unable to inherit property from their spouses, fathers, and other relatives. According to Irene Oloo of the League of Kenya Woman Voters, “If my husband died today . . . I would be given a piece of land to bury my husband and that would be the only land I could use. . . . The only thing that I am entitled to is the grave.”⁵ The Reverend Judy Mbugua said, “Women are not allowed to inherit anything when their husbands die or even when their parents die.”⁶

This inability to inherit property is the result of several important deficiencies in the Law of Succession Act, as well as the continuing use of African custom to determine succession matters. As the government of Kenya has recognized, “The area in which most customary laws disadvantage women is in respect of property rights and inheritance. Under the customary law of most ethnic groups in Kenya, a woman cannot inherit land and must live on the land as a guest of male relatives by blood or marriage.”⁷

The government of Kenya has promised both its citizens and the larger international community that the laws of Kenya will reflect recognized principles of equality and human rights. Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], acceded to by Kenya, promises that “State parties shall accord to women equality with men before the law.”⁸ By acceding to this agreement, the government of Kenya “recognizes the obligation to grant women equal rights with men in all spheres of life.”⁹ Kenya has also acceded to the International Covenant on Economic, Social and Cultural Rights [ICESCR], which promises “the equal right of men and women to the enjoyment of all economic, social, and cultural rights.”¹⁰ The International Covenant on Civil and Political Rights [ICCPR], also acceded to by Kenya, similarly promises the “equal right of men and women to all civil and political rights.”¹¹ In recognition

5. Interview with Irene Aloo in Nairobi, Kenya (Apr. 2, 2008).

6. Interview with Judy Mbugua in Nairobi, Kenya (Apr. 4, 2008).

7. Republic of Kenya, *Combined fifth and sixth periodic reports to the Committee on the Elimination of Discrimination Against Women* (39th Sess., 2007), para. 81, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (scroll to Kenya and select CEDAW/C/KEN/6: English hyperlink) [hereinafter Kenya 2006 CEDAW Report].

8. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR (34th Sess. No. 46), U.N. Doc. A/34/46 (1979), art. 15, *entered into force* Sept. 3, 1981, *acceded to by Kenya* March 9, 1984, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [hereinafter CEDAW].

9. Kenya 2006 CEDAW Report, *supra* note 7, para. 99.

10. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) art. 3, 999 U.N.T.S. 3, *entered into force* Jan. 3, 1976, *acceded to by Kenya* May 1, 1972, available at <http://www1.umn.edu/humanrts/instrtee/b2esc.htm> [hereinafter ICESCR].

11. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) art. 3, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976,

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of its commitments, Kenya has admitted to the Committee on the Elimination of Discrimination Against Women [CEDAW Committee]¹² its obligation to “abandon cultural practices that bar women from inheriting family land.”¹³ In all of these agreements, Kenya has declared that it will align itself with those nations that respect the rule of law, the equal rights of the individual, and the moral and legal obligation of all states to treat their citizens with equal dignity and respect.

Kenya’s Law of Succession Act has many provisions that recognize and embrace the idea that men and women should have the equal right to inherit property. The terms of the Act permit women to inherit. The Act treats male and female children the same in terms of their right to inherit property from their parents.¹⁴ Widows are permitted to inherit property and are given priority over brothers or other male relatives to become the administrators of the estates of their husbands.¹⁵ Despite these provisions, however, widespread discrimination persists. As the government of Kenya stated in its 2007 responses to the CEDAW Committee’s questions, “As much as the Kenya Law of Succession Act is meant to harmonize inheritance laws, in practice the transmission of land rights is largely done within customary laws which discriminate against women and children.”¹⁶

This report will document some of the ways that the Law of Succession Act has failed to live up to the promise of a legal system that ensures equality for all citizens. Discrimination in Kenya on matters of inheritance takes many forms. Some women upon the death of their husband face the threat of being violently evicted from their homes. Others are made to go through dangerous and unwanted cultural practices in order to receive their inheritance, such as widow “cleansing” or widow inheritance. Some women are systematically excluded from the protections of the Law of Succession Act, either because they live in an agricultural area that is exempted from coverage or because of their status as Muslims. The Act denies widows who remarry the life estate maintained by widowers who remarry, and refuses deceased persons’ mothers all inheritance rights if the fathers are alive. It also fails to provide inheritance rights for children whose unwed fathers avoid their parental responsibilities. Many others remain simply unaware of their rights to inherit property or are unable to redeem those rights in a court of law. This report

acceded to by Kenya May 1, 1972, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.html> [hereinafter ICCPR].

12. The CEDAW Committee is made up of 23 experts on women’s human rights issues from different member states. The Committee oversees the implementation of the Convention.
13. Republic of Kenya, Responses to the list of issues and questions to the Committee on the Elimination of Discrimination Against Women, para. 22, U.N. Doc. CEDAW/C/KEN/Q/6/Add.1 (Apr. 27, 2007), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (scroll to Kenya, then click on Responses: English hyperlink) [hereinafter Kenya 2007 CEDAW Responses].
14. Kenya 2006 CEDAW Report, *supra* note 7, para. 11; Law of Succession Act, (1981) Cap. 160 §§ 35(5), 38, 40(2), 41 (Kenya) [hereinafter Law of Succession Act].
15. *Id.* at §§ 35(1), 36(1), 40(2) (providing for widow’s share), 66(a) (“When a deceased has died intestate, the court shall . . . have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall . . . accept as a general guide the following order of preference – (a) surviving spouse or spouses.”).
16. Kenya 2007 CEDAW Responses, *supra* note 13, para 22.

will attempt to demonstrate the costs of these deficiencies, a cost measured both in the lives of women who face poverty and violence as a result of their inadequate protection, as well as the cost to the economy of Kenya and to the next generation of Kenyan citizens.

This report will also present solutions. With only a few amendments, the Law of Succession Act can be made into a statute that is effective and fair to all Kenyan citizens. This report will argue that widows should have greater legal protection from the violent abuse that is often connected to succession claims, through criminal penalties for the crimes of widow abuse, forced widow inheritance, and cleansing. The proposed changes will also protect the integrity and safety of families by ensuring that widows immediately gain full ownership rights to their home upon the death of their husbands, with the rest of the estate split between widows, who receive one-third, and children, who receive two-thirds divided into equal shares for each child. Where there are no surviving spouses or children, mothers will inherit equally with fathers. It will also argue that the Law of Succession Act's coverage should be extended to all Kenyan citizens, regardless of their religion or location within the country. It will propose steps to ensure that the people of Kenya know about their legal rights and can access the legal services necessary to vindicate their claims under the Act. Finally, it will guarantee the right of all children to inherit, regardless of the marital status of their parents.

These amendments will ensure that the Law of Succession Act lives up to Kenya's international commitments. Moreover, these changes will promote the development of Kenya, reduce poverty, reduce social conflict, and ensure a more efficient legal system. In the long run, an improved Law of Succession Act will not only benefit the women of Kenya, but also their sons, brothers, business partners, neighbors, and husbands. Ultimately, an equal and effective administration of justice will benefit both the men and the women in Kenya, as well as future generations

Part II of this report will describe some of the personal, social and economic costs of continued discrimination against women in matters of inheritance. Part III will document the ways that deficiencies in the Law of Succession Act allow and perpetuate this discrimination by failing to provide adequate protection for widows from harmful cultural practices (Part III.A); failing to inform people of their rights and provide access to legal process in order for women to access their rights under the Act (Part III.B); and excluding Muslims and persons in certain agricultural regions from the Act's protections (Part III.C). Part IV documents ways in which the Law of Succession Act fails to ensure equal rights for all citizens even where it does apply. Specifically, the Act fails to grant widows full ownership rights of property inherited from their husbands, provides inadequate protection for polygynous families, and excludes many children born out of wedlock. Part V concludes that women and children in Kenya suffer as a result of discriminatory inheritance laws, customs and practices and that Kenya has an obligation to reform its laws to ensure women's protection and contribute to a safer and more productive future for the country.

As former Court of Appeal Honorable Justice J. Shah said, the "[t]ime has come where the idea of men only inheriting, male offspring only inheriting should

be discarded... The Parliament should enact a comprehensive law to cover women's rights on inheritance, the rights on divorce.¹⁷ He added, "That's the way it has been done in other countries."¹⁸ The current state of succession law in Kenya contributes to the impoverishment of the country, allows for rampant violations of women's human rights, and is inefficient and ineffective. The people of Kenya deserve succession laws that respect the rights of all citizens, obey international legal norms, and allow for greater economic prosperity. The proposals in this report would create a better, stronger, fairer, and more economically beneficial inheritance system for Kenya.

II. DISCRIMINATION IN KENYA'S INHERITANCE REGIME AND CUSTOMARY LAW IMPOSES GREAT COSTS ON THE WOMEN AND CHILDREN OF KENYA.

A. Kenyan Widows Suffer Greatly Because of Discrimination

1. Many Widows Live in Dire Poverty and Often End up in Slums

Widows in Kenya frequently are forced to live in despicable conditions after the death of their husbands. They are often cast out of their homes and separated from their families. A widowed FIDA client stated that most widows "come to slums and struggle daily for money for food."¹⁹ These sentiments are echoed by Nancy Abisai, Project Officer at Shelter Forum in Nairobi, who states, "Many women whose husbands died of HIV were chased away and look for shelter in the slums because they don't have anywhere else to go."²⁰ Reuben Mwenda Murugo, a land policy coordinator, agreed that widow inheritance "is one of the contributing factors to the growth of slums."²¹

The stories of widows who have been forced to move to slums are heartbreaking. One widow named Juma could no longer afford to live in her former home after her in-laws took her property. She now lives "in a structure made of iron sheets and mud walls," with no running water, electricity, or sanitation.²² She has trouble paying for the needs of her children, and, as a result, one child has already dropped out of school.²³ Widows who are driven to slums have a very difficult time making a living. Often they have to engage in prostitution in order to gain the income to provide for their children. Mr. Murugo stated:

When women...go to the slums with the children...[y]ou'll find that they will engage in prostitution. It is the easiest thing to do to make ends meet. And even

17. Interview with The Honorable Justice J. Shah, Court of Appeal, in Nairobi, Kenya (Apr. 4, 2008).

18. *Id.*

19. Interview with FIDA client in Nairobi, Kenya (Apr. 4, 2008).

20. Interview with Nancy Abisai, Project Officer at Shelter Forum, in Nairobi, Kenya (Apr. 2, 2008).

21. Interview with Ruben Mwenda Murugo, Land Policy Coordinator, in Nairobi, Kenya (Apr. 2, 2008).

22. Interview with Nancy Abisai, Project Officer at Shelter Forum, in Nairobi, Kenya (Apr. 2, 2008).

23. *Id.*

those who seem to be engaged in gainful employment like small scale traders they still supplement; that income is not adequate in most cases. . . . [T]he children will not go far in school. . . . The boys become thieves. So it really becomes a vicious cycle within that family.²⁴

Kenya has a duty to provide better legal protection for its widowed women and their children to guard them from such indignities and violation of their human rights. Although the Law of Succession Act was designed to protect women from these violations, it falls short in several ways, and women continue to suffer at the hands of customary law.

2. Many Customary Laws and Practices Are Extremely Harmful to Women

The prevalence of customary law in succession matters, despite the existence of the Law of Succession Act, is harmful to widows and is one of the main reasons why many of them end up in slums. Although the customary practices may vary from tribe to tribe or from one part of the country to another, in most communities customary law dictates that women cannot own or inherit property. Alice Mumbi of Mwiyo, Kenya, stated that, in her community, “Most times it’s the men who get the property.”²⁵ She recounted the story of a widow who was disinherited by her in-laws, saying, “She was left with children. All the land and property was taken away so she had to go back home.”²⁶

The customary law of several communities also discriminates against married daughters, disinheriting them because they have left the home.²⁷ Under a patrilineal system of inheritance, married daughters are not considered to be part of the family line and therefore do not have rights to their father’s property. Charles Murithi Marangi, the Chairman of the Meru Central County Council, summed up the feelings of people in Meru: “If you are a married daughter, it is assumed you will not come back, so there is no inheritance.”²⁸ The feeling is similar among the Kikuyu. Joyce Wangui stated that, under the Kikuyu custom, “[a]

24. Interview with Ruben Mwenda Murugo, Land Policy Coordinator, in Nairobi, Kenya (Apr. 2, 2008).

25. Interview with Alice Mumbi in Mwiyo, Kenya (Mar. 30, 2008).

26. *Id.*

27. See Interview with Charles Murithi Marangi, Chairman, Meru Central County Council and former chief, Githongo Location, in Meru, Kenya (Mar. 31, 2008); Interview with Former Chief in Meru, Kenya (Mar. 31, 2008) (When asked, “And what about with sons and daughters? When their parents die, how does inheritance work in those cases?” he responded, “Yeah, they inherit. That is, all of them are listed down, and if it’s a lady, say whether married or not married. . . . Actually for the married ones, it is assumed that women inherit husband’s land, but then those ones not married will inherit the father’s land.”); Interview with Joyce Wangui in Nanyuki, Kenya (Mar. 30, 2008).

28. See Interview with Charles Murithi Marangi, Chairman, Meru Central County Council and former Chief, Githongo Location, in Meru, Kenya (Mar. 31, 2008) (When asked, “In Meru, do men and women inherit equally? Would sons and daughters inherit equally?” he responded, “Men are the biggest beneficiary. Daughters not married are beneficiaries. If you are a married daughter, it is assumed you will not come back, so there is no inheritance.”)

presumption that when you are married you should get property from that family, not from your parents.”²⁹

Customary law also discriminates against unmarried daughters. Under customary law, unmarried daughters typically receive less than unmarried sons, and sometimes nothing at all.³⁰ A former chief in Meru stated that an unmarried son and an unmarried daughter would not receive the same amount, and said, “Sometimes [daughters] have problems because the sons can say ‘no, a lady should not inherit.’”³¹ The custom is similar in the Kikuyu community. Jane Wanjiru Magenda stated that, under Kikuyu custom, “Normally men get [a] bigger share and some times back, [the] girl did not get anything.”³²

In many cases, customary law permits a deceased man’s family to evict a widow from her marital home. This common practice is in direct violation of the law of Kenya, as Kenya’s Law of Succession Act gives a life interest in the marital home to the widow. Gilbert O. Ombachi, an advocate, stated:

There are times when even somebody passes away and he has only one wife, and the in-laws will always come in and say, “No, we don’t recognize you. Now you can go back where you came from.”...And even if you inherit, you may find it even difficult to stay there so that at the end of the day, you may be forced to sell that land. You can’t stay. So that is the situation which really I think is...the women, normally the widows, will find it very hard.³³

In some areas, it is believed that the woman actually is the property of her husband, and hence of his community, and therefore has no rights of her own to property. Maria Gorreti, a lawyer with FIDA-Kenya, believes customary law is harmful to women because it assumes that a woman has no right to inherit property. “In most of our communities,” she said, “a woman belongs to the community, so if [the] husband died they would see no reason she should be inheriting [from] the husband.”³⁴

Customary law has also distorted practices that may have been originally intended to help widows, like widow inheritance. Mildred Ngesa, a Nairobi journalist, comes from the western province where widow inheritance is practiced. She explained that the original intent of widow inheritance was to ensure that the widow and children of the deceased were cared for, but that the custom has now changed

29. Interview with Joyce Wangui in Nanyuki, Kenya (Mar. 30, 2008) (stating that, under the Kikuyu custom, “[t]here is a presumption that when you are married you should get property from that family, not from your parents,” although she notes that the custom is now changing. “Nowadays,” she said, “women can inherit from parents even married.”)

30. Interview with Former Chief in Meru, Kenya (Mar. 31, 2008); Interview with Jane Wanjiru Magenda in Nanyuki, Kenya (Mar. 30, 2008).

31. Interview with Former Chief in Meru, Kenya (Mar. 31, 2008) (When asked, “For an unmarried son and an unmarried daughter, would they inherit the same amount?” the former Chief responded, “No, and sometimes they have problems because the sons can say, ‘No, a lady should not inherit.’”)

32. Interview with Jane Wanjiru Magenda in Nanyuki, Kenya (Mar. 30, 2008).

33. Interview with Gilbert O. Ombachi, Advocate, in Nanyuki, Kenya (Mar. 29, 2008).

34. Interview with Maria Gorreti, Lawyer for FIDA-Kenya, in Nairobi, Kenya (Apr. 1, 2008).

to require sexual intercourse in exchange for this protection. This practice is called “tero buru.” Ms. Ngesa said:

The point was that the clan never wanted the widow and children to suffer. So the clan said that because you are married here, you are ours, and...your brother-in-law will take care of you. What I don't agree with, is they call it “tero buru.” It means that the brother in law that is supposed to inherit you has to get into the hut with you and have sex with you to cleanse the death of your husband... That is the point where I refuse. Why can't we have positive inheritance without the sex? That is what takes away the value of this culture.³⁵

B. Discrimination Against Women is Crippling Kenya's Economy

Economic discrimination against women has a devastating impact on the Kenyan economy. Women represent the majority of Kenya's population, and as such, represent the majority of Kenya's opportunities for innovation, creativity, and economic productivity. When the legal and economic status of women leaves them without incentives to be productive workers, the entire economy of Kenya suffers. According to a recent study by the International Finance Corporation and the World Bank, “A growing amount of research shows that countries that fail to address gender barriers are losing out on significant economic growth.”³⁶

The impressive record documenting the connection between gender equality and economic growth has led economists such as Nobel Prize winner Amartya Sen to argue that addressing gender equality is the single most important factor in reducing poverty in the developing world.³⁷ Experts writing for the AFRICA COMPETITIVENESS REPORT 2007, sponsored by the World Economic Forum, World Bank, and African Development Bank, argue that “[g]ender inequality plays a significant role in accounting for Africa's poor growth and poverty reduction performance.”³⁸ The International Development Association and International Monetary Fund similarly report that “considerable microeconomic evidence, and growing macroeconomic evidence, suggests that gender inequality directly limits growth, output and productivity in Kenya....”³⁹ One study suggests that the overall agricultural output of Kenya could be increased by 20% if gender inequalities were addressed.⁴⁰ Another concludes that “eliminating gender-based inequalities

35. Interview with Mildred Ngesa, Journalist, in Nairobi, Kenya (Apr. 3, 2008).

36. IFC & WORLD BANK, *supra* note 2, at 1.

37. Isobel Coleman, *The Payoff From Women's Rights*, FOREIGN AFFAIRS, May/June 2004, at 1, available at <http://www.foreignaffairs.org/> (type “Isobel Coleman” in SEARCH ARCHIVES field; then follow “The Payoff From Women's Rights - Isobel Coleman” hyperlink).

38. Elana Bardasi, C. Mark Blackden & Juan Carlos Guzman, *Gender, Entrepreneurship, and Competitiveness in Africa*, in WORLD ECONOMIC FORUM, WORLD BANK & AFRICAN DEVELOPMENT BANK, THE AFRICA COMPETITIVENESS REPORT 2007, at 70 (2007), available at www.weforum.org/pdf/gcr/africa/1.4.pdf [hereinafter WORLD ECONOMIC FORUM].

39. INTERNATIONAL DEVELOPMENT ASS'N & INTERNATIONAL MONETARY FUND, REPUBLIC OF KENYA: JOINT STAFF ASSESSMENT OF THE POVERTY REDUCTION STRATEGY II, para. 35 (Apr. 9, 2004), available at <http://www.imf.org/external/pubs/ft/scr/2005/cro510.pdf>.

40. IFC & WORLD BANK, *supra* note 2, at 1.

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in education and access to agricultural inputs in Kenya could result in a one-off increase of as much as 4.3 percentage points of GDP growth, and a sustained year-on increase of 2.0 to 3.5 percentage points of GDP growth.”⁴¹

Several interviewees confirmed that by denying women the ability to fully participate in the economy, the government of Kenya is doing enormous damage to the economic future of the nation. Frederick Ochieng of UNIFEM observed:

The fact that there is one person who is not given the opportunity to make sure of whatever resources are available to add more wealth, really brings a negative effect. If women were given the same opportunities like men in terms of productivity, I think the economy of this country would have doubled because we know certain places where women are the producers.⁴²

According to a recent study by USAID, women who own land are “more invested: there was proper fencing, they were trying out irrigation, there was long term investment comfort. Those without title or leasing we didn’t see that as much.”⁴³ According to Mike Norton-Griffin, an economic advisor to the government of Kenya,

Women get such a raw deal. Anything that strengthens their rights must have a beneficial role in society.... They are so innovative, when you see them driving in the agricultural fields. There is one businessman that whenever possible, he only works with the ladies. He felt they make better decisions.⁴⁴

When women share in the ownership of land and the income generated from their labor, they are more productive, and the economy, environment, and communities of Kenya benefit.

The economic status of women in Kenya is particularly important because of the high degree of responsibility that women have for the care and education of the next generation of Kenyan citizens, the children. According to Ochieng:

In many rural Kenyan communities, the responsibility of taking care of the family is on the shoulders of the woman. The woman is the one who makes sure that the food is there, the children are healthy, they are going to school, and I’m telling you the economic dynamics in this country have made sure that most of the rural families do not have the husbands around... . But at the same time, a woman at home, even if the husband was in Nairobi, and she’s in Kisumu, some rural area near Kisumu, she would not sell any produce without communicating with the husband who is in Nairobi. So what it means is that until she gets the authority to

41. *Id.*

42. Interview with Frederick Ochieng in Nairobi, Kenya (Apr. 4, 2008).

43. Interview with Beatrice Wamalwa, Development Assistance Assistant, USAID in Nairobi, Kenya (Apr. 2, 2008).

44. Interview with Mike Norton-Griffiths, Economic Consultant, in Nairobi, Kenya (Apr. 4, 2008).

communicate or gets an order from [her husband] that far, it will take six months before she can make use of what she has produced herself... .⁴⁵

A 2001 World Bank Report reported that in one country “increasing women’s share of cash income in the household significantly increases the share of the budget their households allocate to food and reduces the share spent on alcohol and cigarettes.”⁴⁶ Increases in women’s share of household income have also been shown to correspond with greater child nutrition and greater child enrollment in education.

The legal discrimination imposed on Kenyan women thus creates an enormous cost for Kenyan society as a whole; the people who, by social custom, are most responsible for the maintenance of the family are the ones who are most deprived of the rights and opportunities to sustain themselves and their relatives. This problem also can be viewed as an opportunity for growth, for as Kenyan women acquire equal rights and become more legally, economically and socially independent, it will mean greater progress, opportunity and education for the next generation of Kenyan citizens as a whole, both the boys and the girls.

The government of Kenya has already recognized the need to improve the economic rights of women. Its 1997-2001 National Development Plan noted that women’s lack of property rights is one of the major determinants of poverty in Kenya.⁴⁷ Kenya’s 2000 Gender Policy advised the nation to take active steps to promote equal employment and entrepreneurship opportunities between men and women.⁴⁸ In its 2006 report to the CEDAW Committee, the government noted the problem that “[m]ost of the large scale and commercial farming is still dominated by men while women are relegated to small-scale subsistence farming with little, if any, surplus for sale.”⁴⁹ In reporting to the Committee on Economic, Social and Cultural Rights [ESC Committee] in 2007, the Kenyan government further acknowledged that “[t]he growth of [the] rural economy has been faced by a number of constraints among them land tenure and access to land by women in local communities... .”⁵⁰ The government further promised “new legislation that will address gender equality and provide mechanisms of affirmative action to address the injustices occasioned by the gender inequality and inequity that has persisted in the country over the years.”⁵¹

45. Interview with Frederick Ochieng in Nairobi, Kenya (Apr. 4, 2008).

46. ELIZABETH M. KING & ANDREW D. MASON, *ENGENDERING DEVELOPMENT THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICE*, A WORLD BANK POLICY RESEARCH REPORT, NO. 21776, at 81 (2001), available at <http://www.worldbank.org/gender/pgr/>.

47. REPUBLIC OF KENYA, NATIONAL DEVELOPMENT PLAN 1997-2001 at 151.

48. REPUBLIC OF KENYA, NATIONAL GENDER AND DEVELOPMENT POLICY 7 (2000).

49. Kenya 2006 CEDAW Report, *supra* note 7, para. 28.

50. Republic of Kenya, *Initial reports submitted by State parties to the Committee on Economic, Social and Cultural Rights* (41st Sess. 2008), para. 129, U.N.Doc.E/C.12/KEN/1 (Sept. 11, 2007), available at <http://www2.ohchr.org/english/bodies/cescr/cescr41.htm> (scroll to Kenya, then click on Initial Periodic Report: English hyperlink) [hereinfter the Kenya 2007 ESC Report].

51. Kenya 2006 CEDAW Report, *supra* note 9, para. 3.

In order to achieve these economic goals, the Kenyan government must revise laws that perpetuate women's economic subordination, making these laws consistent with both the nation's economic needs and its international human rights obligations. One of the major obstacles to women's economic empowerment is the inequality experienced by women in inheriting property. As a result of this inequality, only one percent of the land in Kenya is held exclusively in the name of a woman, while 93 to 94 percent is held exclusively in the name of a man.⁵²

When women are denied the equal right to inherit land, they are left without property that can be used as collateral for loans. Consequently, female entrepreneurs rate access to financing as the greatest obstacle to economic progress. For example, according to Kenyan businesswoman Rosanne Ndiga, "I've approached several banks but they would not give us loans because of collateral. They don't look at a business as a profitable entity; they are looking for land or a building. They are interested in collateral."⁵³ Experts writing for the World Economic Forum thus conclude, "[T]he legal status and rights of women within the family—especially in relation to marriage, inheritance, and property rights—have a bearing on their capacity to engage in entrepreneurial activity."⁵⁴

Questions of inheritance are often presented as a zero-sum game; increasing the rights of one party (for example, the widow) comes only at the expense of decreasing the rights of another (for example, the brother). This could lead some to falsely assume that, as a matter of public policy, creating more opportunities for women can only come by creating a corresponding decrease in the opportunities for men. The economic evidence in these studies, however, suggests that this is not true. By denying women equal property rights, the law of Kenya is discouraging women from producing wealth for Kenya. That means fewer economic opportunities not only for women, but also for men, and a diminished economy for all of Kenya's citizens. It is vital for Kenya's decision-makers to break out of the mentality that would suggest that men are in any meaningful way advantaged by a legal regime that means fewer jobs, lower wages, and fewer public services in Kenya.

III THE LAW OF SUCCESSION ACT FAILS TO PROTECT KENYAN WIDOWS AND CHILDREN

The actual practices that govern succession matters in Kenya stand in stark contrast to provisions of the Law of Succession Act that appear to promise equal treatment of men and women. According to the Act, sons and daughters have an equal right to inherit from their parents. Widows are promised a significant share of the estate of their husband, and are given priority to administer their husband's estate. However, in reality, these rights are rarely realized.

The Act's failure to actually create a system whereby women have equal rights to inherit property is the result of four critical weaknesses in the statute. First, the Law of Succession Act fails to provide adequate protection for widows from harmful cultural practices following the death of their husband. Second, the Act fails to

52. IFC & WORLD BANK, *supra* note 2, at 1.

53. *Id.*

54. WORLD ECONOMIC FORUM, *supra* note 38, at 83.

account for the fact that many women do not know their legal rights or lack access to legal process. Third, the Act wholly excludes two broad categories of people: Muslims, and those living in rural agricultural lands. Finally, when the Act does apply, it fails to give women full and equal rights.

A. The Law of Succession Act Fails to Protect Widows from the Harmful Cultural Practices of Widow Eviction, Widow Inheritance, and Widow Cleansing

In a country where most of the land is owned and registered in the name of a man, his widow and children are placed in a position of particular vulnerability upon his death. In view of this vulnerability, Kenya must take steps to ensure their material, economic, and physical safety. Unfortunately, cultural practices that exploit this vulnerability and harm these families in need persist in Kenya. Such exploitative practices include widow eviction, whereby the deceased's family pressures or forces a widow and her children to leave their home after the death of the man; widow inheritance, whereby the widow is pressured or forced into marrying her husband's brother or another male relative in order to claim a right to her husband's land; and widow "cleansing," in which the deceased's family or other community members force a widow to have unprotected sex with a professional "cleanser," who receives money for his "services." All of these practices violate these women's rights, and Kenya should take steps to ensure that such practices are abolished.

1. Widow Eviction Forces Families Into Poverty

Eviction often leads to extreme poverty and adversity for widows and their children, leaving them with only the clothes on their backs and nowhere to live. An anthropological study of the Maragoli community in Western Kenya quoted "Widow #2" describing the hardships she experienced at the hands of her in-laws:

[After my husband died], the clansman proposed a man to inherit me, but I declined, and this became the mother of all the trouble I am facing now. Without my knowledge, my father-in-law and his two other sons cut a deal and sold the family land . . . and when I came to know about it, I asked my in-laws what was going on, and they ordered me to pack and leave. I obliged. . . . I am sorry to tell you that I had to sell myself sexually while working as a barmaid in order to raise the money I used to start up my small business in the open-air market, where I keep myself busy by selling used clothes and shoes to eke out a living for my family.⁵⁵

Not only do many widows' in-laws evict them, some also take household items that the widow had considered her own, leaving her with nothing. Irene Oloo recalls:

My friend's husband was ill and she knew he was going to die. . . . [W]hen she was called by the hospital [and learned her husband had died], she went home with a lorry and removed everything before she went to the hospital and before she called any of her relatives. Sure enough when she told her mother-in-law that he had

55. Edwins Laban Moogi Gwako, *Widow Inheritance Among the Maragoli of Western Kenya*, 54 J. ANTHROPOLOGICAL RES. 173, 192 (1998).

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died, [her mother-in-law] also came with a lorry to the house... This was a woman who had been married for twelve years; they had four kids—it didn't matter.⁵⁶

a. The Practice of Widow Eviction Violates Widows' Rights to Equal Rights in Marriage and Adequate Living Conditions under International and Regional Law.

The Kenyan government has failed to take steps to alleviate the problem of widow eviction as required under international law. While the Law of Succession Act states that “no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person” and even criminalizes such action,⁵⁷ it does not specifically forbid the act of evicting a widow from the house she shared with her deceased husband. Moreover, the prohibition applies only to “free property.” By definition, therefore, it does not apply to any communally-owned or unregistered land, leaving widows with homes on those lands without any protection from dispossession or intermeddling. Nor does the Act punish the use of force, threats, or other forms of coercion to pressure a widow into leaving her home. Even where widows do inherit a home, the Act's focus makes clear that it is only a temporary right by granting her a mere life interest that she must forfeit if she remarries.⁵⁸ Giving only a temporary right feeds into the cultural stereotype that the home really belongs to the deceased man's birth family, thus helping to legitimize the actions of his blood family members who push her out. The persistence of widow eviction demonstrates that the Act's limited prohibitions, with their equally limited criminal offenses, create inadequate deterrents.

i. By Permitting the Practice of Widow Eviction to Persist, Kenya Violates Widows' Right to Equal Rights in Marriage and When Marriage Ends.

The failure of the Kenyan government to take effective action against widow eviction violates a woman's right to equal rights both in marriage and when the marriage ends, as guaranteed by CEDAW, the ICCPR, and the African [Banjul] Charter on Human and Peoples' Rights [hereinafter the African Charter]; the CEDAW Committee's General Recommendation 21 and the Human Rights Committee's General Comments 19 and 28 detail these violations in greater depth.⁵⁹

56. Interview with Irene Oloo, League of Kenyan Women Voters, in Nairobi, Kenya (Apr. 2, 2008).

57. Law of Succession Act, *supra* note 14 § 45 (“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall - (a) be guilty of an offense and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator to the extent of the assets which which he has intermeddled. . .”).

58. Law of Succession Act, *supra* note 14, § 35(1) (Kenya) (“... the surviving spouse shall be entitled to ... (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”).

59. For the treaties, see CEDAW, *supra* note 8, art. 16, para. 1(c) (“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women... (c) The same rights and responsibilities during marriage and at its dissolution....”); CEDAW, *supra* note

Article 23 of the ICCPR obligates state parties “to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”⁶⁰ Provisions in the international treaties covering dissolution include dissolution both at divorce and at death. As the Human Rights Committee’s General Comment 28 makes clear, “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.”⁶¹ Also, as the CEDAW Committee notes in General Recommendation 21, “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.”⁶² Because widowers are not evicted by their

8, art. 16, para. 1(h) (“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . . (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. . . .”); ICCPR, *supra* note 11, art. 23, para. 4 (“States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”); African [Banjul] Charter on Human and Peoples’ Rights, art. 18, para. 3, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, acceded to by Kenya Jan. 23, 1992, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> [hereinafter African Charter] (“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”).

For the General Recommendation and General Comments, see Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21, Equality in marriage and family relations* (13th Sess., 1994), para. 35, U.N. Doc. A/49/38 at 1 (1994), available at <http://www2.ohchr.org/english/bodies/cedaw/comments.htm> [hereinafter *CEDAW General Rec. 21*] (“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.”); Human Rights Committee, *General Comment 19, Protection of the family, the right to marriage and equality of spouses (Art. 23)* (39th Sess., 1990), para. 8, U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter *HRC General Comment 19*] (“During marriage, the spouses should have equal rights and responsibilities in the family. . . . Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.”); Human Rights Committee, *General Comment 28, Equality of rights between men and women* (68th Sess., 2000), para. 26, U.N. Doc. HRI/GEN/1/Rev.1 at 28 (2000) available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter *HRC General Comment 28*] (“States parties must also ensure equality in regard to the dissolution of marriage. . . . 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.”). General Comments are the Human Rights Committee’s explanation of certain articles of the International Covenant on Civil and Political Rights, and General Recommendations are the CEDAW Committee’s explanation of certain articles of CEDAW.

60. ICCPR, *supra* note 11, art. 23, para. 4; for the complete text of ICCPR art. 23, para. 4, see *supra* note 59.

61. *HRC General Comment 28, supra* note 59, para. 26.

62. *CEDAW General Rec. 21, supra* note 59, para. 35.

in-laws when their marriage ends because of death, but widows are, Kenya has an obligation under international law and treaties it has acceded to, to enact legislation to protect women in this situation.

ii. By Allowing Women To Be Evicted From Their Homes, Kenya Violates Widows' Rights to Adequate Living Conditions and to Be Free From Forced Eviction

The failure of the Kenyan government to take effective action also violates a woman's equal right to adequate living conditions, as required by CEDAW, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Rights of the Child [hereinafter CRC].⁶³ In particular, CEDAW binds state parties to "ensure to...women the right...[t]o enjoy adequate living conditions, particularly in relation to housing..."⁶⁴ Because evicted women are often forced to move into slums with little sanitation and no clean water or electricity, the Kenyan government is violating this provision of CEDAW.

Also encompassed within the right to adequate housing is the right to be free from forced eviction, as articulated in the General Comment 7 of the Committee on Economic, Social, and Cultural Rights [hereinafter CESCR General Comment 7], which states, "The State...must...ensure that the law is enforced against...third parties who carry out forced evictions" and "where evictions do occur, [ensure] appropriate measures are taken to ensure that no form of discrimination is involved."⁶⁵ Clearly the eviction of widows violates a widow's right to remain in her home. Therefore, Kenya has an obligation to enact and enforce laws to protect women from this pervasive practice.

b. Widow Eviction Should Be Made a Crime

The laws of other countries in Africa specifically protect widows from eviction. A compelling example comes from Ghana's Intestate Succession Law, which forbids any person from "eject[ing] a surviving spouse or child from the matrimonial

63. See ICESCR, *supra* note 10, art. 11, para. 1 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."); ICESCR, *supra* note 10, art. 2 (obligating state parties to "guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex"); ICESCR, *supra* note 10, art. 3 (obligating the state parties to "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights"); Convention on the Rights of the Child, art. 27, para. 1, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, ratified by Kenya Sept. 2, 1990, available at <http://www2.ohchr.org/english/law/crc.htm> [hereinafter CRC] ("States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.")

64. CEDAW, *supra* note 8, art. 14, para. 2(h).

65. See Committee on Economic, Social, and Cultural Rights, *General Comment 7, The right to adequate housing: forced evictions* (16th Sess., 1997), para. 8, U.N. Doc. E/1998/22, annex IV at 113 (1997), available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> [hereinafter *CESCR General Comment 7*] ("The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions."); *CESCR General Comment 7*, para. 10 ("The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.")

home.”⁶⁶ The law makes widow and child eviction a crime, punishable by a fine or a term in prison.⁶⁷ The section of Ghana’s law includes the matrimonial home in its protection not only “where the matrimonial home is the self-acquired property of the deceased,” but also where it is “rented property.”⁶⁸ Thus the surviving spouse and children of the deceased are protected in their home. Kenya should likewise protect widows from this harmful custom, which results in women’s disinheritance from the estates of their deceased husbands.

Many Kenyans support criminalizing widow eviction. In the recent Clinic/FIDA Kenya interviews, twenty-two out of the twenty-eight people questioned about widow eviction supported criminalizing it.⁶⁹ Concepta Mwachi, Projects Manager of an NGO on violence against women, explained her feelings on widow eviction:

It should be the most criminal act. Sometimes I just imagine my parents have worked so hard and then my father dies and my uncles come, to say this is their property; you don’t wait for my father to die and then say it is. If it is not criminalized it should be. There are quite a lot of women who have lost property when their husband has died.⁷⁰

As to the question of appropriate punishment, many Kenyans said they would support jail-time for violators, and some said a monetary fine would also be appropriate.⁷¹ A rural male farmer articulated these sentiments when he stated that

66. Intestate Succession Law, (1985) P.N.D.C.L. 111 § 16A(1) (Ghana), as inserted by Intestate Succession (Amendment) Law, (1991) P.N.D.C.L. 264 § 1 (Ghana) [hereinafter Intestate Succession Law]:

16A. (1) No person shall before the distribution of the estate of a deceased person whether testate or intestate eject a surviving spouse or child from the matrimonial home -

(a) where the matrimonial home is the self-acquired property of the deceased;

(b) where the matrimonial home is rented property, unless the ejection is pursuant to a court order;

(c) where the matrimonial home is the family house of the deceased, unless a period of six months has expired from the date of the death of the deceased; or

(d) where the matrimonial home is public property unless a period of three months has expired from the date of the death of the deceased.

67. Intestate Succession Law, (1985) P.N.D.C.L. 111 § 17 (Ghana), as amended by Intestate Succession (Amendment) Law, (1991) P.N.D.C.L. 264 § 2 (Ghana) (“17. Any person who...unlawfully ejects a surviving spouse or child from the matrimonial home contrary to the section 16A of this Law...commits an offence and is liable...to a minimum fine of C [Ghana cedi, a currency unit] 50,000.00 . . . or to a term of imprisonment not exceeding one year.”).

68. Intestate Succession Law, *supra*, note 66, § 16A(1)(a)-(b) (Ghana).

69. *See, e.g.*, Interview with Geoffrey S. Birundu, Collector of Stamp Duty, Ministry of Lands, in Nairobi, Kenya (Apr. 1, 2008) (“If you force [widow eviction, it] should be criminalized because the penal code doesn’t have it.”); Interview with The Honorable Lady Justice Aluoch, Court of Appeal, in Nairobi, Kenya (Apr. 4, 2008) (“The home where she lives with her husband - in that one, we should protect [the widow] by law.”).

70. Interview with Concepta Mwachi, Projects Manager of an NGO on Violence Against Women, in Nairobi, Kenya (Apr. 2, 2008).

71. *See, e.g.*, Interview with Geoffrey S. Birundu, Collector of Stamp Duty, Ministry of Lands, in Nairobi, Kenya (Apr. 1, 2008) (“Q. What should be the penalty? A. Arrested and fined . . . [a] fair

he would support “both jail-time and a bit of compensation in monetary value because [the] widow already suffers the loss of her husband and this comes in and injects another pain of losing whatever she had.”⁷²

The Law of Succession Act should give Kenyan widows the security that international human rights law guarantees them and that many Kenyans believe they should have. The prohibition on intermeddling with the deceased’s property should be preserved, but it should apply to all of the deceased’s property as of the moment of his death. A definition of intermeddling should be written to specifically include widow eviction by force or coercion and conspiracy with others to evict a widow. The definition should also allow the widow to stay in a rented home for a minimum of three months, like the law of Ghana which protects widows and children living in rented homes for a certain period of time. The penalty for any kind of intermeddling should be jail time and/or a fine

Although it is already a criminal offense to interfere with someone else’s land under the Penal Code,⁷³ widow eviction is a unique offense, perpetrated only against a certain gender, and the Law of Succession should impose criminal penalties against persons who engage in this particular practice in order to call attention to the problem. Such a provision would increase attention to this problem and provide a clear and direct avenue for enforcement. As Gitobu Imanyara, a Member of Parliament, said, “The problem is one of administration and enforcement.”⁷⁴ Criminalizing widow eviction as a separate criminal offense heightens awareness of the problem and demonstrates that the Kenyan government is taking a strong position against it.

2. Widow Inheritance and Cleansing Are Harmful to Women’s Health and Violate Women’s Right to Be Free From Gender-Based Violence and Harmful Cultural Practices.

a. Such Practices Are Harmful to Women’s Health.

Frequently widows are subjected to threats on their physical and emotional safety. If they are compelled to be inherited, they may be forced to engage in nonconsensual sexual intercourse or to enter an unhealthy or abusive marriage. Likewise, life can be very difficult for women who refuse to be inherited. Mary Colleta, a FIDA client, recalled what happened when her husband died and a man wanted to inherit her, but she refused:

jail term would be 5 years.”); Interview with Millie Odhiambo Maboma, Nominated Member of Parliament, in Nairobi, Kenya (Apr. 1, 2008) (“I think you should do a minimum of 5 years in jail.”); Interview with Cecilia Mbaka, Assistant Commissioner in Nairobi, Kenya (Apr. 4, 2008) (“If I’m evicted, the penalty, the period? Also five years.”); Interview with Hellen Kwamboka Ombati, Advocate of the High Court of Kenya and FIDA Member, in Nairobi, Kenya (Apr. 1, 2008) (three year jail sentence).

72. Interview with Rural Male Farmer in Nanyuki, Kenya (Mar. 29, 2008).

73. Interview with Gitobu Imanyara, Member of Parliament, Central Imenti Constituency, in Nairobi, Kenya (Apr. 3, 2008). As Gitobu Imanyara, a Member of Parliament, stated: “But even without registration, nobody can take that land as long as there is someone resid[ing] on it... Under our current law on the Penal Code it is illegal - it’s interference.”

74. Interview with Gitobu Imanyara, Member of Parliament, Central Imenti Constituency, in Nairobi, Kenya (Apr. 3, 2008).

He took my land and sold it to another person. Then he took another part and sold it to another person. Now the land is in my name, but the people keep disturbing [me], they bring trouble, they bring the animals to lie on my house. If we leave, like now we are in Nairobi, they have looted all my bananas and all [my] trees. So now it is the trouble. When they are ready, you have to allow this.⁷⁵

Mildred Ngesa, a Nairobi journalist, echoes this experience, saying, “There [are] one or two or three cases of some few brave women who refuse to be inherited, and because they refuse to be inherited, they are ostracized. The clan throws them out with the children, and they have nothing.”⁷⁶

Many HIV-positive women do not want to pass on the disease, but they are pressured into being inherited, anyway. Ms. Ngesa recalled that a friend of hers was widowed and might have been inherited when she came back to her husband’s village, had her friends not intervened. Ms. Ngesa said:

We had to form a protective ring around her when we took her back to bury her husband. We didn’t expect it when she came home. There was talk that her brother-in-law would inherit her. This happened in a family where there were doctors and lawyers. That was a very good friend. . . .and she’s [HIV] positive. Her husband was positive.⁷⁷

Similarly, in 1997, the Washington Post reported on a young woman named Mildred Auma, whose husband died of AIDS.⁷⁸ She knew that she was infected with HIV herself, but she was pressured by her in-laws into marrying one of her husband’s brothers.⁷⁹ She explained that she really had no choice but to be inherited and risk passing on the disease: “Because of the customs. . . I had to be inherited.” If she refused, “I would have been alone, homeless.”⁸⁰ Her ex-brother-in-law, then husband, infected two other women before dying of AIDS two years after marrying Mildred.⁸¹

These sentiments are echoed by the Rev. Dr. Mrs. Judy Mbugua, Team Leader for Kenya, Association of Evangelicals in Africa, and head of the Pan African Christian Women Alliance, who states:

[W]e see a lot of problems with health because of women inheritance, so that even if the husband died of HIV/AIDS, she will have to be inherited by somebody else. This perpetuates AIDS, or she may herself have AIDS because her husband may

75. Interview with Mary Colleta, FIDA Client, in Nairobi, Kenya (Apr. 3, 2008).

76. Interview with Mildred Ngesa, Designated Features Writer, Nation Media Group Ltd., in Nairobi, Kenya (Apr. 3, 2008).

77. *Id.*

78. Stephen Buckley, *Wife Inheritance Spurs AIDS Rise in Kenya*, WASHINGTON POST, Nov. 8, 1997, available at http://www.washingtonpost.com/wp-srv/inatl/longterm/africanlives/kenya/kenya_aids.htm.

79. *Id.*

80. *Id.*

81. *Id.*

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have died of AIDS, or she may be forced to be inherited by somebody with HIV/AIDS.”⁸²

The risk that HIV poses to the life of the widow is clearly very real and very serious. Widow cleansing, the act by which a woman is “cleansed” of her deceased husband’s spirit by a man who is paid to have sex with her, is also harmful to women. Ms. Ngesa stated that “Just the other day, in our TV station, there was the case of the ‘serial inheritor.’ He is dying because he has been inheriting all these women. He says he does what other men are afraid of doing, that he redeems the dignity of these women by inheriting them.”⁸³ Jacqueline Makokha, Social Mobilization and Partnership Adviser of UNAIDS, stated that widow cleansing “is worrying because then it is a new form of sex work.”⁸⁴ She added, “I’ve heard stories that mostly it is people with disabilities or mentally ill people who don’t understand the risk to themselves, or extremely poor who have no choice.”⁸⁵ Such a commercial “cleanser” obviously runs a very high risk of contracting and passing HIV to the women he “cleanses.”

b. The Practices of Widow Inheritance and Cleansing Violate Women’s Rights to Be Free From Gender-Based Violence and Harmful Cultural Practices Under International and Regional Law

The practices of widow inheritance and widow cleansing violate several rights guaranteed to women under international and regional law, including women’s right to be free from gender-based violence and their right to be free from harmful cultural practices. Because the Kenyan government has failed to adequately address these violations in the Law of Succession Act or elsewhere, it continues to violate the international treaties it has acceded to and must enact new protective laws.

c. Kenya’s Failure to Protect Widows Violates Their Right to Freedom From Gender-Based Violence

First, the practices of widow inheritance and cleansing violate women’s right to be free from gender-based violence. Kenya has an obligation under international law to protect women from violence, particularly family and domestic violence.⁸⁶ CEDAW General Recommendation 19 clarifies that this

82. Interview with the Rev. Dr. Mrs. Judy Mbugua, Team Leader for Kenya, Association of Evangelicals in Africa and Head of Pan African Christian Women Alliance, in Nairobi, Kenya (Apr. 4, 2008).

83. Interview with Mildred Ngesa, Designated Features Writer, Nation Media Group Ltd., in Nairobi, Kenya (Apr. 3, 2008).

84. Interview with Jacqueline Makokha, Social Mobilization and Partnership Adviser, UNAIDS, in Nairobi, Kenya (Apr. 4, 2008).

85. *Id.*

86. CEDAW, *supra* note 8, art. 1 (“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean 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 a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”).

right is guaranteed under CEDAW, stating, “Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.”⁸⁷ The discrimination against women is clear. If a widow’s in-laws insist that she be inherited or cleansed and she refuses, she is sometimes inherited or cleansed, *i.e.* raped or forced into marriage, against her will.⁸⁸ Neither of these acts of violence occur against widowers. Therefore, they are clearly forms of gender-based violence, specifically forbidden by CEDAW.

Kenya has an affirmative obligation to protect women from this violence. CEDAW General Recommendation 19 requires Kenya to “ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.”⁸⁹ The United Nations’ General Assembly Declaration on the Elimination of Violence Against Women concurs:

States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should...[e]xercise due diligence to *prevent*, investigate and, in accordance with national legislation, *punish* acts of violence against women, whether those acts are perpetrated by the State or by private persons.⁹⁰

Women’s right to freedom from violence stems from many specific rights, including life, health, and protection against cruel and degrading treatment. The African Charter, CEDAW, the ICCPR, the ICESCR, and the CRC protect women’s rights to health and life,⁹¹ both of which impose upon states an obligation to pro-

87. Committee on the Elimination of Discrimination Against Women, *General Recommendation 19, Violence against women* (11th Sess., 1992), para. 7, U.N. Doc. A/47/38 at 1 (1993), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> [hereinafter *CEDAW General Rec. 19*].

88. HUMAN RIGHTS WATCH, *DOUBLE STANDARDS: WOMEN’S PROPERTY RIGHTS VIOLATIONS IN KENYA 20* (2003), available at <http://www.hrw.org/sites/default/files/reports/kenya0303.pdf> [hereinafter *HRW DOUBLE STANDARDS*] (describing what happened to Jiwa Felister: “six months after her husband died in 1991...[h]er brother-in-law and four cousins pushed the jater [cleanser] into Felister’s hut and he raped her. Felister screamed, but the jater covered her mouth.”).

89. *CEDAW General Rec. 19, supra* note 87, para. 24(b).

90. United Nations General Assembly, Declaration on the Elimination of Violence Against Women, art. 4, G.A. res. 48/104, U.N. Doc A/RES/48/104 (1993) (emphasis added), available at <http://www2.ohchr.org/english/law/eliminationvaw.htm> [hereinafter *UN DEVAW*].

91. African Charter, *supra* note 59, art. 4 (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person”), art. 16(1) (“Every individual shall have the right to enjoy the best attainable state of physical and mental health.”); CEDAW, *supra* note 8, art. 3 (“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”); *CEDAW General Rec. 19, supra* note 87, para. 7 (“[Women’s [human] rights and [fundamental] freedoms include: (a) The right to life; ... (g) The right to the highest standard attainable of physical and mental health”); ICCPR, *supra* note 11, art. 6 (“Every human being has the inherent right to life. This

tect women from violence. For example, the ICCPR provides: “Every human being has the inherent right to life.”⁹² Further, the ICESCR states that the ratifying parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁹³ Both treaties also require that Kenya provide the rights to life and health equally to men and women and without any sex-based discrimination. Common Article 2 obligates state parties to “guarantee that the rights enunciated in...[each] Covenant will be exercised without discrimination of any kind as to...sex,”⁹⁴ while common Article 3 requires them to “ensure the equal right of men and women to the enjoyment of all...rights”⁹⁵ in the ICCPR and ICESCR. Thus, Kenya must eradicate all practices that endanger women’s health and life.

Finally, women’s right to be free from cruel, inhuman, or degrading treatment, as guaranteed by CEDAW, the ICCPR, the CRC, and the African Charter,⁹⁶ also requires Kenya to enact new laws to protect women from forced widow cleansing

right shall be protected by law. No one shall be arbitrarily deprived of his life.”); ICESCR, *supra* note 10, art. 12 (“1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); Committee on Economic, Social, and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (22nd Sess., 2000) para. 30, U.N. Doc. E/C.12/2000/4 (2000), available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> [hereinafter *CESCR General Comment 14*] (“States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind...”); CRC, *supra* note 63, art. 6 (“1. States Parties recognize that every child has the inherent right to life.”), art. 24 (“1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health...”).

92. ICCPR, *supra* note 11, art. 6.

93. ICESCR, *supra* note 10, art. 12.

94. *Id.* at art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, *supra* note 11, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

95. ICCPR, *supra* note 11, art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”); ICESCR, *supra* note 10, art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”).

96. ICCPR, *supra* note 11, art. 7; CRC, *supra* note 63, art. 37(a) (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”); CEDAW *General Rec. 19, supra* note 87, para. 7 (“[Women’s human] rights and [fundamental] freedoms include... b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment”); African Charter, *supra* note 59, art. 5 (“All forms of exploitation and degradation of man particularly...cruel, inhuman, and degrading punishment and treatment shall be prohibited.”); see also UN DEVAW, *supra* note 90, art. 2(a) (“Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation”).

and inheritance. The ICCPR clearly states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁹⁷ Because these actions against widows often involve rape and tend to treat women as “pieces of property” rather than people, they are cruel, inhuman, and degrading.

Widow inheritance and cleansing create the worst possible impacts on women’s health and life. These include the horrific mental and emotional consequences of being forced to engage in sexual practices against one’s will, as well as the physical consequences. Most notable among them are possible HIV infection. The risk of contracting HIV from widow cleansing and inheritance is very real and poses a serious threat to a widow’s health and ultimately, her life. Nothing but new laws will allow Kenya to “prevent” and “punish” these acts of violence against women.

ii. Kenya’s Failure to Protect Women From These Practices Violates Widows’ Right to Freedom From Harmful Cultural Practices

Kenya also has an obligation under international law to end harmful and discriminatory cultural practices, which include widow inheritance and cleansing. General Comment 28 to the ICCPR instructs state parties to “ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”⁹⁸ Similarly, CEDAW obligates state parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women....”⁹⁹

97. ICCPR, *supra* note 11, art. 7.

98. HRC General Comment 28, *supra* note 59, para. 5. The United Nations’ General Assembly agrees. See UN DEVAW, *supra* note 90, art. 4 (“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.” See also CEDAW General Rec. 19, *supra* note 87, para. 11 (“Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.”); *id.* para. 21 (“Rural women are at risk of gender-based violence because traditional attitudes regarding the subordinate role of women that persist in many rural communities.”); *id.* at para. 23 (“Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes.”).

99. CEDAW, *supra* note 8, art. 2 (“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake... (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women... .”); see also *id.* at art. 5 (obligating state parties to: “take all appropriate measures: (a) 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. . . .”); CEDAW General Rec. 19, *supra* note 87, para. 9 (“Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent vio-

The practices of widow inheritance and widow cleansing are based on the idea that women are inferior to men; those who perpetrate these practices treat women like property which is to be inherited and have no respect for women's bodily integrity and dignity. Men are not viewed as property, and their bodily integrity and dignity are respected. Consequently, widowers are not subjected to either inheritance or cleansing. Therefore, Kenya must take action to end this discrimination against women with its roots in deeply embedded cultural views that condemn women to a subordinate status.

c. Widow Inheritance and Cleansing Should Be Made Crimes

In keeping with their international obligations and commitment to gender equality, other African countries have incorporated language into their constitutions that forbids cultural practices that harm women. For example, the constitution of Ethiopia provides: "Laws, customs, and practices that oppress women or cause bodily or mental harm to them are prohibited."¹⁰⁰ The constitution of Uganda contains similar language: "Laws, cultures, customs, or traditions which are against the dignity, welfare, or interest of women or which undermine their status are prohibited by this Constitution."¹⁰¹

While the Kenyan Constitution does not yet explicitly provide protection against such harm to women, Kenya must nevertheless take action because its binding international human rights obligations require the elimination of discriminatory cultural practices. Other countries can provide statutory guidance. Some have passed laws specifically outlawing widow inheritance and cleansing. For example, Liberia's Equal Rights of the Customary Marriage Law of 1998 expressly forbids a deceased husband's brothers or uncles to compel his widow to marry one of them.¹⁰² Indeed, Kenya's own African Christian Marriage and Divorce Act protects "African" and "native" widows married under the Christian or civil marriage regimes from being "bound to cohabit with" any family member of the deceased husband... "or any other person" or to be at the disposal of such persons in order to receive "support for herself and her children..."¹⁰³ It is discriminatory to give

lations of rights or to investigate and punish acts of violence, and for providing compensation").

100. CONST. OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, art. 35(4), (1994).

101. CONST. OF UGANDA, art. 32(2) (1995) (amended 2005) (The Constitution (Amendment) Act, 2005 § 11 (Uganda) provides: "Article 32 of the Constitution is amended by substituting for clause (2) the following—“(2) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution.”).

102. Equal Rights of the Customary Marriage Law of 1998, § 3.4. (Liberia) ("Any family member who shall compel [a] widow to marry one of her last husband's relatives against her will in order for said widow to be able to subsist or earn a livelihood, has committed a felony of the first degree, and upon conviction in a court of competent jurisdiction, shall be fined the amount of not less than L\$500.00, nor more than L\$1,000.00).

103. The African Christian Marriage and Divorce Act, Cap. 151 § 13(1) (Kenya) ("Any African woman married in accordance with the provisions of this Act or of the Marriage Act or of the Native Christian Marriage Act (now repealed), whether before or after the commencement of this Act shall be deemed to have attained her majority on widowhood, and shall not be bound to cohabit with the brother or any other relative of her deceased husband or any other person or to be at the disposal of such brother or other relative or other person, but she shall have the same right

some women protection from widow inheritance and cleansing, but not others, based entirely on the regime under which they were married and their race and religion.

Many Kenyans support criminalizing widow inheritance. In the recent Clinic/FIDA Kenya interviews, thirteen out of eighteen people questioned about criminalizing widow inheritance would support some sort of criminal penalty, at least for forced or compelled widow inheritance.¹⁰⁴ Many Kenyans said they would support jail-time for offenders.¹⁰⁵

The Law of Succession Act thus needs a new section making widow inheritance a crime. Specifically, it should explicitly make it a crime to use physical violence or unwanted contact, threatening words, harassment, coercion, or the destruction of property to force a widow to undergo widow inheritance or widow cleansing. The statute should also criminalize widow “cleansing,” by criminalizing the exchange of money for sexual cleansing services and vice versa. This will hold both the “cleanser” and the person hiring him liable for the act. The punishment for these acts should include jail time and/or a fine.

These changes will likely attract criticism from those who claim it is their cultural right to practice widow inheritance and cleansing. Even certain women who wish to be cleansed because of their personal beliefs may protest this amendment. Professor Githu Muigui pointed out that “many of these relationships are consensual. You talk about the economic imperative, that you are a lady with maybe four children and this provides some security. So you shouldn’t think of it that there is a predatory male waiting to forcefully apply the woman.”¹⁰⁶ Similarly, Ms. Mary Njeri Gichuru stated:

Even in the circumstances where it happens, inheritance is not really forced, but it’s what the community values, because you see, you do not want to be an outcast in your community. . . . There are some people whose value system still includes these

to support for herself and her children of such marriage from such brother or other relative as she would have had if she had not been married as aforesaid.”) *See also* Intestate Succession Law, (1985) P.N.D.C.L. 111 § 16A(1) (Ghana), as inserted by Intestate Succession (Amendment) Law, (1991), P.N.D.C.L. 264, § 1 (forbidding any person from “eject[ing] a surviving spouse or child from the matrimonial home” prior to the distribution of the decedent’s estate).

104. *See, e.g.*, Interview with Mildred Ngesa, Designated Features Writer, Nation Media Group Ltd., in Nairobi, Kenya (Apr. 3, 2008). (“Q: Do you think it would help if we made a law criminalizing widow inheritance? A: It would help a lot.”); Interview with Johnson Kimani Mwangi, Retired Teacher, in Gitero, Kenya (“Q: Would you support criminalizing widow inheritance? A: A penalty would be welcomed. . . . I have never been in support of widow cleansing so it would discourage the practice.”).

105. *See* Interview with Geoffrey S. Birundu, Collector of Stamp Duty in Nairobi, Kenya (Apr. 1, 2008) (five year jail sentence); Interview with Mr. Ruben Mwenda Murugo, Land Policy Coordinator in Nairobi, Kenya (Apr. 3, 2008) (five year jail sentence); Interview with Millie Odhiambo Maboma, Nominated Member of Parliament in Nairobi, Kenya (Apr. 1, 2008) (10-20 year jail sentence); Interview with Hellen Kwamboka Ombati, Advocate of the High Court of Kenya and FIDA Member in Nairobi, Kenya (Apr. 1, 2008) (seven year jail sentence).

106. Interview with Professor Githu Muigui, Partner, Mohammed Muigui Advocates, in Nairobi, Kenya (Apr. 3, 2008).

things and who think they are valuable.¹⁰⁷

However, in most cases such practices are imposed upon women without their consent. It is the unwanted contact, harassment, and coercion (physical, social or otherwise) to participate in these practices that would be outlawed under the proposed changes. As stated above, General Comment 28 to the ICCPR instructs state parties to “ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”¹⁰⁸ Because these practices are so harmful to women’s human rights, Parliament has an obligation under CEDAW¹⁰⁹ to take steps to eradicate them.

Some persons who were interviewed observed that forced widow inheritance is already a crime under the Sexual Offenses Bill, which criminalizes rape. Reuben Mwenda Murugo, Land Policy Coordinator, stated, “Definitely if she is forced, it is a...criminal offense. So, right now we have the Sexual Offenses Bill [now the Sexual Offenses Act]. If the case gets to court, he should be accused under the Sexual Offenses [Act].”¹¹⁰ However, due to its pervasive and insidious nature and the great degree of social coercion that is typical of this practice, widow inheritance is a unique problem requiring specific attention under the law. A criminal penalty attached to the crime of widow inheritance and widow cleansing, specifically, calls attention to the issue and sends the message that the Kenyan government is serious about stopping the practice. The proposed amendment also covers a broader range of situations; for example, a widow may not be physically forced into being inherited, such that it would be considered rape under the Sexual Offenses Act, but she may be coerced into it, either economically or socially. Calling attention to the fact that women have the right to refuse being inherited will help with another problem Mr. Murugo pointed out, which is that “there are acts to protect, but the issue is implementation.... Perhaps the people being inherited are not even aware

107. Interview with Ms. Mary Njeri Gichuru, Deputy Executive Director of Education, Centre for Women in Democracy, in Nairobi, Kenya (Apr. 4, 2008).

108. *HRC General Comment 28*, *supra* note 59, para. 5; *see also* Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 5, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000), *entered into force* Nov. 25, 2005, *signed by Kenya* Dec. 17, 2003, *available at* <http://www1.umn.edu/humanrts/africa/protocol-women2003.html> [hereinafter *Women’s Protocol*] (requiring state parties to prohibit “harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.”).

109. CEDAW, *supra* note 8, art. 2 (“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: ... (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.); *see also id.* at art. 5 (obligating state parties to: “take all appropriate measures: (a) 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....”).

110. Interview with Ruben Mwenda Murugo, Land Policy Coordinator, in Nairobi, Kenya (Apr. 2, 2008).

of their rights. It is ignorance and they accept.”¹¹¹ By creating a law specifically addressing this problem, Kenya will increase awareness of the problem and make clear to women their right to be free from such practices.

B. The Law of Succession Act Fails to Ensure That Women Have Knowledge of Their Rights and Access to the Legal Services Necessary to Vindicate Inheritance Claims.

Ignorance of legal rights and lack of access to legal services remain enormous obstacles for women in vindicating their rights to inherit property. According to attorney Gilbert O. Ombachi, “The law is there.... People don’t know it or make use of it.”¹¹² Attorney Anthony Kamaru adds, “When the husband dies, the women don’t know what to do. They just sit around. And by the time they take action, they have waited so long that it has become a problem. So lack of information is a big problem.”¹¹³

A recent USAID study found that 90 percent of poor people are not aware of Kenya’s formal inheritance laws.¹¹⁴ This widespread ignorance renders the critical provisions of the Law of Succession Act meaningless, and allows for the continued use of cultural practices and customary law to determine succession matters. These cultural practices almost universally deny women equal rights in inheritance. As businessman Frederick Oundo said, “The whole idea of customary law in Kenya favors men at the expense of women.”¹¹⁵ As a result, thousands of women who have legal rights according to the Law of Succession Act never come forward and make claims to the property that, according to the law, is rightfully theirs.

Even when women have the knowledge necessary to pursue their claims, the process of filing a succession claim can be cumbersome and expensive. Anthony Kamaru, an advocate who provides free legal services to poor women in Kenya, said that women who want to make claims “have to pay court fees, filing fees, disbursement fees, and others.”¹¹⁶ While there is a process by which such fees can be waived for low income applicants, Kamaru noted the difficulties that women have going through that process. For example, in order to qualify for a fee waiver, you must first submit an application for waiver to the court. Ironically, the fee waiver application also may have a fee. On average, Kamaru reports that the pursuit of an inheritance claim costs a Kenyan woman 8,000 Kenyan shillings, before considering the costs of hiring an advocate. Several high-level judiciary officials expressed frustration with the experience of seeing women with strong legal claims unable to pursue those claims

111. *Id.*

112. Interview with Gilbert O. Ombachi in Meru, Kenya (Mar. 31, 2008).

113. Interview with Anthony Kamaru, attorney, Katuuo Cha Sheria in Nairobi, Kenya (Apr. 4, 2008).

114. Interview with Beatrice Wamalwa, Development Assistance Assistant, USAID in Nairobi, Kenya (Apr. 2, 2008).

115. Interview with Frederick Oundo in Nairobi, Kenya (Apr. 3, 2008).

116. Interview with Anthony Kamaru, Attorney, Katuuo Cha Sheria, in Nairobi, Kenya (Apr. 4, 2008). *See* Law of Succession Act, *supra* note 14, § 97; Probate and Administration Rules, (1980) Sub. Leg. Rules 69-71; and Third Schedule (Rule 71) (setting court fees for 26 different forms, filing fees, xeroxing, and like items or actions).

because they did not have access to an attorney, or because they could not pay the costs of traveling to court, or because they could not afford to pay court fees.¹¹⁷ According to Margaret Wangeshi, a rural woman living in Nyeri:

It is not easy to have an advocate and to go to court. It is a very long distance from town to where I live. I have problems at the moment. I cannot get transport to go to court. If there was a court nearby I would go and have my problems solved, but because they are far out I cannot afford the transport. I will stay with my problems in the house and suffer from heartache.¹¹⁸

Questions of access are exacerbated by the unusually long and difficult procedures necessary to file a succession claim. There are three basic stages of the administrative process for making a succession claim. First, the person making a claim on the estate must submit a notice of intent to administer the estate. The applicant must then wait 30 days before filing an application for a grant of administration with a Magistrate Court or High Court.¹¹⁹ Once the application for a grant has been filed, the court will wait a minimum of six months, during which time the applicant is expected to investigate all the assets and liabilities of the estate, as well as list all people who may have a claim on the estate.¹²⁰ At that point, the court may confirm the grant. Even in circumstances where there are no objections to an application for a grant of administration, the process takes almost a year.¹²¹ If there are objections or competing claims to administer the same estate, the dispute can then drag on for years or even decades. In the meantime, a widow trying to use her husband's estate to pay for the maintenance of the family will have only limited access to her husband's property.

This process requires a great degree of diligence and procedural know-how. Attorney David Michuki explained, "When you are filing for probate [*i.e.*, making a claim for inheritance], there are forms and forms to fill, which you submit to the High Court or the Magistrate Court. And if you do not fill them out properly, the Court will make you do it again and that will make the process more difficult."¹²² Many of these forms are written in a legal language that is difficult for people with limited education to read and understand. Another attorney added, "There are many complaints about the process of the forms. There are six forms (*sic*). ... Some of it is a bit technical."¹²³ As a result, "It is very difficult for a party that is not represented to make a claim."¹²⁴

117. Interview with Judicial Officials in Nairobi, Kenya (Apr. 2, 2008).

118. Interview with Margaret Wangeshi in Male, Kenya (Mar. 30, 2008).

119. Law of Succession Act, (1981) Cap. 160 § 67(1). (Kenya).

120. *Id.* at § 51(2).

121. Interview with Anthony Kamaru, Attorney, Katuuu Cha Sheria, in Nairobi, Kenya (Apr. 4, 2008).

122. Interview with David Michuki in Nairobi, Kenya (Apr. 3, 2008).

123. Interview with Anthony Kamaru, Attorney, Katuuu Cha Sheria, in Nairobi, Kenya (Apr. 4, 2008). Law of Succession Act, *supra* note 14, § 97; Probate and Administration Rules, (1980) Sub. Leg. Rules 69-71; and First Schedule (Rule 70) (providing 112 different forms).

124. *Id.*

Widows face particular difficulty when there are competing claims to an estate. Legal disputes can impose several costs on widows. First, the High Court often has the sole jurisdiction to resolve such disputes.¹²⁵ This is a problem for poor women, because while there are over 200 Magistrate Courts in the country, there are fewer than sixty High Courts.¹²⁶ This jurisdictional deficiency means that many women in rural areas have to spend a great deal of time and money in traveling to large towns or cities. High Courts also impose greater court fees.¹²⁷ According to several judicial officials, when faced with the prospect of a transfer to High Court, many poor women have had to simply give up their claims.¹²⁸

More importantly, once a dispute arises the process can take years or even decades to resolve. Registrar General Francis Ng'anga said that the average disputed succession claim takes five years to adjudicate.¹²⁹ Joyce Naitore, a woman in Nyeri, said that the courts are still trying to subdivide the inheritance that she received from her father nine years ago.¹³⁰ Naitore said:

[My father died in] 1999... He said that 'all my children [both male and female] are children.' I still get from his plantations. We are still subdividing. We went to court for the letter of administration. We are waiting for the manager to give us the go-ahead and put the land in my own name.

During the interim period, women have only limited access to this property, cannot use their inheritance as collateral for loans, and have difficulty even accessing property for basic maintenance.¹³¹ According to Ng'anga, "[The woman] cannot charge that property to get a loan. If she has to sell, she has to go to court to ask for consent. And [for] the purpose of maintenance only. She is not supposed to starve. She has to be given consent by the court."¹³² Attorney Jane Serwanga said that courts "are hesitant to let you access the account because a lot can happen before the grant is confirmed. But the Succession Act outlaws dealings with any land that is going through the process of succession."¹³³

Part of the difficulty in many of these cases is that the Law of Succession Act gives only vague guidelines as to how courts should appoint administrators. As a result, deciding these matters is a complicated and time-consuming process. Under

125. Law of Succession Act, *supra* note 14, § 48(1). A resident magistrate under the current Act has jurisdiction only for estates valued at 100,000 shillings or less. And whenever both the High Court and a resident Magistrate Court are available, the High Court has "exclusive" jurisdiction.

126. Interview with Judicial Officials in Nairobi, Kenya (Apr. 2, 2008).

127. *Id.*

128. *Id.*

129. Interview with Francis Ng'anga, Registrar General, in Nairobi, Kenya (Apr. 3, 2008).

130. Interview with Joyce Naitore at FIDA-Kenya office in Nairobi, Kenya (Apr. 4, 2008).

131. Interview with Francis Ng'anga, Registrar General, in Nairobi, Kenya (Apr. 3, 2008).

132. *Id.*

133. Interview with Jane Serwanga, Attorney, FIDA-Kenya in Nairobi, Kenya (Apr. 2, 2008). *See* Law of Succession Act, *supra* note 14, §§ 55(1) (no distribution of capital before confirmation of grant), 71(1) (confirmation of grant required "in order to empower the distribution of any capital assets").

Section 66 of the Act, the criteria upon which the court is to determine whether to grant a letter of administration is ambiguous. The Act recognizes that the spouse of the deceased has the highest priority to administer the estate, but that is only one factor in the court's all-encompassing discretion to consider undefined and potentially unlimited additional factors. According to Section 66, "[T]he court shall...have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference...."¹³⁴ It is unclear under what circumstances the court may deviate from the "general guide" that gives spouses highest priority to administer the estate. It is equally unclear what kinds of argument and criteria can be considered in making a judgment "in the best interests of all concerned."¹³⁵

This ambiguity in Section 66 is effectively an invitation for anyone who for any reason believes that he or she has a right to the decedent's estate to make a claim on it, no matter how legally implausible, even when there is a spouse with a higher priority. Often these are petitions for grants of administration and objections to confirmation of grants submitted by the brothers of the deceased, in opposition to claims made by the widow.¹³⁶ These brothers or other male family members are often motivated by the false belief that women cannot inherit property, that customary law is intended to govern succession matters, or that the property of the deceased must remain within the patrilineal family structure.¹³⁷

According to attorney Helen Ombati, when women actually do pursue these claims in court, because of the priority given to the spouse under Section 66, the widows usually win. She said, "Once they go to court, it usually turns out well."¹³⁸ Nevertheless, in a majority of cases, because the woman lacks the social and legal resources to pursue a claim, the brother, rather than the wife, becomes the administrator of the estate. According to Ombati, that is because brothers can drag out the process, making it too expensive and difficult for the wife to fight the claim in court.

The brothers also may take advantage the widow's ignorance. Ombati said the male relatives "are more aware, more educated. During the mourning period, they will take the death certificate and file a succession matter. They will take all the documents, and they will rush to court. In most cases they leave her out. They will do it behind her back."¹³⁹ The brothers, she said, also "in most cases threaten the lady.... She can even die out of thuggery arranged by the brothers."¹⁴⁰ These difficulties subvert the administration of justice and the ability of the Law of Succession Act to effectively function and resolve these conflicts.

134. Law of Succession Act, *supra* note 14, § 66.

135. *Id.*

136. Interview with Helen Ombati, Attorney, in Nairobi, Kenya (Apr. 1, 2008).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

1. *International Law Requires a Fair, Functional System of Intestate Succession.*

The people of Kenya have a right to a succession law that is fair to all citizens, effective and enforceable. That was the original goal of the Law of Succession Act, a statute that was designed to repeal a system in which succession was determined by eight different statutes and to replace it with one relatively uniform Act with universal jurisdiction. Section 2 of the Law of Succession Act states that, with certain exceptions, the Act's provisions "shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons..."¹⁴¹ As enacted in 1980, there was no exclusion for Muslims; that exclusion was not added until 1990 by No. 21 of 1990 (Schedule). Section 4 of the Law of Succession Act states that succession "shall be regulated by the law of Kenya."¹⁴² Despite these provisions, even in those circumstances where the Law of Succession Act is meant to apply, the vast majority of succession matters on rural lands that the Act covers—that is, lands that are registered, found within a municipality, township, or market, or located outside the 12 districts designated by the Attorney General—are still determined by the local customary law, by people who are largely ignorant of what the applicable written law actually requires. As the government has stated to the CEDAW Committee, "As much as the Kenya Law of Succession Act is meant to harmonize inheritance laws, in practice the transmission of land rights is largely done within customary laws which discriminate against women and children."¹⁴³ In order to turn the Law of Succession Act into a single orderly system to resolve succession conflicts, the Law of Succession Act must become more effective for poor people, and especially for poor women.

In the ratification of numerous human rights agreements and in its Constitution, the government of Kenya has promised its citizens legal rights that exist not only on paper, but in practice. States parties to international treaties must "ensure" people's rights and the protection of such rights must be "effective." Thus, under ICCPR article 26, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and *effective* protection against discrimination on any ground such as...sex...or other status."¹⁴⁴ Similarly, article 2(1) requires that a ratifying State "ensure to all individuals" all ICCPR rights without distinction based on sex or other status, and article 2(2) that the "State adopt such legislative or other measures as may be *necessary to give effect to the rights recognized* in the present Covenant."¹⁴⁵ CEDAW's article 2(a) requires the "practical realization" of equality and article 2(c) the "effective protection of women" against discrimination. Section 70(a) of the Kenyan Constitution implements these international norms by ensuring that all citizens have the equal right, whatever one's "sex," to "the protection of the law."¹⁴⁶ Section 77(9) requires a "fair

141. Law of Succession Act, *supra* note 14, § 2.

142. Law of Succession Act, *supra* note 14, § 4.

143. Kenya 2007 CEDAW Responses, *supra* note 13, para. 22.

144. ICCPR, *supra* note 11, art. 26 (emphasis added).

145. ICCPR, *supra* note 11, art. 2(1)-(2) (emphasis added).

146. CONSTITUTION, § 70(a) (rev. ed. 2001) (1998) (Kenya).

hearing within a reasonable time” for the adjudication of any person’s asserted “civil right.”¹⁴⁷

The right to a remedy is needed to insure that rights are effective. Thus, the IC-CPR requires that “[a]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy. . . .”¹⁴⁸ These rights include: the “equal right of men and women to the enjoyment of all civil and political rights.”¹⁴⁹ The ICCPR goes even further by requiring as to *all laws*, including those relating to economic, social, and cultural rights, that article 26’s protections for equality before the law and for equal protection without sex discrimination apply. Thus, the Human Rights Committee ruled that when a Netherlands state statute denied a married woman unemployment benefits given to married men, the State violated her right to equal economic benefits and was required to remedy her loss.¹⁵⁰ This has an obvious application to the Law of Succession Act, which denies Kenyan widows and daughters the economic benefit of equal inheritance rights with widowers and sons.

The Human Rights Committee’s General Comment 31 shows the interrelationship of effective rights and remedies, stating, “Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person. . . .” The Human Rights Committee adds, “Failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.”¹⁵¹

The widespread difficulty that women have in redeeming their legal rights to inherit property in Kenya equally with men is the kind of persistent, ongoing violation of rights that gives rise to an affirmative obligation by the government to investigate these violations and enact legislative proposals for change. In 2007, the CEDAW Committee concluded as much when it stated that:

It invites the State party [Kenya] to enhance women’s, especially, rural women’s, awareness of their land and property rights through legal literacy programmes and extension services. It encourages the State party to expand legal assistance to

147. CONSTITUTION, § 77(9) (rev. ed. 2001) (1998) (Kenya).

148. ICCPR, *supra* note 11, art. 2(3)(a).

149. ICCPR, *supra* note 11, art. 3.

150. ICCPR, *supra* note 11, art. 26; Broeks v. The Netherlands, Communication No. 172/1984, paras. 15-16, UN Doc. Supp. No. 40 (A/42/40) at 139 (1987), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N87/206/55/IMG/N8720655.pdf?OpenElement> (HRC ruling that a Netherlands statute providing unemployment benefits to all married men but only to married women who provided the family’s chief support violated Ms. Broeks’ equal protection, equality, and non-discrimination rights under ICCPR Article 26 because “she was denied a social security benefit on an equal footing with men.”).

151. HRC General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, (80th Sess., 2004), para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), available at <http://www1.umn.edu/humanrts/gencomm/hrcom31.html>.

rural women wishing to bring claims of discrimination. The Committee requests the State party to include in its next report comprehensive data on the situation of rural women in all areas covered by the Convention, including the causes for the low percentage of women, as compared to men, who own land, and on efforts by the state party to increase this percentage.¹⁵²

The Kenyan government agreed with the CEDAW Committee that changing laws and improving education and access were important goals on succession matters. The government thus promised a new land policy that “provides for repeal of existing laws and outlaw[s] regulations, customs and practices that discriminate against women in relation to land....”; it would also provide for “carrying out of sensitization and education campaigns to abandon cultural practices that bar women from inheriting family land, sensitizing Kenyans on the provisions of the [S]uccession Act and expedient application of the Act.”¹⁵³ With land reform currently at the top of the agenda for several Kenyan government agencies, now is the time to fulfill the government’s promise of gender-sensitive land laws and policies and effective administration and enforcement of women’s right to own and inherit property equally with men.

2. Amendments to the Law of Succession Act Can Ensure a Fair and Functional System of Justice

Many NGOs in Kenya are working hard to spread information about the legal rights of women of Kenya. The government of Kenya should support these efforts. The government should also begin to incorporate awareness of legal rights in succession matters into the basic curriculum of schools, the training of police and chiefs, the training of land board representatives, and the training of judges. In the long run, supporting these forms of education is critical to achieving progress for women in Kenya.

At the same time, the government should revise the procedures of the Law of Succession Act to make them more effective and enforceable. To do this, the government must remove those obstacles that prevent poor people, particularly poor women, from being able to make claims and resolve disputes. The Law of Succession Act failed to create a uniform system to resolve succession disputes because it presumed things that were simply not true – it presumed that people would know about the law; it presumed that people would be able to access courts and attorneys; it presumed that courts would be able to resolve conflicts in a way that was expedient and efficient; it presumed that people would have the resources to pursue their claims in court. The following proposals for amending the Law of Succession Act would help the Act to function more effectively in Kenya, where knowledge of legal rights, the costs of court procedures, and cultural norms all present major obstacles to the application of the Act. The goal of these proposals

152. Committee on the Elimination of Discrimination against Women, *Concluding Comments: Kenya* (39th Sess. 2007), para 42, U.N. Doc. CEDAW/C/KEN/CO/6, available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (follow “Concluding Comments” English hyperlink under “Kenya”).

153. Kenya 2007 CEDAW Responses, *supra* note 13, at 21, para. 22.

is to make the system work better for all Kenyans, particularly for Kenyan women who are the most vulnerable and most in need of legal protection.

a. Section 46 Should be Amended to Require Officers to Inform Potentially Interested Parties of their Legal Rights

The first important question is, how can the Law of Succession Act do a better job of making sure that people who have inheritance claims understand their rights and understand how to vindicate those rights? The estate reporting procedures prescribed under Section 46 of the Act present an enormous opportunity to inform affected persons of their rights under the Act. Under Section 46, “Whenever it becomes known to any police officer or administrative officer that any person has died, he shall...report the fact of the death to the assistant chief... or to the chief administrative officer of the area where the deceased had his last known place of residence.”¹⁵⁴ That administrative officer is then required to “proceed to the last known place of residence of the deceased and take all necessary steps for the protection of his free property...[and] for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of the estate.”¹⁵⁵ Thus, these administrative officers, chiefs and assistant chiefs are already obligated to report the death, to secure the property of the deceased, and to locate people who appear to have an interest in the property. Having already located the affected persons, this officer is in a perfect position to inform them of their legal rights under the Law of Succession Act.

The proposed amendments to Section 46 would make use of this opportunity by creating an affirmative obligation on the part of the administrative officer to give interested parties the information they need to vindicate their rights. This information should include a description of their rights under the Law of Succession Act, information on how to register property, the location of a court where claims can be filed, information on how to register property, contact information for an attorney,¹⁵⁶ and copies of the forms needed to file succession claims. The government should work with NGOs like FIDA-Kenya or Katuo Cha Sheria, organizations that have done a great deal of work with the rural poor, on designing forms that will be sufficient and readable for rural women. The government should also consider working with these organizations, both of which provide free legal services to the poor, to connect them with organizations that will allow poor women to consult with an advocate regarding their legal options. In circumstances where the interested party is illiterate, the amendments would require that the administrative officer communicate this information orally.

This change would place only a small burden on the administrative officers as they are already obligated to locate potentially interested persons, protect the property and ascertain other properties owned by the deceased. In most cases,

154. Law of Succession Act, *supra* note 14, § 46.

155. *Id.*

156. In particular, the government should build relationships with legal NGOs that provide free legal services and counseling to the poor. Even if a group like FIDA-Kenya can only provide free consultation for widows, an hour of consultation could make the difference between being able to vindicate a legal claim and being evicted from a home.

the additional burden would be nothing more than handing the interested party or parties a packet of standardized information. In return, this step could make thousands of poor, uneducated citizens of Kenya aware of their rights, and able to defend their rights in a court of law. For instance, if a widow is told by her brother-in-law or mother-in-law that she is not entitled to any of her husband's land, she would have the information demonstrating that the law was on her side.

To ensure that the administrative officers, chiefs and assistant chiefs understand that this is an important obligation, the proposed changes impose a fine on those officers who negligently fail to deliver this information to interested parties of the deceased. We further recommend that additional training be provided to all chiefs, assistant chiefs, and administrative officers affected by this change, to ensure that they understand what is required of them under the Law of Succession Act and can give some basic legal advice to their constituents. Again, in this, the government should consider working with FIDA-Kenya, which has experience training chiefs on similar issues.

b. The Poor Who Make Claims to Inherit Small Estates Should Not Be Required to Pay Court Fees or Any Other Fees in Order to Access Their Legal Entitlements

The costs of court fees, filing fees, and disbursement fees are often overwhelming to poor widows attempting to inherit relatively small pieces of property. Many of the women interviewed reported difficulties even paying for the bus to travel to the courthouse, much less paying the fees associated with a succession claim. First, there's the filing fee to make a petition for a grant of representation. Then, there is another court fee to get the grant of confirmation confirmed. Next, if you need access to the property while the claims are being resolved, you are required to pay additional fees. Further, if the claim is disputed, the court fees go up astronomically. If you cannot pay for these fees and require a waiver, you even have to pay a filing fee to submit the waiver application.

All of these fees amount to an effective tax on anyone making a claim for inheritance. It is a tax that falls disproportionately on the poor, and it is a tax that discourages people from accessing legal services. The ability to inherit property from your family members is not a privilege that should be given to those who can afford it; rather, it is a right to which all citizens of Kenya are entitled. If the government feels that it must raise revenue to recoup expenses from regulating these succession claims, a much more fair and equitable mechanism to do so would be an inheritance tax. Such a tax would fall evenly on all social classes, rather than disproportionately falling on the poor, and it would be paid when the inheritance is actually received, rather than through multiple filing fees that present an obstacle to making an inheritance claim in the first place.

The proposed changes would stop these fees from becoming barriers to judicial and administrative services. First, the proposed section 42A would provide that surviving spouses would automatically succeed to ownership of the marital home without the need for a grant of representation or administration. The surviving spouse may register the property in his or her name but is not required to do so. Second, the surviving spouse would automatically be named the administrator of the estate under the proposed section 66, subject to a few narrowly defined ex-

ceptions. Third, the proposed section 97(1)(f) authorizes the Rules Committee to provide for waiver of fees for indigent persons. In addition, by making the entitlements of the surviving spouse and children more clear, a revised Law of Succession Act would reduce the incidence of disputes, which currently contribute to the monetary burden of surviving relatives.

c. The Jurisdiction of Magistrate Courts to Resolve Disputes Under the Law of Succession Act Should be Expanded.

Magistrate Courts are more common, more efficient, and more easily accessible to the average rural Kenyan than High Courts. By limiting the jurisdiction of resident Magistrate Courts and failing to include non-resident magistrates, the Law of Succession Act makes it more difficult and more expensive for Kenya's poor to redeem their legal claims. The Law of Succession Act currently so limits the jurisdiction of Magistrate Courts in three provisions found in Section 48(1). The first provision grants resident Magistrate Courts jurisdiction to "entertain any application other than an application under section 76,"¹⁵⁷ that is, any application other than an application to revoke or annul a grant of administration. It also limits their jurisdiction to estates valued at 100,000 shillings or less. The second provision adds that "for the purpose of this section in any place where both the High Court and a resident Magistrate Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act."¹⁵⁸ Finally, only a "resident magistrate" has jurisdiction to hear Succession Act cases; "district" magistrates are not included. According to several high-level judicial officials, Magistrate Courts have the training, education and competence to deal with disputes under the Law of Succession Act.¹⁵⁹ These officials saw no reason to prioritize the jurisdiction of the High Court in this way and did not suggest limiting jurisdiction to resident magistrates.¹⁶⁰ Thus, the proposed changes eliminate both restrictions on the jurisdiction of Magistrate Courts, and include magistrates who are not resident magistrates as well, making the law more available and accessible to the average Kenyan.

d. The Spouse of the Deceased Should Be Automatically Granted Ownership of the Marital Home by Operation of Law

In the immediate aftermath of a death, it is vitally important that the spouse and children of the deceased are secure in their ability to stay in the marital home. Ambiguous claims of ownership encourage other family members to attempt to take possession of the home. When conflicts over the ownership of the marital home force women or children away from the home, the consequences can be devastating; widows often face violence, children may be forced to withdraw from school, and families are divided.

The Law of Succession Act can do a better job protecting widows from being pushed out of their homes by revising the law to ensure that the spouse of the

157. Law of Succession Act, *supra* note 14, § 48(1).

158. *Id.*

159. Interview with Judicial Officials in Nairobi, Kenya (Apr. 2, 2008).

160. *Id.*

deceased immediately gains possession and ownership of the house and the land immediately surrounding the house necessary for upkeep and access. The proposed changes do this by inserting a new Section 42A, which by operation of law makes the spouse the owner of the marital home. This provision also applies to polygynous wives living in separate homes. By establishing clear ownership, this change will provide immediate security for women and children whose husband and father have died and reduce the social conflict that results from competing property claims.

This change complements two other proposed changes in the law: the criminalization of widow eviction and the proposal that widows receive absolute ownership of the marital home when property is distributed under Sections 35 and 36 (discussed in greater detail in Parts IV.A. and IV.B *infra.*). Together, the proposed changes represent a three-part strategy to combat widow eviction. First, the widow is guaranteed clear ownership of the house by operation of law immediately following the death of her husband, even without going through a formal legal proceeding. Second, anyone who attempts to force her off this property is committing a crime. Third, once assets are formally distributed under Sections 35 and 36, the widow retains full ownership of the house and control over the home even after she remarries.

e. The Spouse of the Deceased Should Always Be the Administrator of the Estate.

The court's unlimited "final discretion" under Section 66 to grant letters of administration to "a person or persons" creates a major problem for the effective enforcement of the succession law. A legal system that encourages competing claims to administer and thus control ownership rights and drawn-out legal processes is undesirable and harmful public policy. When there are no clear rules to determine whether a portion of land should be administered by the brother or the widow, both parties are encouraged to think of the land as legitimately – and legally – their own. That disagreement is then allowed to fester for years while the legal process works through their competing claims, with the outcome uncertain. Ultimately, the decision hinges exclusively on what a judge decides is "in the best interests of all concerned."¹⁶¹

Many of the women interviewed who had experienced or who were currently experiencing this situation reported harassment, intimidation and violence. That result is not surprising. If the law is going to take years for the courts to resolve claims, eventually people are going to start taking their alleged property rights into their own hands. Such conflicts are literally tearing families apart, creating multi-generational feuds between close relatives. In the meantime, with the long term ownership questions up in the air, no one can build on that land, or invest

161. Law of Succession Act, *supra* note 14, § 66 ("When a deceased has died intestate, the court shall... have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—(a) surviving spouse or spouses, with or without association of other beneficiaries; (b) other beneficiaries entitled on intestacy, with priority according to the respective beneficial interests as provided by Part V [on intestacy]. ...").

in it; nor can people use that land as collateral for loans to invest in education or business.

It is vital to have a legal rule in these matters that provides for women's equality, but from an even more basic perspective, Kenya must rewrite its intestacy law to give people clear expectations for the judicial process and distribution of the estate. Kenya can do that by replacing the ambiguous all-encompassing discretion granted to courts in Section 66 and replacing it with a clear rule, as follows: the grant of administration always goes to the spouse, subject to only a few narrowly defined exceptions.¹⁶² After all, it is apparently the intent of the current Section 66 to do this in the majority of cases anyway,¹⁶³ and the social costs of having unlimited discretion far outweigh any possible benefits. With a clear legal rule to apply, judges in Kenya will be able to dispose of cases more quickly, thereby resolving conflicts that would otherwise last for years or even for generations. As it becomes more widely understood that the spouses always become the administrators of the estate, people will learn to expect that and it will become less of a source of social conflict.

C. The Law of Succession Act Wholly Excludes Broad Categories of Women and Muslims from Protection.

A third category of problems with the Law of Succession Act are areas in which the Act wholly fails to apply. First, the Act does not apply to large areas of agricultural land that have been specified by the Attorney General in the Gazette. Second, the Act does not apply in situations where the deceased was a Muslim. In the absence of statutory law, succession matters are instead determined by customary law or by Islamic law. Both of these provisions were written with the admirable intention of preserving the cultural traditions of minority communities within Kenya. However, these exceptions accomplish this goal only by sacrificing the principle of a uniform legal system that applies equally to all people, regardless of gender, ethnicity or religion. Further, as both systems fail to ensure equal rights for women, these exceptions make the government and laws of Kenya complicit in enforcing customary practices that violate Kenya's treaty obligations. These exceptions should be amended in a way that will protect the cultures of minority groups while simultaneously affirming Kenya's commitment to a uniform and egalitarian legal system.

1. The Act Does Not Apply to Large Areas of Agricultural Land and Hence Leaves Many Rural Women Without Protection for Their Food and Housing Needs, and Without Equality in Inheritance Rights.

Sections 32 and 33 of the Law of Succession Act exempt the agricultural lands, livestock, and crops in certain areas of Kenya from the requirements of the Act and

162. The exceptions are only when the widow is unwilling to be the administrator of the estate, or has been proven unable to perform the duties of administrator in the relevant court under section 56(1)(a) (barring grants of representation to anyone "who is a minor, or of unsound mind, or bankrupt").

163. Law of Succession Act, *supra* note 14, § 66 (accepting "as a general guide" that surviving spouses should be given first priority to receive a grant of letters of administration).

state that customary law shall apply instead.¹⁶⁴ These districts are set forth in the Subsidiary Legislation issued by the Attorney General for the Law of Succession Act and include the following: West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado, and Narok.¹⁶⁵ These are mainly in the northern and eastern parts of the country, and together, they appear to constitute about 60% of the country's land mass.¹⁶⁶ Most of the people living in these districts are pastoralists.¹⁶⁷

The application of customary law in the area of succession is harmful to women and girls, because customary law in these districts discriminates against them in inheritance matters. By the Kenyan government's own admission in its 2006 Fifth and Sixth Periodic Report to the CEDAW Committee, the Law of Succession Act "denies a woman any interest in her husband's agricultural land, crops and livestock in cases where the husband dies intestate and is resident in an area gazetted by the minister or has interests in communally owned land, where customary law does not allow women to inherit."¹⁶⁸ The problem is exacerbated by the fact that agricultural land, livestock, and crops are often the only property that the deceased person owned or for which the person had use rights,¹⁶⁹ and therefore they constitute the only property available to the widow to keep her out of poverty.

The exclusion of these agricultural lands from the Law of Succession Act and the application of customary law in these areas violate Kenyan women's rights under international and regional law. In particular, this exception violates women's right to food and housing, and to equality and equal protection in inheritance law.

164. Law of Succession Act, *supra* note 14, §§ 3(1), 32, 33:

3. Interpretation

(1) In this Act...

'**agricultural land**' means land used for agricultural purposes which is not within a municipality or a township or a market but does not include land registered under the provisions of any written law. . . .

32. Excluded Property

The provisions of this Part [on Intestacy] shall not apply to -

(a) agricultural land and crops thereon; or

(b) livestock,

in such areas as the Minister may, by notice in the Gazette specify.

33. Law applicable to excluded property

The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be.

165. Law of Succession Act, *supra* note 14, § 32, Sub. Leg., Application of Part V of the Act, Schedule.

166. See Bushdrums, Map of Kenyan Districts, http://www.bushdrums.com/news/districts_of_kenya.php (last visited May 19, 2009).

167. See HRW DOUBLE STANDARDS, *supra* note 88, 32, n.130.

168. Kenya 2006 CEDAW Report, *supra* note 7, para. 184.

169. PATRICIA KAMERI-MBOTE, THE LAW OF SUCCESSION IN KENYA: GENDER PERSPECTIVES IN PROPERTY MANAGEMENT AND CONTROL 14 (1995).

a. The Law Fails to Protect Widows' Equal Right to Food and Housing.

The pastoral widows living on the excluded agricultural lands¹⁷⁰ often rely on this land not only for money and housing, but also as their main source of food. When customary law denies them access to these lands, it violates their international rights. Both the ICESCR and the African Charter Protocol on the Rights of Women in Africa guarantee the right to food and housing.¹⁷¹ The ICESCR requires that men and women shall have an equal right, without discrimination based on sex, to “an adequate standard of living for...[self] and...family, including adequate food...and housing.” The Women’s Protocol guarantees women the “right to nutritious and adequate food” and requires state parties to “take appropriate measures to:...provide women with access to...land, and the means of producing nutritious food...;” it also guarantees their right to “equal” and “adequate housing.”¹⁷² The African Charter reinforces this obligation by requiring Kenya to “ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”¹⁷³ Therefore, Kenya must take active steps to protect women’s right to food and housing. Denying widows rights to the agricultural land where they have made their homes, on the basis of the sex-discriminatory customary laws, certainly violates these rights. When widows are sent away after their husband’s death, they find themselves without a way to grow a steady food supply, feed their families, and stay in their marital home. The only way to end this source of poverty is to amend the Law of Succession Act to give widows on agricultural lands equal rights with widowers.

b. The Law Fails to Protect Widows’ and Daughters’ Right to Equality with Men and Sons in Inheritance and Before the Law

By leaving women and girls vulnerable to the dictates of customary law, this exemption for agricultural lands also violates women’s right to equality with men in

170. See HRW DOUBLE STANDARDS, *supra* note 88, 32, n.130.

171. ICESCR, *supra* note 10, art. 11 (“1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.... 2. The States Parties to the present Covenant, recogniz[e] the fundamental right of everyone to be free from hunger....”); ICESCR, *supra* note 10, art. 2 (obligating state parties to “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to... sex”); ICESCR, *supra* note 10, art. 3 (obligating the state parties to “ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”); Women’s Protocol, *supra* note 108, arts. 15-16 (“15. States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to...provide women with access to...land, and the means of producing nutritious food.... 16. Women shall have the right to equal access to housing... To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.”).

172. *Id.* While Kenya has not ratified the Women’s Protocol and therefore is not required to implement it, it has signed it and the proposed change would be a good-faith effort to insure the Protocol’s goals are already met when Kenya proceeds to ratification.

173. African Charter, *supra* note 59, art. 18, para. 3. See also *id.*, art. 16, providing for the right to health and requiring state measures to insure the peoples’ health; without food, the highest standard of health is obviously not possible.

inheritance matters and fails to provide them equal protection of the law. CEDAW General Recommendation 21 states:

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... . Such provisions contravene the Convention and should be abolished.¹⁷⁴

Because customary law usually gives women a smaller share of the land, or no share at all, the use of customary law blatantly violates this CEDAW requirement.

Article 15 of CEDAW also states that "States Parties shall accord to women equality with men before the law,"¹⁷⁵ and Article 70(a) of the Kenyan constitution states that "every person in Kenya is entitled to ... the right, whatever his . . . sex . . . to each and all of the following, namely—...the protection of the law..."¹⁷⁶ Further, CEDAW Article 15 also states that "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity."¹⁷⁷ As a State Party to CEDAW, Kenya is required to enact laws that guarantee women equality before the law and equal protection. Section 32 as currently written fails to do that as it expressly applies to these rural women the discriminatory mandates of customary law.

c. The Exemption For Agricultural Areas Listed in the Gazette Should Be Stricken From the Law of Succession Act.

Kenya should follow the example of countries which give women equal inheritance rights with men and refuse to apply discriminatory customary laws. The laws of other African countries do not contain exemptions applying customary law for specific areas of agricultural land, the livestock that graze on it, or the crops that are grown on it.¹⁷⁸ In fact, Ghana's Intestate Succession Law specifically provides that the deceased's spouse and children are entitled to the deceased's house and the residue of the estate.¹⁷⁹ It also provides that the spouse and children "shall be

174. *CEDAW General Rec. 21*, *supra* note 59, para. 35, with regard to CEDAW, *supra* note 8, art. 16, para. 1(h).

175. CEDAW, *supra* note 8, art. 15, para. 1.

176. CONSTITUTION, § 70(a) (rev. ed. 2001) (1998) (Kenya).

177. CEDAW, *supra* note 8, art. 15, para. 2.

178. *See* Intestate Succession Law, (1985) P.N.D.C.L. III § 4. (Ghana); Administration of Estates Act, (2001) Cap. 6:01 §§ 68-68K (Zimbabwe), *available at* http://www.parlzim.gov.zw/cms%5CActs%5CTitle06_SUCCESION_AND_INSOLVENCY/ADMINISTRATION_OF_ESTATES_ACT_6_01.pdf [hereinafter Zimbabwe Administration of Estates Act]; Deceased Estates Succession Act, (1997) Cap. 6:02 (Zimbabwe), *available at* http://www.parlzim.gov.zw/cms%5CActs%5CTitle06_SUCCESION_AND_INSOLVENCY/DECEASED_ESTATES_SUCCESION_ACT_6_02.pdf [hereinafter Zimbabwe Deceased Estates Succession Act]. *See infra*, note 267, for further details.

179. Intestate Succession Law, (1985) P.N.D.C.L. III § 4. (Ghana) ("...(a) where the estate includes only one house the surviving spouse or child or both of them, as the case may be, shall be entitled to that house and where it devolves to both spouse and child, they shall hold it as tenants-in-common; (b) where the estate includes more than one house, the surviving spouse or child or both

entitled absolutely to the household chattels of the intestate,”¹⁸⁰ which includes all “household livestock” and “simple agricultural equipment.”¹⁸¹

Similarly, South Africa’s Constitutional Court and Parliament have taken decisive action to end the use of sex-discriminatory customary succession law and guarantee women equal inheritance rights with men. In *Bhe and Others v. Magistrate, Khayelitsha, and Others*, the Court ordered the elimination of a customary law exception contained in South Africa’s Intestate Succession Act. This provision required that “Blacks” be ruled by the “Black Administration Act” provision applying sex discriminatory customary inheritance law; it completely denied women the right to inherit.¹⁸² The Court struck down the customary law of succession because it discriminated against women in violation of both international law and the Constitution’s Section 9 guarantee of equality, equal protection, and freedom from discrimination based on sex.¹⁸³ It also found that the “primogeniture rule as applied to the customary law of succession. . .violates the equality rights of women and is an affront to their dignity.”¹⁸⁴ Nor, it continued, could this rule be justified under Section 36 of the Constitution: “the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity, and freedom.” Finally, the Court required that all South Africans be immediately governed by the Intestate Succession Act, which gives men and women equal inheritance rights.¹⁸⁵

Since then, South Africa has enacted the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 [hereinafter 2009 Act], to give customary widows and daughters the equal inheritance rights with widowers and sons that *Bhe* required. The 2009 Act provides that the Intestate Succession Act will govern the estates of anyone who has not left a will and is “subject to custom-

of them. . .shall determine which of those houses shall devolve to each spouse or child or both of them and where it devolves to both spouse and child they shall hold such house as tenants-in-common. . .”). Sections 5-8 of the Intestate Succession Law define the shares of the residue of the estate that belong to the surviving spouse, child, and parent.

180. Intestate Succession Law, (1985) P.N.D.C.L. 111 § 3. (Ghana).

181. Intestate Succession Law, (1985) P.N.D.C.L. 111 §18 (definition of “household chattels”). (Ghana).

182. See *Bhe and Others v Magistrate, Khayelitsha and Others*, (2005) (1) SA 580 (CC) at 2-3, paras. 1-3, and at 21, para. 39, & n.37 (Oct. 15, 2004) (S. Afr.), available at <http://www.worldlii.org/za/cases/ZACC/toc-B.html> [hereinafter *Bhe*].

183. See *id.* at 56-57, paras. 91, 93 (citing Section 9(3)), and at 58, para. 95 (finding no constitutional justification for violating women’s Section 9 right to equality and their Section 10 right to dignity). The Court also struck down section 23 of the Black Administration Act, 38 of 1927, as racially discriminatory. *Id.* at 44-46, paras. 68, 72-73. Section 23 imposed the customary law of succession on the “Blacks” exempted from the Intestate Succession Act by its section 1(4)(b). See also *id.* at 31-32, para. 51 & nn. 57-58 (citing CEDAW, *supra* note 9, art. 2, paras. (c), (f); the African Charter, *supra* note 59, art. 18, para. 3; and the Women’s Protocol, *supra* note 108, arts. 2, para. 1(a), 21, 25).

184. *Bhe, supra* note 182, at 58, para. 95 (for both this quotation and the one that follows). Section 10 of the Constitution guarantees the right to dignity.

185. *Bhe, supra* note 182, at 68, para. 116, at 73-74, para. 125, and at 81, para. 136(6). See *supra*, note 183, for details about the Court ruling.

ary law”.¹⁸⁶ In the interval before the bill was enacted, the Court’s interim order in 2004 had required the same result.¹⁸⁷

The 2009 Act’s Preamble states that a widow in a customary marriage “does not enjoy adequate protection and benefit under the customary law of succession.”¹⁸⁸ The 2009 Act’s stated objectives, in keeping with the *Bhe* ruling, are to help those widows, abolish the customary rule of male primogeniture, and protect children whose parents have not married.¹⁸⁹ In place of customary rules, the 2009 Act permits all children of customary marriages, irrespective of gender and of their parents’ marital status, to inherit from their parents’ estates.¹⁹⁰ It also gives women and men equal shares in the estate when either spouse dies. Kenya’s Parliament should follow the lead of the South African Parliament and amend the Law of Succession Act to prohibit the use of discriminatory customary law to determine succession matters and to require equal inheritance rights for women and men.

Indeed, the High Court of Kenya has recently determined that the provisions excluding agricultural land listed in the Gazette from the Law of Succession Act are “derogatory to human dignity and equality amongst sex universally applied.”¹⁹¹ The case involved a Masai man who, in defiance of the stereotypes of Masai culture embodied in these provisions, had educated his daughters and exposed them “to the trends of modern Kenya.”¹⁹² Nevertheless, as a resident of lands listed in the Gazette as agricultural land, a strict interpretation of Section 32 and 33 would have required that his lands be distributed according to a conservative interpretation of Masai cultural tradition, which does not recognize the rights of daughters to inherit the property of their fathers, irrespective of the actual preferences and choices of the deceased. The High Court held that in ratifying CEDAW, Kenya had “knowingly and rightly took a bold step to eliminate the discrimination of all manners and types against women. That is where the country’s aspiration has reached and has rightfully intended to stay.”¹⁹³ Thus, “even if provisions of Section 32 do apply to [the estate] and even if Masai customary law would be applicable to the estate, the customary law which shall abrogate the right of daughters to inherit the estate of the father cannot be applicable as it shall be repugnant to justice and morality.”¹⁹⁴

186. Reform of Customary Law of Succession and Regulation of Related Matters Act, No. 11 (2009), 526 GOVERNMENT GAZETTE [Republic of South Africa] No. 32147 (21 Apr. 2009) §2(1), available at <http://www.info.gov.za/view/DownloadFileAction?id=99544> [hereinafter 2009 Act].

187. The *Bhe* decision ordered that until Parliament enacted the necessary legislation, all persons would be subject solely to the Intestate Succession Act, under which men and women have equal inheritance rights. *Bhe*, *supra* note 182, at 68, para. 116, at 73-74, para. 125, and at 81, para. 136(6).

188. 2009 Act, *supra* note 186, Pmbl.

189. *Id.*

190. 2009 Act, *supra* note 186, §§2(1), 3(3).

191. *In Re Estate of Lerionka Ole Ntutu (Deceased)*, (2008) Succession Cause 1263 of 2000, (H.Ct.) eKLR, available at <http://www.kenyalaw.org>.

192. *Id.*

193. *Id.*

194. *Id.*

Further, several Kenyans support the elimination of this exclusion from the current Law of Succession Act intestacy provisions. Local Nairobi attorney Masore Nyang'au says of the excluded land: "There is no rationale why it should be excluded.... A lot of agricultural land in Kenya, like the Masai now have title, so where people used to own land communally, [the land] should now be under the Succession law."¹⁹⁵ Davinder Lamba, an Environmental Planner and Policy Analyst for Masabara Institute, a Nairobi NGO, agrees: "Some of the trust lands are being individualized. And the people in those trust lands, the pastoralists, want land to be individualized, they want private tenure."¹⁹⁶ Further, a Nanyuki advocate, Gilbert O. Ombachi, made the general statement that "[t]he Succession Act will really need to...be applicable now...to uproot most of these people from their habits."¹⁹⁷ By exempting certain lands from the Law of Succession Act, Kenya fails to protect women and supports the spread of discrimination in customary laws and practices.

Kenya's Law of Succession Act should follow the example of other African nations and the advice of Kenya's own citizens to eliminate this exemption. The law's exclusion for certain lands in Kenya should be stricken, so that the Law of Succession Act applies to all land, crops, and livestock, and customary law will not be used to determine inheritance issues in any region. Further, in Section 3 of the Law of Succession Act, the definition of "personal and household effects"¹⁹⁸ should be expanded to include livestock and simple agricultural equipment, such that there can be no mistake that the surviving spouse is absolutely entitled to these belongings under Kenyan law, no matter where he or she may live.

Men from the Masai and other minority communities may argue that the current exemption protects their right to practice their culture as they see fit, which is a recognized right under article 27 of the ICCPR.¹⁹⁹ However, in its General Comment 28, the Human Rights Committee specifically rejects the use of minority rights to justify gender discrimination. It states, "The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law."²⁰⁰ International law dictates that, when a cultural practice violates another person's rights under the same international conventions, the people causing the violation no longer have the right to enjoy their cultural practice to the extent it violates the rights of the other person.²⁰¹ It would

195. Interview with Masore Nyang'au, Partner, Masore Nyang'au and Company, in Nairobi, Kenya (Apr. 1, 2008).

196. Interview with Davinder Lamba, Environmental Planner and Policy Analyst, Masabara Institute, in Nairobi, Kenya (Apr. 2, 2008).

197. Interview with Gilbert O. Ombachi, Advocate, in Nanyuki, Kenya (Mar. 29, 2008).

198. Law of Succession Act, *supra* note 14, § 3.

199. ICCPR, *supra* note 10, art. 27.

200. HRC General Comment 28, *supra* note 59, para. 32.

201. See CEDAW, *supra* note 8, art. 2, para. (f), requiring States Parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices

be illogical for an international convention to explicitly guarantee equal rights to men and women in so many articles and then take those rights back by allowing a huge loophole in the guise of cultural respect.

Further, the overwhelming trend in Kenya is toward land privatization.²⁰² Currently much of the land that is covered by Section 32 and 33 has already been privatized, and much of the remaining land will be privatized in the future. The exemption is thus producing the unintended and unjustifiable consequence of seeming to exempt land that is privately owned, and just as easily covered by the Law of Succession Act as any other area. Indeed, since the definition of “agricultural land” excludes registered land, technically any registered land is already covered, but most people seem unaware of this fact.

Even on land not yet privatized, many times women maintain a marital home and are working on this land while their husbands are away pursuing employment. In such situations, the husband may not be the full registered owner of that land; he may only have a “use right.” Where this is true, the revised Act would provide that the surviving spouse or other descendants are entitled to the same use rights that the deceased had in the land. That solution maintains the customary law doctrine of “use rights,” but gives women and men equal use rights. That is a much more sensible solution to the complexities of governing inheritance matters in pastoral areas than simply abandoning the women to unlimited cultural discrimination. By unjustifiably exempting the agricultural lands named in the Gazette, the law fails to protect women living in these areas. The proposed amendments would cure this problem and give widows the right to inherit the marital home.

2. The Law of Succession Subjects Muslim Men and Women to Discriminatory Treatment.

All democratic nations struggle to find the correct balance between religious tradition and secular law. On the one hand, the consensus of secular societies, codified in a variety of human rights treaties, make it clear that governments must treat all citizens equally, without distinction on the basis of religion. The Universal Declaration of Human Rights states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as...religion...”²⁰³ Article 2 of the ICCPR similarly requires states to ensure to all individuals “the rights recognized in the present Covenant, without distinction of any kind, such as...religion...”²⁰⁴ Similar provisions can be found in the Dec-

which constitute discrimination against women.”

202. Interview with Ruben Mwenda Murugo, Land Policy Coordinator, in Nairobi, Kenya (Apr. 2, 2008). Mr. Murugo stated, “[I]n fact the [National Land] Policy recognizes that the present arrangement on privatization of land sort of negates the issues to do with community and indigenous customs.”

203. Universal Declaration of Human Rights, G.A. Res. 217A, art. 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), , available at <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>.

204. ICCPR, *supra* note 11, art. 2; see also ICCPR, *supra* note 11, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective

laration on the Elimination of All Forms of Intolerance or Discrimination Based on Religion or Belief²⁰⁵ and the African [Banjul] Charter on Human and Peoples' Rights.²⁰⁶ The freedom to practice religion is meant to ensure that all people can choose their religion without either gaining or losing political or economic rights; thus, human rights treaties require secular law to treat all people "without distinction" regardless of whether they are Muslim, Christian, Hindu, or any other religion or belief.

Religion remains an important and vibrant force in modern societies, however, and the particulars of religious traditions often appear to conflict with human rights and the goals of secular government. That conflict is particularly apparent in the governance of personal matters such as inheritance, over which both religious traditions and government claim authority. As a State Party to CEDAW, ICCPR and ICESCR, Kenya is obligated to ensure that women have equal rights with men to inherit property. Muslim inheritance laws, however, dictate that women and girls should receive only half the share of inheritance that similarly situated men and boys would receive.²⁰⁷ The conflict between these two views of inheritance understandably leads some to conclude that the advancement of secular laws, especially in the governance of personal matters, can only come at the expense of the free exercise of religious tradition. This in turn leads some members of minority religious traditions to claim a right to be exempt from secular laws that they believe conflict with their religious beliefs. Thus these religious minorities ask that the law not be applied in a way that is uniform and equal, but rather that members of their religious tradition should be given a different set of legal rights than members of the majority religion.

The Kenyan Constitution tries to balance between these two impulses in Section 82. Subsection 82(1) states that "no law shall make any provision that is discriminatory either of itself or in effect."²⁰⁸ A strict interpretation of this provision would invalidate state enforcement of many Islamic and customary laws related to inheritance, marriage, divorce and property. In deference to these discriminatory laws, however, subsection 82(4) exempts many of them from this anti-discrimination provision, stating "[s]ubsection (1) shall not apply to any law so far as the law makes provision... with respect to adoption, marriage, divorce, burial, *devolu-*

protection against discrimination on any ground such as...religion...").

205. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 33/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981), art. 2 ("No one shall be subject to discrimination by any State . . . on the grounds of religion or other belief. . . . For the purposes of this declaration the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."), available at <http://www2.ohchr.org/english/law/religion.htm>.

206. African Charter, *supra* note 59, art. 2 ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as . . . religion. . . .").

207. Interview with Ahmed Sharif, Kahdi, Kadhi's Court, in Nairobi Kenya (Apr. 2, 2008).

208. Const. § 82(1) (Kenya).

tion of property on death or other matters of personal law.”²⁰⁹ These provisions have permitted the use of discriminatory customary inheritance laws and the growth of Kadhi’s courts in the governance of personal legal matters such as inheritance within the Kenyan Islamic community. And according to the Constitution of Kenya Review Commission, Kadhi’s courts have become for Muslims “a symbol of their Islamic faith and culture.”²¹⁰

But the exemption in subsection 82(4) does not justify the mistreatment of women under Kenya’s succession laws. First, this exemption applies only to the anti-discrimination clause of the Kenyan Constitution. It does not apply to anti-discrimination provisions of the binding international human rights treaties Kenya has acceded to, which continue to mandate that Kenya ensure women receive equal treatment with men under all laws, including matters of personal law such as inheritance.²¹¹

Further, while the exemption may *permit* Parliament to enact laws that discriminate against women concerning “devolution of property on death”, it does not *require* Parliament to do so. Parliament remains perfectly free to enact intestacy laws that treat men and women equally. It would violate *no* provision of the Kenyan Constitution to enact such laws, and the proposed amendments to the Law of Succession Act would further serve to bring Kenya into compliance with all its human rights obligations.

The Law of Succession Act was originally written with the intent of having “universal application to[] all cases of intestate or testamentary succession... .”²¹² It originally affirmed the international legal requirement to treat all citizens without distinction, regardless of their religious identity. From 1978 through 1990, the predecessor to current section 2(1) provided that the Act applied to everyone.²¹³ As early as 1976, the predecessor to current section 5(1) gave Muslims and others the right to make wills with “reference to any secular or religious law that he [or she] chooses.”²¹⁴

In 1990, Kenya denied these rights to Muslims. For the first time, Kenya enacted a law prohibiting persons deemed Muslim from writing wills or being subject to the Act’s intestacy provisions.²¹⁵ These amendments not only permit Kenya’s

209. Const. § 82(4) (Kenya) (emphasis added).

210. CONSTITUTION OF KENYA REVIEW COMMISSION, REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION 56 (2002).

211. See, e.g., ICESCR, *supra* note 10 art. 3; ICCPR, *supra* note 11, art. 3.

212. See No. 13 of 1978, (1978) sched., (codified as section 2(1) of the Law of Succession Act, *supra* note 14, § 2(1)) (requiring the Act’s “universal application” to all Kenyans).

213. *Id.*

214. See No. 8 of 1976, (1976) § 3 (codified as section 5(1) of the Law of Succession Act, *supra* note 14, § 5(1)).

215. See No. 21 of 1990, sched., adding Law of Succession Act, *supra* note 14, § 2(3) (Act’s provisions “shall not apply to *testamentary* or *intestate* succession” of deceased Muslims’ estates (emphasis added)); see also *id.* § 2(4) (permitting only Muslim administration of estates, if Part VII (sections 44-95) of the Act’s provisions, on Administration of Estates, are “inconsistent with those of Muslim law.”).

Muslims to have their estate governed by Islamic law; the law now actually forces them to do so. Thus, the 1990 amendments denied Muslims the right to write secular and religious wills or to have their estates governed by the general intestacy and administration of estates protections in the Law of Succession Act.

The proposed amendments to the Act would reinstate the right of all Muslims to the protections of the full Act, while permitting those Muslims who want to be governed by Muslim law the right to state their clear intent to that effect in a valid will, as determined under Part II on Wills. The Khadi's courts would then determine the appropriate distribution of the estate according to Muslim law. The amendments thus insure that Muslims will have the same choices as all other Kenyans in matters of succession.

Moreover, there will be now be a clear way to identify who is a Muslim who desires the application of Muslim law of his or her own free will. The current statute does not do so, stating only that a Muslim is one who "professes the religion of Islam and accepts the unity of God and Mohammed as his prophet" at the "time of his death."²¹⁶ Once a person is dead, it is virtually impossible to know his or her beliefs at the moment of death. Without a will, there is no way to know how the deceased wished his or her estate to be divided. With a will, one can be sure.

To accomplish this goal, the proposed amendments change the definitions of "Muslim" and "Muslim law" in section 3(1) of the Act. The amended provisions define a Muslim as someone who chooses this identity through a valid will. They also define "Muslim law" as the Khadi's courts decisions on who gets what property under Muslim law (the distribution of the estate).

The proposed amendments will also bring Kenya into compliance with international human rights requirements. By compelling the estates of all intestate persons whom someone considers to be Muslim to be subject to Muslim law, and denying Muslims the freedom to write a will leaving their property to a person or persons of their choice, the current Law of Succession Act section 2(3) denies Muslim men and women the freedom to choose a religious or other belief different from that imposed on them by current section 2(3). Moreover, the statute does so explicitly on the basis of their religion. International human rights law prohibits this distinction.²¹⁷

There are several secular countries with significant or even majority Muslim populations that have adopted uniform inheritance laws for all of their citizens.

216. See Law of Succession Act, *supra* note 14, § 3(1) (defining "Muslim" and "Muslim law").

217. See ICCPR, *supra* note 11, arts. 2, para.1 (prohibiting any "distinction" based on religion in IC-CPR rights), 18, para.1 (requiring states to recognize each person's freedom to adopt a religion or belief of his or her choice), 18, para. 2) (prohibiting state "coercion" that impairs a person's right to choose a religion or belief of his or her own choice), and 26 (prohibiting "discrimination" on ground of religion in any state laws).

Examples come from Turkey,²¹⁸ the United Kingdom, and Mauritius.²¹⁹ In determining that Muslims in Mauritius had no constitutional freedom of religion right to be subject to a separate system of religious laws governing marriage and inheritance, but should instead be ruled by the secular law that applies to everyone, the Mauritius Supreme Court stated:

The secular state is not anti-religious but recognises freedom of religion in the sphere that belongs to it. As between the state and religion each has its own sphere, the former, that of law-making for the public good and the latter that of religious teaching, observance and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law.²²⁰

The Mauritius Court also ruled that even if the law subjecting Muslims to the secular law were to be construed as a violation of their religious freedom, it would nevertheless be permissible under the Constitutional provision justifying limits on religion.²²¹ Finally, it declared that, in any event, the Court could not support the use of the Muslim law of inheritance, marriage, and divorce, because to do so would violate Mauritius' obligations under the ICCPR to provide equal rights without sex discrimination to women and girls.²²²

3. The Imposition of Islamic Law Governing Inheritance Is Particularly Harmful to Muslim Women.

While the current Law of Succession Act discriminates against both Muslim men and women by restricting their right to create a secular will or have their estates treated under the secular intestacy provisions, the discriminatory impact against Muslim women is much more severe. Muslim women are given different and lesser rights than similarly situated Christian women, precisely because of their husband's identity as a Muslim. The Law of Succession excludes Muslims from the application of the Act, stating that the Act "shall not apply...to the estate of

218. In its 1996 CEDAW Report, Turkey notes that while its population is 99 percent Muslim, its laws have been secular, "not based on religion..." since 1926. Turkey, *Combined second and third periodic reports to the Committee on the Elimination of Discrimination Against Women* (16th Sess., 1997), 2, U.N. Doc. CEDAW/C/TUR/2-3 (Sept. 26, 1996), available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws16.htm> (scroll to Turkey and select Periodic Report: English hyperlink). In its 2003 Report, it notes that the amended Civil Code 2001 provisions on inheritance provide equal rights to sons and daughters, and to husbands and wives. Turkey, *Combined fourth and fifth periodic reports to the Committee on the Elimination of Discrimination Against Women* (32nd Sess., 2005), 49, art. 16, para. 1(h), U.N. Doc. CEDAW/C/TUR/4-5 (Aug. 8, 2003), available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws32.htm> (scroll to Turkey and select Periodic Report: English hyperlink).

219. Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, in *ISLAMIC FAMILY LAW* 147, 157 (Chibli Mallat & Jane Connors eds. 1990) (2nd prtg. 1993).

220. *Bhewa v. Government of Mauritius*, [1991] LRC (Const) 298, 308 (Sup. Ct. 1990).

221. *Id.* at 309.

222. *Id.*

any person who at the time of death is a Muslim. The devolution of estate of Muslims shall be governed by Muslim law.”²²³ Although the provision is facially neutral in regards to gender, the Muslim inheritance laws it imposes patently discriminate against women. Specifically, Muslim inheritance laws dictate that women and girls should only receive half the share of inheritance that similarly situated men and boys would receive. Khadi Ahmed Sharrif explained:

In a case where a husband died, the surviving wife is entitled to either 12.5% [$\frac{1}{8}$] of the entire estate [if the deceased husband had children], or 25% [$\frac{1}{4}$] if the deceased man had no children at all whether from this wife or a previous wife. . . . If the wife dies, the husband gets 25% if the woman who died had children either from him or a previous marriage. Suppose the woman had no children at all, then the man is entitled to 50%. . . . Female counterparts get half of what their male counterparts get.²²⁴

The inequality is particularly jarring in the case of Muslim widows whose husbands had multiple wives. When polygynous Muslim women are widowed, they must split whatever share a de facto monogamous Muslim widow would get evenly amongst themselves. When asked about the shares Muslim widows in polygynous marriages would receive upon the death of their spouse, Khadi Ahmed Sharrif explained that if they have children, such widows would “share the $\frac{1}{8}$. So if [there are] two wives, the $\frac{1}{8}$ will be divided by two, or if there are three wives, the $\frac{1}{8}$ is divided by three.”²²⁵

Islam permits men to marry up to four wives. This means that a Muslim widow who has children and was married to a polygynous man will inherit a share of only $\frac{1}{32}$ [$\frac{1}{8}$ divided by 4] of the estate. It is easy to imagine a scenario, especially in the case of small estates, where this tiny fraction would not be enough to support a widow. For example, if a man died and left an estate worth 100,000 shillings and was survived by four wives, who each had two children, each of his wives would only be entitled to a portion of the estate worth 3,125 shillings [100,000 divided by 32].

Under the current Law of Succession, a similarly situated non-Muslim woman would be entitled to inherit a portion worth 25,000 shillings. That can be seen by applying the same hypothetical facts to the determination of non-Muslim widows’ rights under section 40. It provides:

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

223. Law of Succession Act, *supra* note 14, § 2(3).

224. Interview with Khadi Ahmed Sharrif, Kadhi’s Court, in Nairobi, Kenya (Apr. 2, 2008).

225. *Id.*

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.²²⁶

For the non-Muslim man with an estate worth 100,000 shillings and four wives, each with two children, section 40(1) requires that the estate first be divided into four shares worth 25,000 shillings for each “house” (that is, each unit of a wife and her two children). Turning to section 35(1), as section 40(2) requires, each wife would inherit a life estate in the 25,000 shillings allotted to her house. When each wife died, section 35(5) requires that each wife’s children would then receive the whole estate for that house to “be equally divided among the surviving children.”

Thus, the Succession Act discriminates against Muslim women on the basis of religion by giving non-Muslim widows a greater share when their husband dies than Muslim widows receive. The exclusion of Muslim women from the Act violates international and regional laws which give women the right to be free from discrimination on the basis of religion and gender and the right to equality in inheritance.²²⁷ Thus, this exemption must be removed from the Act so that the protections of the Act will universally apply.

IV. EVEN WHEN IT IS APPLIED, THE LAW OF SUCCESSION ACT FAILS TO ENSURE EQUAL RIGHTS FOR ALL KENYAN CITIZENS

Even in circumstances where the Law of Succession Act does apply and the parties involved have the knowledge and resources necessary to pursue inheritance claims, the Act nevertheless fails to ensure equality for all Kenyan citizens. Several substantive provisions of the Act are discriminatory. First, the Law of Succession Act grants widows only a “life interest” in the estate of their husbands. A widow’s “life interest” expires if she remarries, whereas a widower is able to keep property inherited from his wife even when he remarries. Second, the Act fails to ensure equitable distribution of property in circumstances of polygynous marriages. Third, the Act gives unequal priority to fathers over mothers in inheritance. Finally, the Act denies the right of all children to inherit property from their parents.

A. A Life Interest In the Estate Is Insufficient To Protect Widows

Even if a widow is able to inherit under the Law of Succession Act, she will only inherit a life interest in property.²²⁸ That life interest provides inadequate financial protection. Sections 35 and 36 of the Law of Succession Act govern intestacy. Section 35(1) determines how the decedent’s estate will be distributed “...where an intestate has left one surviving spouse and child or children...”²²⁹ Section 36(1) determines distribution “[w]here the intestate has left a surviving spouse, but no child or children...”²³⁰ Both sections give the surviving spouse the personal and

226. Law of Succession Act, *supra* note 14, § 40.

227. See ICCPR, *supra* note 11, arts. 2, para. 1, 18, paras. 1-2, and 26.

228. Law of Succession Act, *supra* note 14, §§35(1), 36(1).

229. *Id.* § 35(1).

230. *Id.* § 36(1).

household effects absolutely, but give a mere life interest in the remainder of the estate, with a minor additional amount where the deceased left no children.²³¹

The life interest provision of the Law of Succession Act fails to provide adequate financial protection for widows. It is clear from the language of sections 35 and 36 of the Act that the drafters' intention was to protect widows who were financially dependent on their husbands by giving them a life interest in their husband's property after his death.²³² The fact that the Act was written with widows in mind is a testament to the reality that widows and widowers are in disparate positions after the death of a spouse. When a man dies, he frequently leaves behind a widow who owns nothing of her own, so she is given a life interest in her deceased husband's property under the Succession Act. By contrast, when a woman dies, she leaves behind a widower who is likely to have inherited property from his parents²³³ or registered the marital property in his name²³⁴, and therefore, does not so desperately need the life interest that is awarded to the surviving widow under the Act.

Despite the gender-neutral language of the "life interest", however, it discriminates against widows in application. Even though a widower may receive the same life interest as a widow, he often has financial resources available to him so that the life interest does not limit his ability to provide for himself and his family. By contrast, a widow is usually completely dependent upon her interest in the property that her husband leaves behind and does not have outside financial resources. According to Frederick Ochieng from the United Nations Development Fund for Women (UNIFEM), "Traditionally a woman does not own land. The land is owned by the man."²³⁵ Because a widow only has a life interest in the property, she can work the land, but she will never own it. She cannot sell it to support her fam-

231. *Id.* § 35(1) ("...[W]here an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—(a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate..."); *id.* § 36(1) ("Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled to—(a) the personal and household effects of the deceased absolutely; and (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty *per centum* thereof whichever is the greater; and (c) a life interest in the whole of the remainder...").

232. *See id.* § 35(1)(b), 36(1)(c) (each containing the proviso that "if the surviving spouse is a widow that life interest shall be determined upon her re-marriage to any person.").

233. Interview with Jackson Kirigia, in Meru, Kenya (March 31, 2008) (Q: Do married daughters ever lay claim to deceased father's land? A: No, not normally. Q: Do they inherit equally or in different portions? A: Normally we advocate it but sons resist it very much. Q: Why do they resist? A: Because where a woman is going there's property so why are they coming here to get more property."); Interview with Charles Murithi Marangi, Meru Central County Council, in Meru, Kenya (March 31, 2008) ("If you are a married daughter, it is assumed you will not come back, so there is no inheritance."); Interview with Joyce Wangui, in Nanyuki, Kenya (Mar. 30, 2008) ("There is a presumption that when you are married you should get property from that family, not from your parents.").

234. Interview with Joshua Kiirinya, in Meru, Kenya (Mar. 30, 2008) (Q: Why did you register land you bought during marriage only in your name? A: I wouldn't say there is a reason. But it's kind of tradition.").

235. Interview with Frederick Ochieng, United Nations Development Fund for Women [hereinafter UNIFEM], in Nairobi, Kenya (Apr. 4, 2008).

ily and she cannot use it as collateral to get bank loans²³⁶ in order to start a business or pay school fees for her children or to improve the property. Because she cannot sell the land to provide for her family, she may be forced to move to the slums where it is cheaper to live.

The restrictive life interest also makes widows vulnerable to attacks by the decedent's family. Widows may become the victims of greedy relatives who want to take back the land of the deceased. In order for a widow to keep the property, she may be pressured by relatives to participate in discriminatory customary practices such as widow inheritance or "cleansing." Davis Molumbe from the Kenya Human Rights Commission commented how easy it is for a widow to be displaced if she does not comply with the wishes of her deceased's husband's family: "The rural women are left at the mercy of their male relatives. At that point it becomes very easy to be displaced from the matrimonial home if you don't comply with family procedures."²³⁷ Because widows do not legally own the land, they will be less likely to fight for their right to stay. One widow said that sometimes the only option is to leave the property rather than suffer attacks by the deceased's family:

When you are widowed, no one is concerned about you. In such a situation you decide to take care of yourself because even if you stay with the family, they will only look for wrongdoing on your part. I decided instead of trouble all the time, I chose to move out of that land to live with my children in peace. My husband's parents used to say, "Now that your husband has gone, we don't want you."²³⁸

If a woman relinquishes her right to stay on the property she may end up living in the slums. When asked why he thought so many of the households in the slums were headed by women, Elijah Odhiambo from the Economic & Social Rights Centre answered:

It is linked to the whole issue of inheritance—because of issues like AIDS and other causes of deaths. Once the husband dies, most of these women, whatever they had they're dispossessed. They cannot go back to their homes and in places where they married, their in-laws say this is a portion of their land. . . . But if they go home the chance is they're attacked by in-laws. They think, "Why expose my life to danger when I can start life afresh in an urban center where no one knows me—places where housing is cheap and [where I] can start with very minimal financial support?"²³⁹

Thus, upon being widowed, a Kenyan woman's years of contribution and sacrifice to the marriage, children and marital home frequently go unrecognized. In-

236. Interview with Reverend Dr. Judy Mbugua, in Nairobi, Kenya (Apr. 4, 2008) (" . . . [L]and is used as collateral in many, many instances when you can get a bank loan, and when you don't have it, then you can't even access a bank loan.")

237. Interview with Davis Malombe, Human Rights Commission, in Nairobi, Kenya (Apr. 4, 2008).

238. Interview with FIDA client, in Nairobi, Kenya (Apr. 4, 2008).

239. Interview with Elijah Odhiambo, Economic & Social Rights Centre, in Nairobi, Kenya (Apr. 1, 2008).

stead, she is threatened by her relatives and forced into a life of alienation and poverty in the urban slums; unfortunately, the law does little or nothing to protect her.

1. Revocation of a Life Interest upon Remarriage Deprives Widows of Economic Independence and Bargaining Power

Both sections 35 and 36 of the Succession Act blatantly discriminate against widows by stripping them of their property interest upon remarriage but allowing widowers to keep their interest when they remarry. Sections 35(1)(b) and 36(1)(c) grant the surviving spouse a life interest in the intestate estate until she remarries: "...provided that, if the surviving spouse is a widow, that interest shall be determined upon her re-marriage to any person."²⁴⁰ The use of the term "widow" within the provision means that widowers are not subject to the same rules as widows. Thus, a widow will lose her right to live in the marital home if she chooses to remarry, but a widower will be allowed to remain in the marital home if he decides to remarry.

As a result of this provision divesting a woman of her life interest in the estate if she remarries, Kenyan women are forced into financial dependence on their new husband. Because most Kenyan women do not own property,²⁴¹ such women go to the new marriage with no property and no economic independence. Thus, the woman is forced to enter a marriage with nothing, on an unequal financial footing with her new husband. Because she is not able to keep the property she inherited, she has no financial independence and must rely on her new husband for money and resources.

There are other non-economic repercussions as well. For example, this general lack of financial independence means that she will not be able to negotiate for safe sex and she may be infected with HIV. When asked how economic independence is connected with the spread of HIV, Annie Muchiri, from the Kenya Aids NGOs Consortium (KANCO), said, "There is a big relationship [between economic independence and demanding that a man use a condom] because when a woman is economically empowered, she is able to negotiate for safer sex. Whoever is economically disempowered cannot negotiate."²⁴²

2. Discrimination against Widows Violates their Rights to Equality, Equality in Marriage, and an Adequate Standard of Living Under International Law

a. Discrimination Against Widows Violates their Broadest Right to Equality

The discriminatory effect of the life interest granted to widows under the Act and the revocation of a widow's life interest upon remarriage violate a woman's broadest international right to equality under CEDAW, ICCPR, and the African Charter.²⁴³ CEDAW calls for the equal treatment of men and women under do-

240. Law of Succession Act, *supra* note 14, §35(1)(b), 36(1)(c).

241. IFC & WORLD BANK, *supra* note 2, at 1 (women have title to only one percent of the land).

242. Interview with Annie Muchiri, Kenya AIDS NGOs Consortium [hereinafter KANCO], in Nairobi, Kenya (Apr. 1, 2008).

243. CEDAW, *supra* note 8, art. 15, para. 1; ICCPR, *supra* note 11, art. 26; African Charter, *supra* note 59, arts. 3 and 2.

mestic law: “States Parties shall accord to women equality with men before the law.”²⁴⁴ So, too, do the ICCPR and the African Charter.²⁴⁵ The disparate treatment of women and men in Sections 35 and 36 of the Law of Succession Act clearly violates this international equality right because these Sections treat similarly situated widows and widowers unequally.

b. Revocation of a Widow’s Life Interest Upon Remarriage Violates Her Right to Equality in Marriage

Revocation of a widow’s life interest violates her right to equality in marriage as set forth by CEDAW article 16(1), which states, “States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage...on a basis of equality of men and women.”²⁴⁶ This loss of her life interest specifically violates her equal right to enter freely into marriage, her right to equal ownership and enjoyment of property upon dissolution of the marriage by death, and her right to choose her residence.²⁴⁷

Revoking a widow’s life interest upon remarriage violates her equal right to enter freely into marriage as set forth in CEDAW article 16(1)(a) and (b), which state, “States parties...shall ensure, on a basis of equality of men and women:...[t]he same right to enter into marriage; ...[t]he same right freely to choose a spouse....”²⁴⁸ If a widow is forced to choose between keeping her right to use her deceased husband’s land and marrying a new husband, then she cannot exercise or enjoy her right to freely enter into marriage or to choose her spouse. Unlike a widower, her choice will always be restricted by this legal provision.

This restriction also violates ICCPR article 23(4), as interpreted by HRC General Comment 28, which calls for an equal right to enter into marriage and requires States to protect widows from economic coercion. General Comment 28 states, “Men and women have the right to enter into marriage only with their free and full consent, and States have an obligation to protect the enjoyment of this right on an equal basis. Many factors may prevent women from being able to make the decision to marry freely.... [The] criteria [for marriage] should ensure women’s

244. CEDAW, *supra* note 8, art. 15, para. 1.

245. ICCPR, *supra* note 11, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...sex....”); Human Rights Committee, General Comment 18, Non-discrimination (37th Sess. 1989), para. 12, U.N. Doc. A/45/40, <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (“[W]hen legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory...”); African Charter, *supra* note 59, art. 3 (“Every individual shall be equal before the law [and] ...entitled to equal protection of the law.”), art. 2 (“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as...sex....”), art. 18, para. 3 (“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of woman and the child as stipulated in international declarations and conventions.”).

246. CEDAW, *supra* note 8, art. 16, para 1.

247. CEDAW, *supra* note 8, art. 16, para 1(a)-(c), (h).

248. CEDAW, *supra* note 8, art. 16, para. 1(a)(b).

capacity to make an informed and uncoerced decision.”²⁴⁹ If a widow wants to remarry, she will have to forfeit her existing financial resources. This is not only sex discrimination, but effective economic coercion as well, and thus a violation of her international right to marry.

Revocation of a widow’s life interest upon remarriage violates a woman’s right to equality at the end of marriage and her right to equal enjoyment of property as set forth in CEDAW article 16(t), which states, “States parties shall...ensure, on a basis of equality of men and women: ... (c) [t]he same rights and responsibilities during marriage and at its dissolution; . . . [and] (h) [t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property... ”²⁵⁰ This means that widows and widowers shall have equal rights to the estate after the death of a spouse. But, because under the Law of Succession Act widows are granted a *revocable* life interest in the intestate estate whereas widowers are granted an *irrevocable* life interest, their rights are unequal. This directly violates widows’ right to equal property ownership and enjoyment when their marriages end in death.

Finally, revocation of a widow’s life interest also violates her right to equal choice of residence upon dissolution of the marriage as set forth in international human rights covenants. CEDAW speaks specifically to her right to choose her “residence,” and HRC General Comment 19 adds, “During marriage, the spouses should have equal right... This equality extends to all matters arising from their relationship, such as choice of residence... ”²⁵¹ This equality must continue upon “separation or dissolution of the marriage.”²⁵² As the Law of Succession Act provides that a widow’s home will be taken away from her upon remarriage, she will not be able to exercise her right to choose her residence. She must make a decision between staying in her home and moving to a new residence if she remarries. A widower does not have to make this decision. He has the ability to exercise his right to choose his residence where a widow does not. Thus, the existing law is both discriminatory and violative of a woman’s fundamental right to equality in marriage.

249. *HRC General Comment No. 28*, *supra* note 59, para. 23; ICCPR, *supra* note 11, art. 23, para. 4 (“States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”).

250. CEDAW, *supra* note 8, art. 16, para. 1(c); *see also* ICCPR, *supra* note 11, art. 23, para. 4, quoted *supra* note 249; *HRC General Comment No. 19*, *supra* note 59, para. 8 (“During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence . . . and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.”); *HRC General Comment No. 28*, *supra* note 59, para. 26 (“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.”).

251. CEDAW, *supra* note 8, art. 15, para. 4 (“States Parties shall accord to men and women the same rights with regard to . . . the freedom to choose their residence. . . .”); *HRC General Comment No. 19*, *supra* note 59, para. 8.

252. *HRC General Comment No. 19*, *supra* note 59, para. 8, quoted *supra* note 250.

c. Revocation of The Life Interest Violates a Widow's Equal Right to An Adequate Standard of Living

When a widow does not have the equal right of a widower to choose her residence, she does not have the equal right to an adequate standard of living. She does not have the same rights as a widower with respect to ownership, enjoyment and disposition of property as set forth under CEDAW.²⁵³ She could not, for example, keep her current home and add to it the interest she would acquire in a new home upon remarriage. A widower, on the other hand, could keep his current home as well as acquire an interest in a second home by taking a new wife.

In the context of the right to an adequate standard of living, including housing, guaranteed by the ICESCR and CEDAW, a widower has a greater rights than a widow. He also has the ability to improve his living conditions where a widow does not. The ICESCR article 11(1), read in conjunction with article 3, ensures "the equal right of men and women" to "an adequate standard of living" and "housing" for oneself and one's family, "including the continuous improvement of living conditions."²⁵⁴ The revocation of a widow's life interest violates the ICESCR not only because it give widows a lesser right to an adequate standard of living and housing than a widower, but also because it gives her less of an opportunity to improve her living conditions through adding to her property upon remarriage. A widow is forced to choose between her current living conditions if she remains single, and future living conditions if she chooses to remarry. A widower does not have to make this choice.

3. Surviving Spouses Should Be Granted a Non-Revocable Absolute Interest in the Marital Home and One-Third of the Residue Intestate Estate.

Surviving spouses should be given the marital home plus one-third of the residue net intestate estate absolutely. This means that widows would get an "absolute interest" rather than a mere "life interest" in their inheritance. Ensuring that widows get to keep the marital home and granting them an absolute interest in the estate would give them greater financial protection than they are currently afforded under the Law of Succession Act. Widows would have unrestricted control over the property so that they could use it as a resource to provide food, clothing, medicine, and pay school fees for their children.

253. CEDAW, *supra* note 8, art. 16(1)(h) ("States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and...shall ensure, on a basis of equality of men and women: ... (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.").

254. ICESCR, *supra* note 10, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."); ICESCR, *supra* note 10, art. 11, para. 1 ("The States Parties to the present Covenant recognize the right of everyone to an *adequate standard of living* for himself and his family, including *adequate* food, clothing and *housing*, and to the continuous improvement of living conditions."). [Emphasis added.] *See also* CEDAW, *supra* note 8, art. 14, para. 2 ("States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing...").

The old law is based upon harmful and outdated stereotypes that men should be given more property because they must provide for their wives and children. The CEDAW Committee calls discrimination that is justified by such stereotypes “clearly unrealistic” and declares that it has “a serious impact on a woman’s practical ability...to support herself or her family and to live in dignity as an independent person.”²⁵⁵ Granting surviving spouses an absolute interest in the estate ensures that both widows and widowers will have equal financial protection under the law because both widows and widowers will own property. This would eliminate the discriminatory effects of the life interest by leveling the financial playing field for widows and widowers.

An absolute interest that cannot be revoked upon remarriage empowers the widow economically. It will also give her the financial independence to negotiate for safe sex. In the words of Reverend Judy Mbugua, “A woman who is economically independent will not submit to the husband” who is HIV-positive and thereby endanger herself.²⁵⁶ It gives her financial independence when entering into a new marriage which would allow her to bargain for use of a condom in order to protect herself and her children from HIV/AIDS.²⁵⁷ It will also give her the financial means to leave the marriage when she chooses. Lawyer Maria Gorretti commented that allowing widows to keep their interest to property upon remarriage “will empower women so that even if you are remarried...you can get out of the marriage because you are economically able.”²⁵⁸

Under both international and domestic law, Kenya has a duty to ensure women’s equal rights. In fact, in its report to the CEDAW Committee, the government of Kenya admitted its “obligation” to grant women rights equal to those enjoyed by men “in all spheres of life.”²⁵⁹ Section 82(1) of the Kenyan Constitution provides protection from discrimination by stating that, “no law shall make any

255. *CEDAW General Rec. 21, supra* note 59, para. 28 (“Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage...is discriminatory and will have a serious impact on a woman’s practical ability...to support herself or her family and to live in dignity as an independent person.”); *see also CEDAW General Rec. 21, supra* note 59, para. 35 (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.”).

256. Interview with Reverend Dr. Judy Mbugua, in Nairobi, Kenya (Apr. 4, 2008).

257. Interview with Annie Muchiri, KANCO, in Nairobi, Kenya (Apr. 1, 2008) (“There is a big relationship [between economic independence and demanding that a man use a condom] because when a woman is economically empowered, she is able to negotiate for safer sex. Whoever is economically disempowered cannot negotiate.”).

258. Interview with Maria Goretti, FIDA-Kenya Lawyer, in Nairobi, Kenya (Apr. 1, 2008).

259. Kenya 2006 CEDAW Report, *supra* note 7, para. 99 (“The government of Kenya recognizes the obligation to grant women equal rights with men in all spheres of life.”).

provision that is discriminatory either of itself or in its effect.”²⁶⁰ Discrimination is defined in 82(3) as “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by...sex.”²⁶¹ Section 82(4) allows exceptions for discrimination in matters with respect to inheritance: “Subsection (1) [prohibiting discrimination] shall not apply to any law so far as that law makes provision—with respect to ...devolution of property on death or other matters of personal law.”²⁶²

This section allows Parliament to enact discriminatory laws, but does not *require* Parliament to do so. Therefore, because the Constitution does not require sex discrimination in inheritance laws, Kenya must honor the international covenants it has acceded to that prohibit discrimination based on sex in any laws. Parliament would not violate the Constitution if it amends the Law of Succession Act to give women equal rights to inherit with men. It has no excuse to continue to violate women’s rights, as the Law of Succession Act now does.

Kenya should therefore conform its succession laws to reflect the succession laws of the many countries that give women equal rights to inheritance.²⁶³ These include the 26 African nations which have recognized that revoking the property rights of a widow upon remarriage amounts to discrimination against women.²⁶⁴ Specifically, Kenya should look to the inheritance laws of African countries like Ethiopia,²⁶⁵ South Africa, and Côte d’Ivoire,²⁶⁶ which give women inheritance

260. CONSTITUTION, § 82(1) (rev. ed. 2001) (Kenya).

261. CONSTITUTION, § 82(3) (rev. ed. 2001) (Kenya).

262. CONSTITUTION §82(4)(b) (rev. ed. 2001) (Kenya).

263. See, e.g., Merrian Loewenthal & Dr. Friedrich Schwank, *Austria*, in INTERNATIONAL SUCCESSION 36, 40 (Louis Garb ed., 2004) [hereinafter IS]; Archie Rabinowitz, *Canada: Ontario*, in IS 109, 111; Didier Frechette et al., *Canada: Quebec*, in IS 125, 127-8; Richard Xiaoyun Wang, *China*, in IS 156, 157-58; Clive Cutbill et al., *England and Wales*, in IS 193, 195; Joseph Roubache, *France*, in IS 218, 220; Heinz L. Bauer, *Germany*, in IS 236, 239; Vera Varkonyi, *Hungary*, in IS 283, 286-88; Louis Garb, *Israel*, in IS 342, 345; Yusuke Komatsu, *Japan*, in IS, 380, 382; M. H. ten Wolde, *The Netherlands*, in IS 434, 436; Goril Asmussen Zimmer, *Norway*, in IS 460, 462-63; J.R. Flax, *South Africa*, in IS 527, 530; Isabel Escudero, *Spain*, in IS, 547, 549; Régis Loretan, *Switzerland*, in IS 574, 578; Nigel N. T. Li., Sophia Yeh & Josephine Peng, *Taiwan*, in IS 595, 598; Yamaner & Yamaner Law Offices, *Turkey*, in IS 612, 614-15; James Ripley Westmoreland, *United States: New York*, in IS 625, 627; Betty Igdalski Lawler, *United States: Pennsylvania*, in IS 638, 640-41 (all authors stating that the countries they review have laws that grant women equal inheritance rights with men).

264. See the Women’s Protocol, *supra* note 108, art. 21 (“A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.”). The African Union reports that 26 African States have ratified the Women’s Protocol. See <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (last visited Mar. 3, 2009).

265. CONST. OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, art. 35(7) (“Women...shall...enjoy equal treatment in the inheritance of property.”) (1994), available at http://www.servat.unibe.ch/law/icl/etooooo_.html (information on website as of Sept. 2000) (last visited Mar. 4, 2009).

266. For the Republic of South Africa, see *Bhe*, *supra* note 182, and discussion at text for notes 182-185; see also 2009 Act, *supra* note 186, §§2(1), 3(3), and discussion at text for notes 186-190. For Côte d’Ivoire, see THE CENTER FOR REPRODUCTIVE LAW AND POLICY & GROUPE DE RECHERCHE FEMMES ET LOIS AU SENEGAL, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE RIGHTS—FRANCOPHONE AFRICA 125 and note 145 (1999) (stating that the inheritance law “bars dis-

rights equal to those enjoyed by men. Specific to the issue of the absolute interest, Kenya should look to the inheritance laws of Zimbabwe²⁶⁷ and Ghana,²⁶⁸ which grant both surviving spouse and children an immediate, absolute interest in the marital home and intestate estate. Similarly, Rwanda's 1999 Law of Succession Act explicitly allows a widow to keep her property interest upon remarriage.²⁶⁹ Look-

crimination" and that the property share of the surviving spouse under the community property system is distributed under that law, citing Act No. 64-379 of Oct. 7, 1964 on succession, Official Journal No. 59 (Oct. 27, 1964), available at <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/cotedivoire.pdf>.

267. Zimbabwe Administration of Estates Act, *supra* note 178, §§ 68F(2)(b)-(c), (g). Under these provisions concerning people subject to customary law, the surviving spouse or spouses receive one-third of the net estate, with two-thirds for the children. *See id.* §§ 68F(2)(b), 68F(2)(c). In addition, all surviving wives, whether or not they have children, receive "ownership of or, if that is impracticable, a usufruct over, the house...together with all the household goods in that house...." *See id.* §§ 68F(2)(c)(i)(two or more surviving wives), 68F(2)(d)(i)(one surviving wife), 68F(2)(g)(i) (one surviving wife and no children; in this latter case, the wife also inherits "half [of] the remainder of the estate..."). If the surviving wives shared one house, they receive a joint ownership or usufruct interest in the house and in the household goods. *See id.* § 68F(2)(c)(ii). Where there is only one wife, she also receives "a share in the remainder of the net estate determined in accordance with the Deceased Estates Succession Act [Chapter 6:02]...." *See id.* § 68F(2)(d)(ii). Under the Zimbabwe Deceased Estates Succession Act, *supra* note 178, § 3A, which applies to people *not* governed by customary law: "The surviving spouse of every person who... dies wholly or partly intestate shall be entitled to receive from the free residue of the estate—(a) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death, and (b) the household goods and effects...." In addition, under *id.* § 3(a)-(b), the deceased spouse inherits a share equal to that of each of the children from the residue of the deceased's estate. If there are no surviving children, but there is a surviving parent or sibling, the surviving spousal share increases to one-half the residue estate; and if there are no surviving children, parents, or siblings, the surviving spouse inherits the whole estate. *Id.* § 3(c)-(d).
268. Intestate Succession Law, (1985) P.N.D.C.L. III §§ 3-6, 14. (Ghana):
 3. Where the intestate is survived by a spouse or child or both, the spouse or child or both of them ...shall be entitled absolutely to the household chattels of the intestate.
 4 ...
 (a)...[W]here the estate includes only one house the surviving spouse or child or both...shall be entitled to that house and where it devolves to both spouse and child, they shall hold it as tenants-in-common;
 (b) where the estate includes more than one house, the surviving spouse or child or both of them ...shall determine which of those houses shall devolve to such spouse or child or both of them and where it devolves to both spouse and child they shall hold such house as tenants-in-common.
 ...
 5. Where the intestate is survived by a spouse and child the residue of the estate shall devolve in the following manner:
 (a) three-sixteenth to the surviving spouse;
 (b) nine-sixteenth to the surviving child...
 Under section 6(1), where only a spouse survives, the residue is distributed "one-half to the surviving spouse...." In the case of two or more surviving spouses, section 14 requires that "they shall divide it among themselves in equal shares." This section 14 requirement of equal shares applies whenever "two or more persons are entitled to a share...."
269. LAW N° 22/99 O of Nov. 12, 1999, O.G. [Official Gazette of Rwanda], Nov. 15, 1999, Matrimonial Regime, arts. 2-3; Intestate Succession, art. 70, available at http://www.amategeko.net/index.php?Parent_ID=7329&Langue_ID=An [select "12/11/1999 LAW N° 22/99 O TO SUPPLEMENT BOOK I OF THE CIVIL CODE AND TO INSTITUTE PART FIVE REGARDING

ing to the laws of other countries, Justice Shah said, “We have to follow. We have to go along with international law. We can’t just be on our own. The time has come now where the idea of men only inheriting, male offspring only inheriting, should be discarded.”²⁷⁰

In addition to complying with international and domestic laws, Kenya must comply with the wishes of its people. Many interviewees responded favorably to the idea of giving widows an absolute interest in her deceased spouse’s estate. Approximately half of the interviewees who were asked about inheritance rights agreed that widows should get an absolute interest in at least the marital home.²⁷¹ One interviewee justified his response in favor of this revision by saying, “Even if I was paying money for the land, she was paying for my shoes... Even if I was paying for the land, she was paying for the food I was eating. So if I die, who else should come in here? It is her who has got the rights...”²⁷²

When asked about a widow having an absolute interest in her spouse’s estate, one magistrate responded, “I think it would be a very good idea... In my view, when the women have the property, the children’s future is secured.”²⁷³ Abdul Nahab, the Chief of Bahati, even spoke out against the life interest, in support of the absolute interest, by saying, “If I am married to you, you must have an interest in the property. You are not in jail. You can remarry but then retain the life interest in my property. To say that when a woman remarries she does not get anything, that is a human violation.”²⁷⁴

Even an interviewee who at first thought both the widow and widower should lose their life interest if they remarried eventually concluded that an absolute inter-

MATRIMONIAL REGIMES, LIBERALITIES AND SUCCESSIONS. O.G. N°22 OF 15/11/1999”) hyperlink, then select “Title I, Cap. 1, Types of Matrimonial Regime[s]” for arts. 2, 3; select “Title II, Cap. 2, Section 3, Intestate Succession” hyperlink for art. 70.]

In Rwanda, article 2 makes community of property the default regime when a couple marries and does not select another property regime; article 3 explains that community property is “based on joint ownership of a[ll] their property - movable as well as immovable...” When one spouse dies, article 70 provides:

7 - the surviving spouse who no longer has any children under his/her care and wants to remarry shall obtain full ownership of the 1/2 of the patrimony and another half shall be given to the deceased’s heirs; 8 - in case of remarriage of the surviving spouse who is still bound by the duty of raising the children of the *de cujus* [deceased], she or he shall obtain full ownership of 1/4 of the succession and shall continue to administer the remaining 3/4 for the benefit of the children;

270. Interview with The Honourable Court of Appeal Justice Shah, Retired, in Nairobi, Kenya (Apr. 4, 2008).

271. See *e.g.*, Interview with Francis Ng’anga in Nairobi, Kenya (Apr. 3, 2008) (“I believe some portion of the property can be apportioned absolutely, and have the right of inheritance absolutely, so she can develop, go to an equity bank, get a loan, develop, but now she cannot do that.”); interview with a High Court Judge, in Nairobi, Kenya (Apr. 1, 2008) (“Q. Do you have any examples of cases in which a question was decided to be repugnant to Constitution? A. What comes to mind is where the widow is made to leave just because that poor man has died... Saying you cannot sell land if the husband dies. The life interest is repugnant.”).

272. Interview with Joshua Kiriinya in Meru, Kenya (Mar. 30, 2008).

273. Interview with a Magistrate Judge in Nairobi, Kenya (Apr. 1, 2008).

274. Interview with Abdul Nahab, Chief of Bahati, in Nairobi, Kenya (Apr. 2, 2008).

est would be better. Professor Githu Muigui initially did not see the point in a surviving spouse keeping his or her interest upon remarriage: “. . . whether you are the husband or the wife, the interest should terminate upon remarriage because clearly you have gone and found better pasture.” On further reflection, however, he concluded that outright ownership “would make life much easier. Interests would vest, and I can do what I want with it.”²⁷⁵ In saying this, he showed why it is so essential for women to have their own property and source of income. When they do, they can freely use the property to build a business or grow agricultural products to support and protect themselves and their children. An absolute interest in the matrimonial home and one-third of the estate would provide that security.

4. The Children Should Be Granted an Absolute Interest in Two-thirds of the Residue Intestate Estate.

In order to ensure that the children are provided for under the Law of Succession Act, two-thirds of the net residue estate should be equally divided among the children of the deceased. This would allow both the surviving spouse and children to inherit immediately and leave all parties free to do what they wish with their portion of the inheritance. This alleviates the unease that some have with the idea of a widow getting an absolute interest in the property out of concern that a widow’s new husband would try to take the property of her deceased husband.

The Honorable Lady Justice Aluoch expressed this concern where there are young children:

Let’s say we have a twenty-four year old widow. The children are maybe four and all below eighteen. . . . She has found another man and she wants to get married. She takes the grant that she had as sole administrator. We want to believe that this property still remains the property of these four children and not the new husband. How are we going to ensure [this]. . . . But life interest, I don’t support it where children are above eighteen. . . . I would support [outright ownership]. . . where the children are eighteen. . . .²⁷⁶

Johnson Okello, a Senior State Counsel with the Kenya Law Reform Commission, also expressed concern over protection of the children and even suggested that spouses might be inclined to abandon their children if they were to be granted an absolute interest in property.²⁷⁷

Although it is a possibility that a widow could turn over her property to her new husband or abandon her children, most interviewees indicated that it is not likely. The women of Kenya are loyal to their children. When asked if she thought a widow with an absolute interest might abandon her children, attorney Angeline

275. Interview with Professor Githu Muigui in Nairobi, Kenya (Apr. 3, 2008).

276. Interview with The Honorable Lady Justice Aluoch in Nairobi, Kenya (Apr. 4, 2008). She noted with disapproval, “[N]ow even when children are above eighteen, she [their mother] still needs their consent.”

277. Interview with Johnson Okoth Okello, Senior State Counsel, Kenya Law Reform Commission, in Nairobi, Kenya (Apr. 2, 2008).

Kinuthia said, “Here?! Never!”²⁷⁸ Father Francis Mbutia supported the idea that women are loyal to their families:

If you give a woman 100 shillings in a home and you give a man 100 shillings in the same home and look at the kinds of things that will be done by the 100 shillings given to a woman and the 100 shillings given to a man, it’s totally different because the 100 shillings given to a woman would make sure that there is paraffin in the house, there is food in the house, [and] there is everything that you require within there. But the 100 shillings given to a man, he would probably go and buy beer, and it will not come back to help to improve the standard of living of the people in this household.²⁷⁹

Furthermore, Kenyan law provides that both men and women have a legal obligation to shelter and care for their children until the children reach the age of majority.²⁸⁰ The proposed amendments strengthen that protection in the event one parent dies and thus answer the Honorable Justice’s concerns. The children will no longer have to wait to inherit their property until the life estate for the surviving parent ends through death (or remarriage for a widow) – the life estate being the time period during which the new husband might try to take control. Instead, the children will immediately own two-thirds of the residue estate when the first parent dies. And the surviving widow (or widower) will immediately own the remaining one-third.

Though interviewees had differing opinions about exactly how the inheritance laws should be written, almost all agreed on the need for change with respect to women’s right to inherit her husband’s property. Almost everyone admitted that women are not treated equally with men in matters involving property. And almost all thought it necessary to protect children’s interests. If both the Kenyan people and government have acknowledged the problem, it is Kenya’s duty to work towards a solution.

B. The Law of Succession Does Not Adequately Provide for Widows in Polygynous Marriages.

Adding insult to injury, widows in polygynous marriages face many of the same problems as widows in monogamous marriages and suffer even more in inheritance matters. By permitting polygyny to persist, Kenya violates women’s rights under international law to equality in marriage and at its dissolution (divorce or death), as required by the ICCPR and CEDAW.²⁸¹ In particular, the ICCPR requires state parties “to ensure equality of rights and responsibilities...of spouses... during marriage and at its dissolution.”²⁸² Polygyny goes against this right at the most basic level.

278. Interview with Attorney Angeline Kinuthia, Kinuthia & Co. Advocates, in Nairobi, Kenya (Apr. 4, 2008).

279. Interview with Father Francis Mbutia in Nairobi, Kenya (Apr. 2, 2008).

280. Children Act, (2001) Cap. 8 § 6(1) (Kenya) (“A child shall have a right to live with and to be cared for by his parents.”).

281. CEDAW, *supra* note 8, art. 16, para. 1; ICCPR, *supra* note 11, art. 23, para 4.

282. ICCPR, *supra* note 11, art. 23, para 4.

The inequality of polygynous marriages and its particular unfairness in inheritance matters is illustrated by the application of current Sections 40 and 35 of the Law of Succession Act. Section 40 of the Act governs succession where the intestate deceased man was polygynous. This section requires that the net estate of such a man be divided among his surviving wives and children. That means that the portion of the marital estate a widow receives decreases with the addition of more wives. In contrast, under current section 35, if a man has multiple wives he will inherit a full life estate as each wife dies. Thus, his potential to accumulate property through inheritance from a deceased spouse increases with each additional wife he marries, while hers decreases. This violates a widow's right to equal treatment with a widower in the amount each partner to a marriage inherits.

As a party to CEDAW, Kenya has an affirmative duty to remedy this inequality. CEDAW General Recommendation 21 states, "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited."²⁸³ In addition to this General Recommendation, the CEDAW Committee has issued many Concluding Comments noting that polygyny in Kenya and other countries violates CEDAW and calling upon States to end it.²⁸⁴ In particular, the Committee urged Kenya in 2007 to implement measures aimed at eliminating polygyny.²⁸⁵ To end this harmful and blatantly discriminatory practice, as well as to ensure compliance with its obligations under CEDAW, Kenya should ban future polygynous marriages. In the meantime, proposed revisions to the Law of Succession Act must take into account the presence of polygynous marriages and protect individuals in those families.²⁸⁶

283. CEDAW General Rec. 21, *supra* note 59, para 14.

284. See, e.g., Committee on the Elimination of Discrimination against Women, *Concluding Comments: Sierra Leone* (38th Sess. 2007), para. 38, U.N. Doc. CEDAW/C/SLE/CO/5, available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws38.htm> (scroll to Sierra Leone and select CO: English hyperlink.) ("The Committee expresses concern that discriminatory provisions persist in customary law and the Mohammedan Marriage Act. The Committee notes, for instance, that polygamy is permitted, intestate distribution of property discriminates against women..."); Committee on the Elimination of Discrimination Against Women, *Concluding Comments: Cameroon* (23rd Sess. 2000), para. 54, U.N. Doc. CEDAW A/55/38 (2000), available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws23.htm> (scroll to Cameroon and select CO: English hyperlink.) ("The Committee urges the Government to review all aspects of this situation and to adopt legislation to prohibit discriminatory cultural practices, in particular those relating to... inheritance... and polygamy.") The CEDAW Committee issues Concluding Comments after meeting with government representatives to discuss the country's CEDAW Report; the Comments highlight positive steps the country has taken and future steps it must take to comply with CEDAW.

285. Committee on the Elimination of Discrimination against Women, *Concluding Comments: Kenya* (39th Sess. 2007), para 44, U.N. Doc. CEDAW/C/KEN/CO6, available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws39.htm> (scroll to Kenya and select CO: English hyperlink.) ("The Committee calls upon the State party to implement measures aimed at eliminating polygamy as called for in the Committee's general recommendation No. 21 on equality in marriage and family relations.") See also *id.* para. 42 (The Committee urges the State party to take appropriate measures to eliminate all forms of discrimination against women with respect to... inheritance of land.")

286. The most favorable solution is to ban all future polygynous marriages. Even if such a ban on polygyny were to be implemented, however, the Law of Succession Act would still have to ad-

Thus, the revised Succession Act must ensure that all individuals in polygynous families are adequately provided for in the event that one of the spouses dies. The most important thing is to provide that every member of the polygynous family will have a place to live. The revised Act must clearly state what happens to the wives, children, and husband in polygynous families when either one of the spouses dies.

First, when a man married to more than one woman dies, his surviving wives must each have a place to live. Each surviving wife should own her marital home. In Kenya, men in polygynous unions typically have a separate marital home for each wife.²⁸⁷ If each wife is given absolute ownership of the home she shared with her husband, she will have a place to live and a place to raise her children. Alternatively, she may sell the home and use the proceeds for herself and the children or use the home as collateral for loans to get other necessities.

In the rarer case where all of the widows shared one marital home with the deceased prior to his death, all widows should get equal ownership of the marital home. If it is impractical for all of the widows to live together, then the home may be sold with the proceeds of the sale to be equally divided among them. In either situation, the widows would share one-third of the residue of the deceased's estate with the deceased's children sharing equally the other two-thirds.

These proposed revisions to the Law of Succession Act will also help Kenya to fulfill its international obligation to protect families, and in particular, the children of Kenya.²⁸⁸ The CRC requires that children be given the right to stay with their families and that no child shall be separated from his or her parents against his or her will.²⁸⁹ This CRC right is recognized in Kenya's Children Act, which gives a child the "right to live with and to be cared for by his parents."²⁹⁰ The current law, which deprives women of absolute ownership of the home, can and does lead to the forced separation of children and their mothers. If the law does not provide a widow with absolute ownership of her home, she may not freely dispose of the marital home or use it for collateral on loans. If she needs more money, this may force her to leave her home and find work in other areas. If a widow cannot afford to take her children with her, she will be forced to part with her children. This forced separation is a violation of the CRC and the Children Act.

dress the rights of polygynous wives and children. One suggestion would be to ban all future polygynous unions, but provide a succession scheme for polygynous marriages entered into prior to the enactment of a ban on polygyny. While this proposal does not suggest the ban on future polygynous marriages, it does provide for polygynous wives and children.

287. Interview with Evangelist in Nanyuki, Kenya (March 29, 2008) (stating "when a man marries and then gets a second wife he cannot bring the second wife into the house of the first wife").

288. ICCPR, *supra* note 11, art. 23, para. 1 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); African Charter, *supra* note 59, art. 18, para. 1 ("The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral[s].").

289. CRC, *supra* note 63, art. 9, para. 1 ("States Parties shall ensure that a child shall not be separated from his or her parents against their will...").

290. Children Act, (2001) Cap. 8 § 6(1) (Kenya).

The CRC also requires that state parties undertake efforts “to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents; .”²⁹¹ By ensuring that the widow receives outright ownership of the marital home, Kenya will be taking an appropriate step to ensure the well-being of her children. If a widow has a home, her children will have a home.

In cases where a polygynous husband’s wife predeceases him, the husband will be able to live with another wife or in his own separate home. Since the deceased mother’s children must be ensured a place to continue to live, they should receive the marital home in equal shares upon reaching the age of majority. Until the children reach that age, the revised Succession Act would provide that the home is to be held in trust for them by their surviving father. If all his wives predecease him, he would receive the marital home of the last wife to die, because at that point he would be in a *de facto* monogamous marriage and thus governed by Section 35. Under this set of policies, the polygynous man is no worse off than any of his wives, as he has the same right to inherit only one marital home, just as each of his wives may only inherit one marital home.

If there is only one marital home shared by two or more polygynous wives, then the children should receive their mother’s interest in that home. By giving outright ownership of the marital home to children in polygynous families who lose their mothers, Kenya will also be ensuring the right to protection of the family. With home ownership, the children will be less likely to face the threat of eviction from either their father or their father’s other wives.

C. The Law of Succession Act Unfairly Gives Priority to Fathers Over Mothers in Inheritance.

The Law of Succession Act violates a woman’s right to equality and freedom from discrimination under the law because it expressly grants priority to fathers over mothers to inherit a deceased child’s property whenever the intestate left no surviving spouse or children.²⁹² In practice, this provision means that as long as the father of the deceased is alive, the mother of the deceased will not inherit. As stated previously, international treaties, regional law and the Constitution grant women equal protection under the law and freedom from discrimination based on gender.²⁹³ Kenya can easily remedy this problem and come into compliance with its obligations by eliminating the language that gives fathers priority to inherit over mothers. The new section should state that fathers and mothers inherit equal shares of the deceased’s estate where the intestate has left no surviving spouse or children. Every person interviewed on the subject agreed with this suggestion.²⁹⁴

291. CRC, *supra* note 63, art. 3, para 2.

292. Law of Succession Act, *supra* note 14, §39(1)(a).

293. CEDAW, *supra* note 8, art. 15, para. 1; ICCPR, art. 26; African Charter, *supra* note 59, arts. 2, 3, 18, para. 3.

294. In an interview with Ahmed Sharrif, Kahdi, Kadhi’s Court, in Nairobi, Kenya (Apr. 2, 2008), the Kahdi explained that Muslim law provides that the father of the deceased inherits twice the mother’s share. Of course, that is more than the zero share the mother now inherits under the Succession Act when the father is alive. He was not asked about the proposed change to give parents equal shares, however.

D. The Law of Succession Act Does Not Give Adequate Protection to Children Born out of Wedlock.

The Law of Succession Act unlawfully discriminates against another group of Kenyan citizens: children born out of wedlock. The definition of “child” in Section 3(2) of the Act states that a child will include “in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”²⁹⁵ Children born out of wedlock to fathers who do not voluntarily accept responsibility for raising them are thus redefined to be no longer “children” under the Act. As a result, if the unwed father dies intestate and his assets are distributed under Section 38 of the Act, his child born out of wedlock will not inherit anything from him.²⁹⁶ Just as the South African Constitutional Court struck down gender discrimination in *Bhe*, it also struck down the discrimination against children whose parents were not married, relying on both the Constitution and international law; so, too, did the South African Parliament.²⁹⁷ Kenya should follow that lead as well.

Children, like adults, have legal rights that are understood in international law and codified in human rights agreements. The ICCPR states, “Every child shall have, without any discrimination as to...sex...or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”²⁹⁸ The Convention on the Rights of the Child goes further by prohibiting discrimination whether it is based on the child’s or the child’s parent’s sex or birth; it also directly prohibits “discrimination or punishment on the basis of the status...of the child’s parents...”²⁹⁹ When a child is denied a share of his or her

295. Law of Succession Act, *supra* note 14, § 3(2).

296. *See id.* § 38 (“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall...devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”). Since section 3(2) defines “children” to exclude those whose unwed fathers choose not to recognize them, these children cannot inherit from their father under section 38.

297. *Bhe*, *supra* note 182, at 32-38, paras. 52-56, 58-59, at 45-46, paras. 69, 74, and at 57-59, paras. 93 (“In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of section 9(3) [prohibiting discrimination based on sex, birth, and other status grounds] of the Constitution.”), 95 (“The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights... [T]he limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.”), 97. *See also id.* at 34, para. 55 (citing the CRC, *supra* note 63, pmb. and art. 2), & n.67 (citing the ICCPR, *supra* note 11, art. 24, para. 1; the African Charter, *supra* note 59, art. 18, para. 3; and the African Charter on the Rights and Welfare of the Child, arts. 3 and 26, para. 3, adopted July 1990, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, acceded to by Kenya July 25, 2000, available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>). *See also* 2009 Act, *supra* note 186.

298. ICCPR, *supra* note 11, art. 24, para. 1.

299. CRC, *supra* note 63, art. 2, para. 2; *see also id.* art. 2, para. 1. CEDAW is equally explicit: “States Parties... shall ensure, on a basis of equality of men and women...[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount...” [Emphasis added.] CEDAW, *supra* note 8, art.

father's inheritance, in circumstances where the child of married parents would be entitled to inherit, that child is being punished for the non-marital status of his or her parents, and the consequences for that child could be devastating. It is unclear why the law of Kenya would choose to discriminate against these citizens.

When fathers abandon children born outside of wedlock, those children often end up homeless or in slums. Mary Colleta ran a school for children living in the Nairobi slums. She said:

Many of the children were born out of wedlock, displaced. We were teaching them the word of God. When children grow up in the right way, they retain most of the way that is the right way. They need more protection, preservation, and care. Because in this land if you don't have blood they call you a 'bastard,' and that is difficult.³⁰⁰

In interviews, many Kenyans expressed the view that children born out of wedlock should be entitled to the same rights as any other child. According to Colleta, "This is African custom. This is the father of the child. Where will he get another father? The child should be supported fully with the property of the mother and father."³⁰¹

Some women expressed this view in spite of the fact that recognizing the rights of children born out of wedlock would mean a smaller share of inheritance for their own children. A nurse from the rural district of Nyeri was divorced from a man who had two children with her and five children with five other women outside the marriage. He did not support any of his children. Because the children born out of wedlock are highly unlikely to be eligible to inherit his property under the current Law of Succession Act, each of his children from his marriage will be entitled to one-half of their father's estate under Section 38; if the other five children were allowed to inherit, each child would only receive one-seventh of the total.³⁰² Nevertheless, when asked whether children born out of wedlock should have the right to inherit property, she said "Yes. The child is innocent. Even if the father went outside the marriage, [the child] is innocent. We should pass that law."³⁰³

Further, by acceding to CEDAW, the government of Kenya has recognized that "[m]en and women share equal responsibilities towards their children."³⁰⁴ The differing treatment that the Law of Succession Act gives to fathers who do not take responsibility for their children, as opposed to mothers, violates the principle that parents share equal responsibility for raising children. Admittedly, there is a biological reality that claims of paternity are often disputed, whereas establishing

16, para. 1(d).

300. Interview with Mary Colleta in Nairobi, Kenya (Apr. 3, 2008).

301. *Id.*

302. For the text of Section 38, see *supra*, note 296,

303. Interview with Joyce Naitore in Nairobi, Kenya (Apr. 4, 2008).

304. Kenya 2006 CEDAW Report, *supra* note 7, para. 173; see also CEDAW, *supra* note 8, art 5, para. (b) (requiring states "[t]o ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.").

maternity is usually uncontroversial. Nevertheless, the fact that it may be difficult in some circumstances to establish paternity does not mean that the law should ignore circumstances where the paternity of a child is known or knowable (for example, with a DNA test).

The proposed change will protect the legal rights of Kenyan children by expanding the definition of children to include all biological descendants of an unwed father, other than children who have been adopted by another father, and providing that children of unmarried fathers are equally entitled to the Act's protections. This change will help ensure that no child is legally stripped of a father's protection and resources, and that Kenyan law clearly indicates the need for both parents to support their children.

V. CONCLUSION

A. Kenyan Women are Harmed by Discriminatory Inheritance Laws, Customs, and Practices.

Widows in Kenya continue to suffer egregious human rights violations simply because they are widows. Despite the existence of the Law of Succession Act, discriminatory customary law often prevails in matters of inheritance. Many widows are evicted by in-laws who use customary law to claim that a widow has no right to her deceased husband's property. Others are coerced into being inherited by one of their male in-laws and banished from the community if they refuse. Still others are forced to have sex with a professional "cleanser" because the village elders insist that custom demands it. These practices all too often lead to horrific consequences for the widow and her children: poverty, HIV-infection, starvation, and life in the slums.

Even when the Law of Succession Act is used, it gives inadequate protection to widows and their children. Surviving spouses are given only a life interest in their marital home, and, for widows only, this life interest terminates upon remarriage. Widows are therefore particularly vulnerable to the attempts of others to stake a claim to their home and evict them. Widows in polygynous marriages have to share their deceased husband's estate with the other wives, leaving many of them in poverty. Mothers inherit from their deceased child's estate only if the father is also dead, leaving some mothers without a means to support themselves. Also, children of unwed parents do not inherit from their father in many instances, although they always inherit from their mother.

Further, even the limited protections of the Law of Succession Act do not apply to two large groups of people: Muslims and those who live on certain agricultural lands that have been listed in the Gazette. These groups are, by law, subject to Islamic law or African customary law, respectively, in matters of inheritance. Both Islamic law and African customary law are clearly discriminatory toward women in inheritance matters, with women receiving less than men and sometimes nothing at all.

Finally, even among Kenyans governed by the Law of Succession Act, many are not even aware of the law's existence, and even some of those women who do attempt to exercise their rights are discouraged by the cumbersome probate process. Thus, there is a great need to revise the Law of Succession Act and expand its protections to all women throughout Kenya.

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B. Proposed Amendments Alleviate the Harms Done To Women Under Existing Law and Will Bring Kenya Into Compliance with Its Obligations Under International Law.

Georgetown Law Center's International Women's Human Rights Clinic, in collaboration with FIDA-KENYA, has proposed several amendments to the Law of Succession Act which are outlined in the attached bill and annotated appendix. Two proposed amendments criminalize widow eviction, as well as forced or coerced widow inheritance, and forced or coerced widow "cleansing." This helps women by specifically punishing cultural practices that harm women and helps to bring Kenya into compliance with its obligation under international law to take steps to eliminate gender-based violence and harmful cultural practices and to provide equal rights in marriage and adequate living conditions for its citizens.

In order to make one uniform succession law for all Kenyan citizens, another set of amendments removes the exemptions for Muslims and those living on agricultural lands that have been listed in the Gazette, Members of either group, however, would be able to write wills to insure that their customary or religious beliefs are honored. This proposal extends the protections of the Law of Succession Act to all women and helps Kenya fulfill its obligation under international law to refrain from discrimination on the basis of religion, ethnicity, and sex. It also ensures equality in inheritance to its citizens.

To guarantee that all surviving spouses have a place to live, another proposed amendment gives automatic ownership of the marital home to the surviving spouse in both monogamous and polygynous marriages, by operation of law. This proposal would help protect a widow from eviction by her in-laws and enables Kenya to fulfill its obligation under international law to protect its citizens' rights to equality in marriage and adequate living conditions.

To those who would object to these revisions for religious or cultural reasons, perhaps the best support for changing the laws of intestate succession in Kenya lies in the freedom of each Kenyan citizen to write or express a will, a freedom that the amendments will reinstate for Muslims. If a citizen does not want his or her property to be disbursed according to the intestate law, that person is free to indicate his or her wishes in a valid will. Because Kenyan citizens can write wills, they are not automatically bound by the laws of succession. That means that if Kenya adopts non-discriminatory measures that are disliked by certain groups, those groups need not suffer under the law, but remain free to follow their own customs by expressing them in valid wills.

The fact that an estimated 90%³⁰⁵ of Kenyans do not write wills creates a heightened duty on Kenya to adopt non-discriminatory succession laws that will encourage its citizens to write wills. When asked if changes to the Succession Act would encourage people to write wills, Johnson Okello, Senior State Counsel with the Kenya Law Reform Commission answered:

305. Interview with the County Council in Nanyuki, Kenya (Mar. 30, 2008) (stating, "Almost 90% die without a will. If it is word of mouth, you cannot prove that because I'm talking what my father told me. We do not prepare ourselves because there is no time to say when I die. It is bad for Africans to think of death, so that's why most of us die without making a will. You just see people coming to claim at death.").

Yes, it would encourage people to start writing wills. That would be a welcome move, to know the intention of the person. If we had a way of commanding everyone to write a will, we would—but we can't.... When we went around the country people told us to simplify the way to write a will. We hope it inspires people to start thinking.³⁰⁶

The Clinic and FIDA-Kenya have also proposed several amendments to help increase Kenyan women's knowledge about the Law of Succession Act and how to assert their rights. The revisions also make access to the court system easier and cheaper. One provision requires chiefs or administrative officers to inform potentially interested parties of their rights, so that people who would not otherwise know about the provisions of the Act will be informed and can use the court process. Another proposal expands the jurisdiction of Magistrate's Courts to resolve inheritance disputes so that people do not have to travel to a High Court and will therefore have more convenient access to the judiciary.

Finally, in recognition of the difficulties women, and particularly rural women, have in enforcing their rights in inheritance, the Clinic and FIDA-Kenya have proposed amendments stating that the spouse should be automatically granted ownership of the home by operation of law and that the spouse be appointed administrator of the estate. As administrator, the surviving spouse would also serve as trustee for minor children's property, unless proved unable or unwilling to assume this responsibility. These provisions will help to ensure that widows cannot be evicted from their property and can protect their children.

Another set of proposals eliminates discrimination against mothers and the children of many unwed fathers. They would require that mothers and fathers inherit in equal shares from their deceased child, thus fulfilling Kenya's international obligations to provide equality in inheritance rights to both genders. As a final measure, they would guarantee that all children born to unwed parents will inherit from their fathers, not just from their mothers as is now the case. This would bring Kenya into compliance with its human rights treaty obligations to give all children the protection they need as minors.

Please consult the attached bill, which details the proposed changes to the language of each provision. The attached appendix shows how the Law of Succession Act will look after incorporation of the proposed amendments. The annotations in these documents also clarify how these amendments help alleviate the harms done to Kenyan women and children and bring Kenya into compliance with its international obligations. These amendments will not only assist Kenyan women, but will help bring about economic growth for everyone in Kenya.

C. The People of Kenya Deserve Laws That Ensure Women's Equality and Protection from Harmful Cultural Practices and That Will Contribute to a Safer, Healthier, and More Economically Productive Future.

As made clear in the preceding sections, continuing gender inequality in Kenya's inheritance law is undermining its development efforts, perpetuating pov-

306. Interview with Johnson Okoth Okello, Senior State Counsel, Kenya Law Reform Commission, in Nairobi, Kenya (Apr. 2, 2008).

erty and contributing to the spread of HIV/AIDS in the country, with disastrous effects for Kenyan citizens and future generations. Women represent the majority of Kenya's population and agricultural work force. Because the laws make it difficult for Kenyan women to own property and do not recognize the contributions of Kenyan women, women lack a financial incentive to develop land or grow their financial resources. Further, lacking any property of her own, a woman cannot obtain credit because she does not have any collateral. This situation essentially incapacitates women economically and represses the potential productivity of over half of the country's population.

Likewise, the current inheritance regime creates economically disadvantageous incentives for men. A man who expects his spouse and children to benefit from his life's labor will work harder to have something to convey to them. On the other hand, where a man has reason to believe that his property will go to the most intimidating or manipulative of his male relatives, he will not have a great incentive to invest his wealth in future generations.

As several experts and international organizations have recognized, gender inequality in Kenya's land laws is crippling the nation's economy,³⁰⁷ and women are not the only ones to suffer. When their mother is isolated and stripped of all property and possessions, the children of widows will be at a great disadvantage, often lacking money for basic necessities and school fees. The educational and health obstacles faced by these children will affect Kenya's economic development for decades into the future.

Just as significantly, the current inheritance regime promotes the spread of HIV/AIDS as it renders women economically and socially dependent on men with little or no control over their own sexual activity, no leverage to negotiate safe sex, and no power to demand fidelity of their husbands. The practices of widow inheritance and widow "cleansing" are obvious contributors to the spread of the AIDS epidemic as these practice promote unsafe sexual practices among multiple partners. In addition, impoverished widows, and their daughters, may resort to prostitution in order to sustain themselves and their children. This also makes women vulnerable to, and a vehicle for, HIV/AIDS.

In addition to Kenya's international obligations to remedy gender inequality in its inheritance laws, these economic, social, and health imperatives obligate the country to take action now to resolve this crisis it is perpetuating on its citizens. Unless it does so immediately, Kenya is failing to live up to its international obligations, and, perhaps more importantly, is failing its own people. By enacting the gender-sensitive reforms contemplated by this Report and proposed legislation, Kenya will be taking a monumental step toward equalizing its property regimes and ensuring a safe, equitable and prosperous future for its citizens.

307. See, e.g. Elana Bardasi, C. Mark Blackden & Juan Carlos Guzman, *Gender, Entrepreneurship, and Competitiveness in Africa*, in WORLD ECONOMIC FORUM, WORLD BANK & AFRICAN DEVELOPMENT BANK, THE AFRICA COMPETITIVENESS REPORT 2007, at 70 (2007), available at www.weforum.org/pdf/gcr/africa/1.4.pdf; INTERNATIONAL DEVELOPMENT ASS'N & INTERNATIONAL MONETARY FUND, REPUBLIC OF KENYA: JOINT STAFF ASSESSMENT OF THE POVERTY REDUCTION STRATEGY II, para. 35 (Apr. 9, 2004), available at <http://www.imf.org/external/pubs/ft/scr/2005/cr0510.pdf>.

Law of Succession (Amendment) Bill, 2009

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PART I - PREAMBLE

WHEREAS the Constitution of Kenya guarantees that all citizens of Kenya are equal before the law and have the protection of the law whatever the person's race, tribe, place of origin or residence or other local connection, political opinions, color, creed or sex;

WHEREAS the Constitution of Kenya protects all citizens from discrimination, including discrimination on the basis of the person's sex, tribe, or creed;

WHEREAS the Constitution of Kenya does not prohibit Parliament from giving women equal rights with men with respect to devolution of property on death;

WHEREAS the Constitution of Kenya therefore permits Parliament to give women equal rights with men with respect to devolution of property on death;

WHEREAS Kenya has signed numerous international and regional treaties that embody the global consensus that all people, without regard to their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, have an equal right to the equal protection of the law; an equal right to the protection of their family; an equal right to participate fully in the economic and social life of their nation; and an equal right to be able to bequeath and inherit property;

WHEREAS women represent the majority of Kenya's population, and that as such improving the economic independence and productivity of Kenyan women is of enormous importance in attracting foreign investment, stimulating growth, and developing the economy of Kenya;

WHEREAS the current state of Kenyan inheritance law fails to fully embody the promise of a legal system founded on equal recognition of universal rights;

WHEREAS ensuring the equal rights of women to inherit property in Kenya would demonstrate Kenya's commitment to the protection of human rights and the binding promises that Kenya has made to the international community;

WHEREAS the current state of Kenyan inheritance law fails to ensure Kenyan women their ability to be productive members of the Kenyan economy, and thereby impoverishes the nation of Kenya as a whole;

WHEREAS the development of Kenya into a modern nation requires continued legal, economic and social progress for Kenyan women;

WHEREAS Kenya has acceded to numerous international and regional treaties that embody the global consensus that women are entitled to equality with men before the law and to protection from discrimination based on their sex;

WHEREAS Kenya has acceded to the Convention on the Elimination of All Forms of Discrimination Against Women, Article 15 of which states that "State parties shall accord to women equality with men before the law";

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WHEREAS Kenya has acceded to the International Covenant on Social, Economic and Cultural Rights, Article 3 of which promises “the equal right of men and women to the enjoyment of all economic, social and cultural rights”;

WHEREAS Kenya has acceded to the International Covenant on Civil and Political Rights, Article 3 of which promises the “equal right of men and women to all civil and political rights”;

WHEREAS Kenya has acceded to the African (Banjul) Charter on Human and Peoples’ Rights, Article 18(3) of which promises “the elimination of every discrimination against women and...the protection of the rights of the woman and the child as stipulated in international declarations and conventions”;

WHEREAS in all of these agreements, Kenya has declared that it will align itself with those nations that respect the rule of law, the rights of the individual and the moral and legal obligation of all states to treat their citizens with equal dignity and respect;

BE IT RESOLVED THAT THE PARLIAMENT OF KENYA HEREBY ENACTS

a BILL

To ensure the equal rights of all Kenyan citizens to inherit property without discrimination on the basis of sex, tribe, creed, or other prohibited classifications, and thereby implement Kenya’s international and regional human rights obligations under human rights treaties it has acceded to, including the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, the International Covenant on Civil and Political Rights, and the African [Banjul] Charter on Human and People’s Rights, and others.

1. Amending
the Preamble
of the Act

1. The preamble to the Law of Succession Act, 1981 (as amended through No. 21 of 1990) is amended by inserting, after the words “deceased persons;” the words:

and to implement the principles of equality and human rights as set forth in, and required by, human rights treaties signed and ratified or acceded to by Kenya, and as interpreted by international human rights bodies, including in their General Comments, General Recommendations, Concluding Observations, and Jurisprudence, which shall be used to ensure the Act as applied complies with Kenya’s treaty obligations. These human rights treaty obligations include, but are not limited to, the requirements of articles 2(a)-(f), 5, 13(b), 14(2)(g)-(h), 15(1)-(2), and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women; articles 2, 3, 17, 18(1)-(3), 23(2) and (4), 24, and 26 of the International Covenant on Civil and Political Rights; articles 2(2), 3, 11(1), and 12(1) of the International Covenant on Economic, Social and Cultural Rights; articles 2, 3, 8, 14, 16, and 18(3) of the African [Banjul] Charter on Human and People’ Rights; articles 2, 3, 4, 18, 19, and 27 of the Convention on the Rights of the Child; articles 1, 3, 4(1), 10, 18(1)-(2), 19, 20, and 21 of the African Charter on the Rights and Welfare of the Child, and others;

PART II - PRELIMINARY

Short title and commencement

2. Short
title and com-
mencement

2. (1) This Act may be cited as the Law of Succession (Amendment) Act, 2009.

(2) This Act shall come into force from the date of assent.

3. Defining
“the act”

3. In this Act, unless the context otherwise requires, “the Act” means the Law of Succession Act, 1981, as amended through No. 21 of 1990.

PART III - AMENDMENT OF PART I OF THE ACT, “Preliminary”

4. Amending Section 2,
“Application of the Act”].

1. Section 2 of the Act is amended -
 - (1) By deleting subsections (3) and (4).
 - (2) By inserting immediately after subsection (2) the following new subsections (3)-(5) -
 - (3) The provisions of this Act shall be interpreted and implemented in accordance with the principles of equality and human rights as set forth in, and required by, human rights treaties signed and ratified or acceded to by Kenya, and as interpreted by international human rights bodies, including in their General Comments, General Recommendations, Concluding Observations, and Jurisprudence. These human rights treaty obligations include, but are not limited to, the requirements of articles 2(a)-(f), 5, 13(b), 14(2)(g)-(h), 15(1)-(2), and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women; articles 2, 3, 17, 18(1)-(3), 23(2) and (4), 24, and 26 of the International Covenant on Civil and Political Rights; articles 2(2), 3, 11(1), and 12(1) of the International Covenant on Economic, Social and Cultural Rights; articles 2, 3, 8, 14, 16, and 18(3) of the African [Banjul] Charter on Human and People’ Rights; articles 2, 3, 4, 18, 19, and 27 of the Convention on the Rights of the Child; and articles 1, 3, 4(1), 10, 18(1)-(2), 19, 20, and 21 of the African Charter on the Rights and Welfare of the Child, and others.
 - (4) Subject to subsection (5), the provisions of this Act shall apply in testamentary or intestate succession to the estates of all persons, regardless of their individual religion, community, sex, race, parents’ marital status or other prohibited classifications.
 - (5) Notwithstanding the provisions of subsection (4), the Kadhi’s Court shall determine the appropriate distribution of the testate estate of any person whose will both complies with the provisions of Part II relating to Wills and also states that the person wishes the distribution of his or her estate to be governed by Muslim law, as section 5(1) permits.”

5. Amending Section 3,
“Interpretation” 5.

- Section 3 of the Act is amended -
- (1) In subsection (1) as follows -
 - (a) By deleting the definition of “house.”
 - (b) By inserting immediately after the definition of “independent witness” the following definitions -
“intermeddling” or “intermeddle” includes:
 - (a) taking possession of or disposing of or using the property of the decedent in any way without lawful right

or title;

(b) ejecting, by force or by coercion (whether physical, emotional, financial, by harassment, or by any other methods) a surviving spouse or minor child from the matrimonial home;

(c) conspiring with another to eject by force or by any form of coercion a surviving spouse or child from the matrimonial home;

(d) where the matrimonial home is rented, ejecting, or conspiring with another to eject, whether by force or by any form of coercion, a surviving spouse or child from the matrimonial home for a period of three months after the death of the decedent, or until the end of the lease, whichever is greater.

“invalid monogamous marriage” means a purported marriage, undertaken pursuant to any system of law that does not permit polygyny, and that is invalid under Cap. 150, Cap. 151, Cap. 157, or any other law because one of the parties thereto at the time of the celebration of such marriage is married to any person other than the person with whom such marriage is had.

“invalid polygynous marriage” means a purported marriage under customary law or custom or under any system of law permitting polygyny where either of the parties thereto at the time of the celebration of such marriage is validly married in a monogamous marriage in accordance with any system of laws that does not permit polygyny, including Cap. 150, Cap. 151, Cap. 157, or any other law.

(c) By inserting immediately after the definition of “limited residuary bequest” the following definition -

“matrimonial home” means the house or structure lived in either by the deceased and his or her surviving spouse, or by the surviving spouse alone, at the time of death or previously, including any surrounding residential land and any surrounding property that provides the basic sustenance or income necessary to support the surviving spouse and children or other dependants;

(d) By inserting the following definition immediately after the definition of “minor” -

“monogamous marriage” means a valid marriage in which the two parties may only marry each other under Cap. 150, Cap. 151, and Cap. 157, or any other law that prohibits a man from marrying more than one wife while he has a living wife;

(e) By deleting the definitions of “Muslim” and “Muslim Law” and substituting the following definitions -

“Muslim” means any person who chooses to identify as a

Muslim by specifying in a valid will, as set forth in Part II relating to wills, that Muslim law should apply to his or her estate;

“Muslim law” means the law applied by the Kadhi’s Court to determine the distribution of property in the testate estate of a “Muslim” person, as defined above;

(f) By inserting into the definition of “personal and household effects” immediately after the word “utensils” and before the words “and all other articles of household use or decoration” the following words -

motor vehicles not used exclusively for business purposes, simple agricultural equipment, livestock

(g) By inserting into the definition of “personal and household effects” immediately after the words “but does not include any motor vehicle” and before the words “or any other thing connected with the business or profession of the deceased” the words “used exclusively for business purposes.”

(h) By inserting immediately after the definition of “personal representative” the following definition -

“polygynous marriage” means a marriage in which a man is validly married to more than one woman at one time.

(i) By deleting the definition of the word “portion.”

(j) By inserting immediately after the definition of “representation” the following definition -

“residue estate” means the remainder of the net intestate estate after the marital home, personal and household effects have been distributed.

(2) In subsection (2), by deleting from the definition of “child” and “children” the phrase “and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility,” and substituting in its place a child born in or out of wedlock, a child adopted under either statutory or customary law, and any person recognised by the person in question as his or her child or recognised by law to be the child of such person.

(3) In subsection (3), by deleting -

A child born out of wedlock shall have the same relationship to other persons through his or her father and mother as though the child had been born in wedlock.

(4) In subsection (5), by deleting its text and inserting in its place the following subsections (5) - (8) -

(5) A woman married in a valid monogamous marriage is, where her husband has purported to enter into a subsequent

invalid polygynous or monogamous marriage, a “wife” for the purposes of this Act, and

(a) The woman in the valid monogamous marriage is entitled to the protections of sections 29, 35, and 36 of this Act.

(b) Any woman whose purported polygynous or monogamous marriage is invalid because her husband was already validly married to another woman in a monogamous marriage is entitled to the protections of section 29 as a dependant.

(6) A woman validly married under a system of law which permits polygyny is, where her husband has purported to enter a subsequent invalid monogamous marriage to another woman, a wife for the purposes of this Act, and

(a) If such woman is the sole surviving wife in a valid marriage, she is entitled to the protections of sections 29, 35, and 36 of this Act.

(b) If there is more than one surviving wife in a valid polygynous marriage, each such wife is entitled to the protections of sections 29 and 40 of this Act.

(c) A woman whose purported monogamous marriage is invalid because her husband was already validly married to another woman is entitled to the protections of section 29 of this Act as a dependant.

(7) Where the deceased is a woman, a man whose marriage to the deceased woman is invalid because he took either of the actions described in subsections (5) or (6) above is entitled to the protections of section 29 as a dependant.

(8) The children of any relationship described in subsections (5)(b), (6)(c), or (7) and the children of parents who never purported to marry each other are entitled to the protections of section 29 as dependants and are also entitled to be treated as children with the same rights as all other children of the deceased.

PART IV - AMENDMENT OF PART III OF THE ACT, “Provisions for Dependents”

6. Amending Section
27, “Discretion of court
in making order”

6. Section 27 of the Act is amended by deleting the words “complete”, “such”, and “as it thinks fit” and inserting after the word “conditions” the following text -

except that the order may not violate international and regional human rights treaties binding on Kenya. This

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discretion must be exercised on a sound legal and factual basis, consistent with the provisions of § 28 and § 29, and without any discrimination on the basis of sex, tribe, community, ethnicity, race, religion, creed, parents' marital status, or other prohibited classifications.

7. Amending Section 29, "Meaning of dependant"

7. Section 29 of the Act is amended -

(1) In subsection (a), by deleting both references to "wife or wives" and inserting "spouse or spouses" in both places, by inserting the word "all" before the words "the children of the deceased," and inserting the words "and whether born in or out of wedlock" at the end of the paragraph after the word "death".

(2) By inserting immediately after subsection (a) the following new subsection -

(b) any person who is party to an invalid monogamous marriage or to an invalid polygynous marriage with the deceased, as defined in section 3(1), who was being maintained by the deceased immediately prior to his or her death;

(3) By relettering subsection (b) as subsection (c), and deleting the semi-colon and word "; and" at the end of that subsection, inserting a period, and by repealing the current section 29(c).

PART V- AMENDMENT OF PART V OF THE ACT, "Intestacy"

8. Replacing and renaming Section 32, "Excluded Property"

8. Section 32 of the Act is amended by deleting the current title and text and substituting the following title and section -
32. Agricultural Land

(1) The provisions of this Part shall govern the devolution of rights to certain agricultural land, as defined in subsection 3(1), situated in such areas as the Minister may, by notice in the Gazette, specify; and subsections (2), (3), and (4) of this section, as the case may be, specify how the Law of Succession Act shall apply to the agricultural land in question.

(2) Where the matrimonial home is located on agricultural land that is registered pursuant to The Registered Land Act,

Cap. 300 (2006) or any other written law, the law applicable to the distribution on intestacy as set forth in this Part shall apply.

(3) Where the matrimonial home is located on specified agricultural land that is not registered pursuant to The Registered Land Act, Cap. 300 (2006) or any other written law, the law applicable to the distribution of the estate on intestacy as set forth in this Part, including sections 35, 36, 38, 40, 41, 42, and 42A, shall apply, as modified, where necessary, by the substitution of use rights for ownership rights as follows:

(a) the surviving spouse of the deceased is entitled to the use rights or other rights held by the deceased in such agricultural land; or, if no spouse is surviving,

(b) all children of the deceased are entitled to the use rights or other rights held by the deceased in such agricultural land in equal shares; and

(c) for the avoidance of doubt, both a surviving husband and a surviving wife have a use right in the matrimonial home upon the death of the other.

(4) Where the matrimonial home is located on partly registered land and partly unregistered agricultural land, the law applicable to the distribution on intestacy as set forth in this Part shall apply to any portion of the matrimonial home that is located on registered land as set forth in subsection (2) above, and the law applicable to the distribution on intestacy as set forth in this Part shall apply to any portion of the matrimonial home that is located on unregistered land as set forth in subsection (3) above.

(5) The Minister shall conduct a study to determine the number of women and men on unregistered agricultural land and help them to register the land in the names of both husband and wife, with a view to reducing the amount of agricultural land in the areas designated by the Schedule to the Attorney General's order under paragraph (b) of repealed section 32 of the Act, within one year of the [date of assent].

(6) The purpose of the program required by subsection (5) is to enable the greatest possible number of surviving spouses to have clear registration records of the fact that they co-own their matrimonial home, and the Minister shall take this intended purpose into account in issuing the orders required by this section.

(7) The Minister shall issue a new order under subsection (1) to replace L.N. 94 of 1981 within one year of the [date of consent]; the new order shall clearly identify the boundaries of all registered and non-registered land within each of the

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twelve districts now listed (West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tanu River, Lamu, Kajiado, and Narok) so that judges and magistrates can easily determine whether to apply subsection (2), (3), or (4) of this section in intestacy proceedings.

(8) The Minister shall annually amend the order required by subsections (1) and (7), after reviewing the land areas newly registered during the preceding year and ensuring that the order clearly marks the relevant boundaries within the districts of newly registered land.

9. Repealing Section 33, “Law applicable to excluded property”

9. Section 33 of the Act is repealed.

10. Amending Section 34, “Meaning of Intestacy”

10. Section 34 is amended to read as follows -

A person is deemed to die intestate in respect of all his or her free property and in respect of all his or her use rights on unregistered agricultural land of which he or she has not made a will which is capable of taking effect.

11. Amending Section 35, “Where intestate has left one surviving spouse and child or children”

11. Section 35 is amended as follows -

(1) By amending subsection (1) as follows -

(a) By inserting after the phrase “subject to the provisions” the new phrase, “subsection 35(3) and” and by inserting the word “below” after the words “Section 40”;

(b) By deleting paragraphs (a) and (b) and replacing them with the following paragraphs -

(a) the entire matrimonial home and personal and household effects of the deceased absolutely; and”

(b) one-third of the residue estate absolutely.

(2) By substituting for subsections (2), (3) and (4) the following -

(2) Subject to the provisions of subsection 35(3) and section 40 below, the surviving child or children shall be entitled to share equally in the remaining two-thirds of the residue

estate; and for each minor child, his or her portion of the residue estate shall be held in trust by his or her parent, guardian, or caretaker until he or she reaches full age.

(3) “Where deceased has left one surviving spouse and a child or children, and the entire estate is worth 100,000 shillings or less, the surviving spouse shall be entitled to the entire residue estate absolutely.”

(4) The Minister may, by order in the Gazette, vary the amount specified in subsection (3).

(3) By repealing subsection (5).

12. Amending Section 36, “Where intestate has left one surviving spouse but no child or children”

12. Section 36 is amended -

By repealing subsections (1), (2) and (3), and substituting the following -

Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled to the entire net intestate estate absolutely.

13. Repealing Section 37, “Powers of spouse during life interest”

13. Section 37 is repealed.

14. Amending Section 39, “Where intestate has left no surviving spouse or children”

14. Section 39 is amended -

(1) By deleting paragraphs (a) and (b) of subsection (1) and inserting the following new paragraph in their place -

(a) the biological or adoptive parents in equal shares, where parent means natural mother and father and any persons recognized by law to be the mother or father of the intestate; or, if none,

(2) By relettering paragraphs (c) - (e) of subsection (1) as (b) - (d)

(3) In subsection (2), by replacing the phrase “(e)” with “(d)”.

15. Amending and Renaming Section 40, “Where Intestate Was Polygamous”

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15. Section 40 is amended-

(1) By deleting the word “polygamous” from the section title and replacing it with the words “a spouse in a valid polygynous marriage.”

(2) By deleting subsections (1) and (2) and substituting the following subsections-

(1) Where an intestate man was validly married to more than one woman under any system of law permitting polygyny, and is survived by more than one wife, and had one or more children:

(a) Where each wife had a separate matrimonial home:

(i) Each wife shall be entitled to the matrimonial home and personal and household effects absolutely.

(ii) Each wife shall be entitled to equal shares with the other wife or wives of one-third of the residue of the net intestate estate absolutely.

(iii) Each child of the deceased shall be entitled to an equal share with the other children of two-thirds of the residue of the net intestate estate absolutely.

(b) Where two or more wives shared a single matrimonial home, each wife residing in the matrimonial home shall be entitled to an equal share in the matrimonial home and in the personal and household effects absolutely.

(i) Subject to paragraph (iii) of subsection (1)(b), the wives shall be entitled to one-third of the residue of the net intestate estate absolutely, to be divided equally among them.

(ii) Subject to paragraph (iii) of subsection (1)(b), the children shall be entitled to the remaining two-thirds of the residue net intestate estate absolutely, to be divided equally among them.

(iii) If the residue estate has a value of 100,000 shillings or less, the wives shall be entitled to the entire residue estate absolutely, to be divided equally among them.

(2) Where the intestate man was validly married to more than one woman under any system of law permitting polygyny, and is survived by more than one wife, but had no children:

(a) Where each wife had a separate matrimonial home:

(i) Each wife shall be entitled to the matrimonial home and personal and household effects absolutely.

(ii) Subject to paragraph (iii) of subsection (2) (a), each wife shall be entitled to equal shares with the other wife or wives of the residue of the net intestate estate absolutely.

(iii) If the residue estate has a value of 100,000 shillings or less, the wives shall be entitled to the entire residue estate absolutely, to be divided equally among them.

(b) Where two or more wives shared a single matrimonial

home, each wife residing in the matrimonial home shall be entitled to an equal share in the matrimonial home and in the personal and household effects and in the residue estate absolutely.

(3) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygyny and had another wife or more than one wife living, each wife living in a separate matrimonial home, and she is survived by her husband and had one or more children:

(a) Each child, upon reaching full age, shall be entitled to the matrimonial home and personal and household effects absolutely, to be divided equally among them.

(b) The husband and each child, upon reaching full age, shall be entitled to the deceased's residue estate absolutely, in equal shares among them.

(4) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygyny and had another wife or more than one wife living, and the deceased shared her home with one or more of her husband's other wives, and she is survived by her husband and had one or more children:

(a) Each child, upon reaching full age, shall be entitled to co-ownership of the deceased's share of the matrimonial home and personal and household effects, in equal shares among them.

(b) The husband and each child, upon reaching full age, shall be entitled to the residue of the net intestate estate absolutely in equal shares among them.

(5) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygyny and had another wife or more than one wife living, and she is survived by her husband, but had no children, her husband shall be entitled to the matrimonial home and personal and household effects absolutely. Her parents and brothers and sisters shall be entitled to the residue of the net intestate estate absolutely, with the parents entitled to one-half of the residue estate to be shared equally between them and her siblings entitled to the other one-half of the residue estate to be shared equally among them.

16. Amending Section
41, "Property devolving
to child to be held in
trust"

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16. Section 41 is amended by deleting the phrases, “or who, being female, marry under that age,” and “or so marry,” and by substituting for the phrase, “and who” the phrase, “until they”

17. Amending Section 42, “Previous benefits to be brought into account”

17. Section 42 is amended -

- (1) By replacing each instance of the word “house” with the word “spouse”
- (2) By deleting the comma in the phrase “the share of the, net estate”.

18. Enacting Section 42A, “Automatic ownership of home or continuing rental for surviving spouse”

18. Section 42A is enacted as follows-

42A. Automatic ownership of home or continuing rental for surviving spouse.

(1) In any circumstance where the deceased has left only one surviving spouse and such surviving spouse lives or has lived in a matrimonial home on land owned and registered to the deceased, the spouse shall be automatically the owner of the matrimonial home by operation of law, except in the circumstances set forth in subsections 40(3)-(4).

(2) In any circumstance where the deceased has left more than one spouse, each living or having lived in a separate matrimonial home or in a shared matrimonial home on land owned and registered to the deceased, each spouse shall be automatically the owner of her matrimonial home or her share of the matrimonial home by operation of law.

(3) In any circumstance where the deceased has died and left one or more spouses living or having lived in a matrimonial home that is rented or leased in the name of the deceased, each spouse shall be entitled to remain in the separate or shared matrimonial home, as the case may be, for the duration of the lease or for three months after the death of the deceased, whichever is greater, by operation of law.

(4) Any person who becomes the owner of property under this section 42A may register such property in his or her own name but is not required to do so to be recognized as the legal owner. The failure to go to court or to register the property shall not affect the person’s ownership rights in any way, and

in any court procedure concerning the matrimonial home, including application for and confirmation of grants under Part VII, the court shall insure that the ownership or rental interests of surviving spouses are automatically recognized, and shall provide sufficient information and documentation to enable a surviving spouse to register the property in his or her name under The Registered Land Act, Cap. 300 (2006) or other relevant law.

PART VI - AMENDMENT OF PART VII OF THE ACT, “Administration of Estates”

19. Repealing Section
44, “Application of
Part”

19. Section 44 is repealed.

20. Amending Section
45, “No intermeddling
with property of deceased
person”

20. Section 45 is amended.

(1) By deleting subsection (1) and substituting the following new subsection-

(1) As of the moment of the deceased’s death, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person or any use rights in the matrimonial home pursuant to section 32, unless he or she is authorized to do so by section 42A as a matter of law or by a grant of representation and a subsequent confirmation of the grant under this Part.

(2) By amending paragraphs (a) and (b) of subsection (2) to read-

(a) be guilty of a criminal offence and liable to a fine not less than one hundred thousand shillings and to a term of imprisonment not less than five years; and

(b) be answerable to the rightful executor or administrator or owner by operation of law or holder of a use right by operation of law to the extent of the assets with which he or she has intermeddled after deducting any payments made in the due course of administration.

21. Enacting Section
45A, “Prohibition of
forced or coerced widow
inheritance and widow
cleansing”

21. Section 45A is enacted as follows-

45A. Prohibition of forced or coerced widow inheritance

and widow cleansing

(1) No one shall engage in actions or behaviours, including but not limited to, acts of physical violence or unwanted contact, threatening words, harassment, coercion of any kind, or the destruction of property, in order to force or compel a surviving spouse to undergo widow cleansing or widow inheritance.

(2) Included under the prohibitions of this section are actions or behaviours to force or compel a surviving spouse to cohabit with or marry any person or engage in any sexual act in order to inherit the property of the deceased.

(3) No person shall exchange money or property for widow cleansing services of a sexual nature, and no person shall exchange widow cleansing services of a sexual nature for money or property.

(4) Any person who contravenes the provisions of this section shall be guilty of a criminal offence and liable to a fine of not less than one-hundred thousand shillings or to a term of imprisonment not less than two years or to both such fine and imprisonment.

22. Amending Section
46, “Duties of officers
in relation to protection,
etc., of deceased’s
property”

22. Section 46 is amended by inserting immediately after subsection (5), the following subsection (6)-

(6) “Any assistant chief, chief, or administrative officer to whom a report is made under subsection (2) shall

(a) Ensure that all persons who appear to have a legitimate interest in the estate of the deceased receive all accurate and necessary information to redeem any legal claims they may have in the estate of the deceased.

(b) Ensure that such information and all forms are written in simple English or the relevant local language if necessary and that they include:-

(i) Accurate information on the state of Kenyan intestacy law, including especially

(A) the rights of widows and daughters to inherit property and to remain in the matrimonial home equally with widowers and sons under sections 27, 32, 34, 35, 36, 38, 40, 41, and 42A of this Act,

(B) the fact that surviving spouses automatically acquire ownership of the matrimonial home or continuing right to rent the home, as the case may be, pursuant to section 42A,

(C) the right of widows and children not to be subjected to

eviction under section 45, and of widows not to be subjected to widow cleansing or widow inheritance under section 45A, and of widows' right to administer the estate under section 66(1) and 66(4).

(ii) The location of a magistrate court, resident magistrate court, high court, or other office where petitions related to intestate claims can be submitted;

(iii) The contact information for an advocate or non-governmental organization that provides free legal assistance to indigent persons;

(iv) All forms necessary to make a claim for grant of representation or any other necessary petition.

(v) All forms or other information necessary to enable the surviving spouse to register the matrimonial home in his or her name.

(c) The administrative officer or other person providing this information shall ensure that the interested parties are able to read and understand the information required by paragraph (b) of subsection (6), and shall also review that information orally with such parties. If the interested party is unable to read, the administrative officer or other person shall communicate this information orally and shall also leave a copy of the written information.

(d) Any assistant chief, chief, or administrative officer to whom a report is made under subsection (2) who negligently fails to provide this information accurately to all apparently interested parties shall be subject to a fine of not less than one-half of one month's salary.

Jurisdiction

23. Amending and Renaming Section 48, "Jurisdiction of High Court"

23. Section 47 is amended by adding the words "magistrates or" immediately after the words "represented by" and immediately before the words "resident magistrates appointed."

24. Amending Section 48, "Jurisdiction of magistrates"

24. Section 48 is amended-

(1) By deleting the three phrases in subsection (1): "other than an application under section 76"; "the gross value of which does not exceed one hundred thousand shillings";

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and “Provided that for the purpose of this section in any place where both the High Court and a resident Magistrate Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this act.”

(2) By adding to subsection (1) the words “magistrate or” immediately after the words “provisions of section 49, a” and immediately before the words “resident magistrate shall have.”

(3) By deleting subsection (2) and replacing it with the following new subsection (2) -

The Kadhi’s courts shall have and exercise jurisdiction, in relation to the estate of a deceased person whose valid will under Part II on Wills requires that Muslim Law govern the distribution of his or her estate, for the determination of questions relating to the distribution of the deceased’s property in accordance with Muslim law. With respect to such estates, a magistrate, resident magistrate, and High Court shall continue to have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate, except for the determination of questions relating to the distribution of property under Muslim law.

25. Amending Section
49, “Territorial
jurisdiction of
magistrates”

25. Section 49 is amended -

(1) By deleting the commas and phrase “, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings,” and inserting the words “magistrate or” immediately after the word “The” and immediately before the words “resident magistrate within whose area”

(2) By inserting in paragraph (i) of the Proviso—the words “or resident magistrate” after the words “the magistrate” and by inserting the words “magistrate or” after the words “to any other”.

(3) By inserting in paragraph (iii) of the Proviso the words “magistrate or” immediately after the word “every” and immediately before “resident magistrate shall have jurisdiction.”

26. Amending Section
50, “Appeals to High
Court,”

26. Section 50 is amended -

(1) By amending the current section title to read as follows—
Appeals to High Court and Court of Appeals

(2) By deleting in subsection (1) the phrase “and the decision of the High Court there shall be final” and, inserting in its place the following phrase—

, and to the Court of Appeals from the High Court.

(3) By deleting the current subsection (2) and substituting the following subsection—

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi’s Court in respect of the distribution of the estate of a deceased person whose valid will under Part II on Wills requires that Muslim Law govern the distribution of his or her estate and, in respect of any such point of Muslim law, to the Court of Appeal, upon the prior leave thereof.

27. Replacing Section
50A, “Power to make
rules”

27. Section 50A is amended by deleting the current text and substituting the following text—

The Chief Justice may, in consultation with the Chief Kadhi, make rules of court for the better carrying into effect in relation to the estate of a deceased person whose valid will under Part II on Wills requires that Muslim Law govern the distribution of his or her estate, in particular regulating the exercise of the jurisdiction conferred by this Act for Kadhi’s courts to determine the distribution of property under Muslim law.

Application for Grant

28. Amending Section
51, “Application for
grant”

28. Section 51 of the Act is amended by adding the following subsection (5)—

(5) For avoidance of doubt, a person is not required to receive a grant of representation in order to acquire ownership of the matrimonial home, as subsection 42A(4) provides.

29. Amending Section
52, “Wilful and reckless
statements in application
for grant”

29. Section 52 is amended by deleting the phrase “or to both such fine and imprisonment” and by replacing the word

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“or”—located immediately after the word “shillings” and immediately before “to a term of imprisonment”—with the word “and.”

Form of Grant

30. Amending Section
55, “No distribution of
capital before confirmation
of grant”

30. Section 55 of the Act is amended-
- (1) By renumbering the current subsection (2) as subsection (3) and adding the following as a new subsection (2)-
 - (2) The restriction on distribution under subsection (1) does not apply to the distribution before the grant of representation is confirmed of the surviving spouse’s automatic ownership or rental or use rights as provided for by sections 42A and 32(3)-(4).
 - (2) By adding the following subsections (4) and (5)-
 - (4) The restriction on distribution under subsection (1) does not apply to distribution of assets necessary for the maintenance of dependant family members or the payment of school fees.
 - (5) No court shall require the payment of any court fees, transfer fees, or any other forms of payment in an application for distribution of assets under subsections (2)-(4).

Persons Entitled to a Grant

31. Amending Section
58, “Number of
administrators where
there is a continuing t
rust”

31. Section 58 of the Act is amended-
- (1) In subsection (1) -
 - (a) By adding to paragraph (a) the phrase “ where that person is a surviving spouse or the parent of a minor child” immediately after “alone except” and immediately before “where that person is the public trustee or of a Trust Corporation.”
 - (b) By capitalizing the letter “p” in “public” and deleting the word “of” immediately after the words “Public Trustee” to read in full as follows:
 - (a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is a surviving spouse or the parent of a

minor child or where that person is the Public Trustee or a Trust Corporation.

(c) By adding the comma and word “, or” at the end of paragraph (b)(ii) of subsection (1) and immediately thereafter inserting paragraph(b)(iii) of subsection (1) to read as follows -

(iii) in the will the testator has appointed his or her surviving spouse as the executor.

(2) In subsection (2) -

(a) By substituting the word “and” for the word “an” appearing immediately after the words “one person alone” and immediately before the words “a continuing trust” and

(b) By inserting the comma and phrase as follows

, except that the court shall not be required to appoint an additional administrator where there is a surviving spouse who is not ineligible under paragraphs 66(1)(a) or (b) and where the continuing trust is for his or her children” at the end of the subsection.

32. Amending and
Renaming Section 66,
“Preference to be
given to certain persons
to administer where
deceased died
intestate”

32. Section 66 of the Act is amended-

(1) By deleting the current title and by substituting the following title “Spouse is automatically administrator of deceased’s estate where deceased died intestate and preference to be given to certain persons to administer in other situations; and

(2) By deleting the section text up to paragraph (b), adding subsections (1) to (5), and changing the paragraph letters (b), (c), and (d) to letters (a), (b), and (c) of subsection (5), to read in full as follows-

66. Spouse is automatically administrator of deceased’s estate where deceased died intestate and preference to be given to certain persons to administer in other situations

(1) Subject to subsection 66(3) below, when the deceased has died intestate and left one surviving spouse, the surviving spouse shall be automatically named administrator of the estate, unless another party proves to the court’s satisfaction, based on reliable evidence and beyond a reasonable doubt, that:

(a) the surviving spouse is unable to administer the estate for the reasons specified in section 56(1)(a), or

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(b) the surviving spouse is unwilling to administer the estate and no other person has coerced him or her to make that choice.

(2) If the deceased has left minor children, the court may exercise its discretion to appoint a co-administrator of the estate to represent the interests of the children, but only if another party proves to the court's satisfaction, based on reliable evidence and beyond a reasonable doubt, that the surviving spouse, based on that person's past conduct, is unlikely to administer the decedent's estate for the best interests of the child or children.

(3) When the minor children of the deceased are entitled to a share of the matrimonial home pursuant to sections 38 and 40(3)-(4) of this Act, the magistrate or judge hearing the case shall appoint a person as administrator who the court determines, based on reliable evidence and beyond a reasonable doubt, will act impartially in the best interests of all heirs.

(4) When the deceased has died intestate and has left more than one surviving spouse, each surviving spouse shall be the administrator of the matrimonial home, or of her respective proportion of a joint home (where there is more than one wife living there), and of all associated personal and household effects, that she shared with the deceased. For the administration of all other property, the magistrate or judge hearing the case shall appoint a person or persons as administrator who the court determines, based on reliable evidence and beyond a reasonable doubt, will act impartially in the best interests of all heirs.

(5) When the deceased has died intestate and has left no surviving spouse, the court shall, except as otherwise expressly provided, grant letters of administration, using the following general guide as an order of preference:

(a) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(b) the Public Trustee; and

(c) creditors.

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Procedure on Grants

33. Amending Section
70, "Powers of courts"

33. Section 70 of the Act is amended -

(1) By inserting "(1)" before the phrase "a court may, before

making a grant of representation” and adding the phrase “; and” to the end of paragraph (c) of subsection (1).

(2) By inserting a new subsection (2) as follows—

(2) a court shall, before making a grant of representation -

(a) ensure that any surviving spouse appears before the court and is notified in person of his or her right to act as administrator; and

(b) provide simplified forms and information to assist such spouse in the process of administering the estate with or without an advocate; and

(c) notify such spouse of her or his ownership and/or use rights in the estate and of the Act’s protections against eviction, widow inheritance, and widow cleansing, using the information and forms required by section 46(6).

Confirmation of Grants

34. Amending Section
71, “Confirmation of
grants”

34. Section 71 of the Act is amended by inserting within the Proviso to subsection (2)(d), the following sentence: “. In order to satisfy itself of this information, the court shall contact the relevant assistant chief, chief, or administrative official described in section 46(6) and require that person to provide the information about the identities of all such persons. When”, immediately after the words “beneficially entitled”, and deleting the clause “; and when” from the Proviso, so that the Proviso reads in full as follows—

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled. In order to satisfy itself of this information, the court shall contact the relevant assistant chief, chief, or administrative official described in section 46(6) and require that person to provide the information about the identities of all such persons. When confirmed the grant shall specify all such persons and their respective shares.

Alteration and Revocation of Grants

35. Amending Section
75A, “Continuing trust
arising”

35. Section 75A is amended by inserting the phrase “and subject to section 66” at the end of subsection (2) before the

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period.

36. Amending Section
77, “Sealing of
Commonwealth and
foreign grants”

36. Section 77 is amended by replacing “un” with “an” immediately after “letters of administration, or” and immediately before “equivalent thereof”.

“Powers and Duties of Personal Representatives”

37. Amending Section
81, “Powers and duties
of personal representatives
to vest in survivor on
death of one of them”

37. Section 81 is amended by inserting in its second paragraph the phrase “subject to section 66,” after the words “Provided that,” and before the phrase “where there has been a grant of letters”.

38. Amending Section
82, “Powers of personal
representatives”

38. Section 82 is amended by inserting the phrase “trustee or” in paragraph (ii) of the Proviso to paragraph (d), immediately after the phrase “the consent of either the” and immediately before the phrase “trustees thereof”.

39. Amending Section
83, “Duties of personal
representatives”

39. Section 83 is amended by deleting from paragraph (i) the phrase “if required by the court, either of its own motion or on the application of any interested party in the estate”.

40. Amending Section
84, “Personal
representatives to act
as trustees in certain
cases”

40. Section 84 is amended in its second paragraph to read as follows—
Provided that, where valid polygynous marriages of the deceased person have resulted in that person leaving more than one surviving spouse, the court may at the time of confirmation of the grant appoint separate trustees of the

residue estate passing to each or any of those surviving spouses and children as provided by section 40, except that the court shall respect the automatic grant of representation to each surviving spouse with respect to each wife's matrimonial home and the personal and household effects as required in section 66.

41. Amending Section
95, "Offenses by personal
representatives"

41. Section 95 is amended-
- (1) By deleting the subsection number "(1)" and amending paragraph (b) to substitute for the phrase "(e) and (g)" the following phrase, "(e), (g), and (i)".
 - (2) By amending the fine amount in paragraph (d) from "ten" to "five hundred" thousand shillings.
 - (3) By deleting the current subsection (2).

PART VII- AMENDMENT OF PART VII OF THE ACT,
"Miscellaneous"

42. Amending Section
97, "Rules"

42. Section 97 of the Act is amended-
- (1) By creating a new subsection (1) as follows-
 - (a) By inserting the subsection number "(1)" at the beginning of the section, immediately before the words "The Rules Committee may make;"
 - (b) By deleting the phrase "or subsection (3) of section 35" in paragraph (a) and the phrase "and subsection (3) of section 35" in paragraph (d).
 - (c) By replacing the current paragraph (e) with new paragraph (e) of subsection (1), as follows-
 - (e) the information and simplified forms required by sections 46(6) and 70(2), and permission for advocates and representatives from non-governmental organizations that provide free legal assistance to assist a person to fill out the forms upon request;
 - (d) By substituting the letter (f) for the former letter (e) and adding the phrase ", and for their waiver for indigent persons." at the end of paragraph (f);
 - (2) By inserting subsection (2) as follows-
The Rules Committee shall ensure that its rules apply equally to men and women.

43. Enacting Section
102, "Inflation"

43. Section 102 is enacted as follows-

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102. Inflation

The Minister, by issuance of an order, shall annually increase the monetary amounts referenced in Sections 3, 35, 40, 45, 45A, 52, and 95 as necessary to ensure that the amounts reflect the rate of currency inflation that occurred in the previous year for the purpose of maintaining the true value each year of the amounts that were enacted in [year of enactment].

44. Amending the Act to neutralize gender references

44. The sections of the Act referenced in the Schedule to this Bill are amended as set forth in that Schedule in order to neutralize references in the Act to a person's gender.

45. Correcting Typographical Errors

45. The following typographical errors are corrected as follows—
(1) in section 62, by deleting the word “is” and by substituting the word “as”; and
(2) in Section 63, by hyphenating “un administered” as “un-administered.”

46. Incorporating the Act, as amended by Law of Succession (Amendment) Act, 2009, as set forth in the Appendix

46. The Law of Succession Act, as amended by this Bill, is incorporated as set forth in the Appendix.

Law of Succession (Amendment) Bill Schedule—Gender-Neutral Phrasing

Section in Law of Succession (Amendment) Bill	Section in Law of Succession Act	Section in Law of Succession Act
5.(1)	3.(1) “free property”	Insert “or her” after each instance of “his.”
5.(1)	3.(1) “general legacy”	Insert “or her” after “his.”
5.(1)	3.(1) “net intestate estate”	Insert “or she” after “he.”

Section in Law of Succession (Amendment) Bill	Section in Law of Succession Act	Section in Law of Succession Act
5.(1)	3.(1) "will"	Insert "or her" after each instance of "his."
N/A	3.(4)	Insert "or her" after "his."
N/A	4.(1)(a) and 4.(1)(b)	Insert "or her" after "his."
N/A	4.(2)	Insert "or her" after "his."
N/A	5.	Insert "or her" after "his," and insert "or she" after each instance of "he."
N/A	9.(1)(b)	Insert "or she" after "he."
N/A	11	Insert "or her" after each instance of "his" or "him."
N/A	14	Delete "his."
N/A	16	Insert "or her" after "his," and insert "or she" after "he."
N/A	17	Insert "or her" after "his," and insert "or she" after "he."
N/A	18	Insert "or her" after "his."
N/A	26	Insert "or her" after each instance of "his."
6.	27	Insert "or her" after "him."
N/A	28	Insert "or her" after "his."
7.	29	Insert "or her" after each instance of "his."
N/A	31	Insert "or her" after each instance of "his" and "him," and insert "or she" after each instance of "he."
16	41	Insert "or her" after "him," and insert "or she" after "he."
17	42	Insert "or her" after "his."
22	46	Insert "or her" after each instance of "his" and "him," and insert "or she" after each instance of "he."

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Section in Law of Succession (Amendment) Bill	Section in Law of Succession Act	Section in Law of Succes- sion Act
25	49	Insert “or her” after each instance of “his.”
28	51	Insert “or her” after each instance of “his.”
N/A	63	Insert “or her” after “his.”
N/A	64	Insert “or her” after “his.”
N/A	65	Insert “her” after “him,” and insert “or she” after “he.”
34	71	Insert “or her” after each instance of “his,” and insert “or she” after “he.”
N/A	72	Insert “or she” after “he.”
35	75A	Insert “or her” after “him.”
N/A	79	Insert “or her” after “him.”
37	81	Insert “or her” after “him.”
38	82	Insert “or her” after each instance of “his.”
39	83	Insert “or her” after each instance of “his” or “him.”
N/A	85	Insert “or her” after each instance of “his.”
N/A	89	Insert “or she” after “he.”
N/A	91	Insert “or her” after each instance of “his” and “him,” and insert “or she” after “he.”
N/A	94	Insert “or her” after “him,” and insert “or she” after “he.”
41	95	Insert “or her” after “him.”

**APPENDIX–ANNOTATED VERSION OF THE LAW OF SUCCESSION
ACT, AS AMENDED BY THE LAW OF SUCCESSION (AMENDMENT)
ACT, 2009
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CHAPTER 160

LAW OF SUCCESSION ACT, AS AMENDED BY THE LAW OF SUCCESSION (AMENDMENT) ACT, 2009

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and to implement the principles of equality and human rights as set forth in, and required by, human rights treaties signed and ratified or acceded to by Kenya, and as interpreted by international human rights bodies, including in their General Comments, General Recommendations, Concluding Observations, and Jurisprudence, which shall be used to ensure the Act as applied complies with Kenya's treaty obligations. These human rights treaty obligations include, but are not limited to, the requirements of articles 2(a)-(f), 5, 13(b), 14(2)(g)-(h), 15(1)-(2), and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women; articles 2, 3, 17, 18(1)-(3), 23(2) and (4), 24, and 26 of the International Covenant on Civil and Political Rights; articles 2(2), 3, 11(1), and 12(1) of the International Covenant on Economic, Social and Cultural Rights; articles 2, 3, 8, 14, 16, and 18(3) of the African [Banjul] Charter on Human and People's Rights; articles 2, 3, 4, 18, 19, and 27 of the Convention on the Rights of the Child; articles 1, 3, 4(1), 10, 18(1)-(2), 19, 20, and 21 of the African Charter on the Rights and Welfare of the Child, and others; and for purposes connected therewith and incidental thereto.

PART I

Preliminary

1. Short title and commencement

This Act may be cited as the Law of Succession Act and shall come into operation on 1st July 1981.

2. Application of Act

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall

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have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

~~(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.~~

(3) The provisions of this Act shall be interpreted and implemented in accordance with the principles of equality and human rights as set forth in, and required by, human rights treaties signed and ratified or acceded to by Kenya, and as interpreted by international human rights bodies, including in their General Comments, General Recommendations, Concluding Observations, and Jurisprudence. These human rights treaty obligations include, but are not limited to, the requirements of articles 2(a)-(f), 5, 13(b), 14(2)(g)-(h), 15(1)-(2), and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women; articles 2, 3, 17, 18(1)-(3), 23(2) and (4), 24, and 26 of the International Covenant on Civil and Political Rights; articles 2(2), 3, 11(1), and 12(1) of the International Covenant on Economic, Social and Cultural Rights; articles 2, 3, 8, 14, 16, and 18(3) of the African [Banjul] Charter on Human and People's Rights; articles 2, 3, 4, 18, 19, and 27 of the Convention on the Rights of the Child; and articles 1, 3, 4(1), 10, 18(1)-(2), 19, 20, and 21 of the African Charter on the Rights and Welfare of the Child, and others.

~~(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.~~

(4) Subject to subsection (5), the provisions of this Act shall apply in testamentary or intestate succession to the estates of all persons, regardless of their individual religion, community, sex, race, parents' marital status, or other prohibited classifications.

(5) Notwithstanding the provisions of subsection (4), the Kadhi's Court shall determine the appropriate distribution of the testate estate of any person whose will both complies with the provisions of Part II relating to Wills and also states that the person wishes the distribution of his or her estate to be governed by Muslim law, as section 5(1) permits.

The proposed bill amends section 2 to provide that the Law of Succession Act will apply uniformly to all estates in Kenya, while permitting Muslims (and others) to write wills incorporating their religious law's rules about the distribution of property, as interpreted by the Kadhi's Court. These amendments reinstate earlier law. From 1978 through 1990, the predecessor to current section 2(1) provided that the Act applied to everyone. See No. 13 of 1978, (1978) Cap. 160 sched. (now sec-

tion 2(1) of the Act) (requiring the Act's "universal application" to all Kenyans). As early as 1976, the predecessor to current section 5(1) gave Muslims and others the right to make wills with "reference to any secular or religious law that he [or she] chooses." *See* No. 8 of 1976, (1976) Cap. 160 § 3 (now section 5(1) of the Act).

In 1990, Kenya denied these rights to Muslims. For the first time, Kenya enacted a law prohibiting persons deemed Muslim from writing wills or being subject to the Act's intestacy provisions. *See* No. 21 of 1990, (1990) Cap. 160 sched. (now section 2(3)) (Act's provisions "shall not apply to testamentary or intestate succession" of deceased Muslims' estates); *see also id.* (now section 2(4)), permitting only Muslim administration of estates provisions, if the administration sections of Part VII (sections 44-95) are "inconsistent with those of Muslim law." Thus, the 1990 amendments for the first time denied Muslims the right to write wills or to have their estates governed by the general intestacy and administration of estates protections in the Law of Succession Act.

The proposed amendments to the Act would reinstate the right of all Muslims to have the protections of the full Act, while permitting those Muslims who want to be governed by Muslim law the right to state their clear intent to that effect in a valid will, as determined under Part II on Wills. The Kadhi's Court would then determine the appropriate distribution of the estate according to Muslim law. The amendments thus insure that Muslims will have the same choices as all other Kenyans in matters of succession. This change will bring Section 2 into conformance with Section 5(1) of the Act, which provides that "...any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses."

Moreover, there will now be a clear way to identify who is a Muslim who desires the application of Muslim law of his or her own free will. The current statute does not do so, stating only that a Muslim is one who "professes the religion of Islam and accepts the unity of God and Mohammed as his prophet" at the "time of his death." *See* Law of Succession Act, (1981) Cap. 160 § 3(1) (definitions of "Muslim" and "Muslim law."). Once a person is dead, it is virtually impossible to know his or her beliefs at the moment of death. Without a will, there is no way to know how the deceased wished his or her estate to be divided. With a will clearly stating the intent to have the distribution of the estate governed by Muslim law (by stating, for example, "The estate is to be governed by Muslim law,"), one can be sure of the deceased's desires.

In accordance with these amendments, the definitions of "Muslim" and "Muslim law" in section 3(1) below have also been amended. The amended provisions define a Muslim as someone who chooses this identity through a valid will. They also define "Muslim law" as the Kadhi's Court decisions on who gets what property under Muslim law concerning the distribution of the estate.

The proposed amendments will also bring Kenya into compliance with international human rights requirements. By compelling the estates of all intestate persons whom someone considers to be Muslim to be subject to Muslim law, the law

denies Muslims the freedom to write a will leaving their property to a person or persons of their choice and to have their intestate estates governed by the Law of Succession Act provisions extended to all other Kenyans. In this way, section 2(3) of the current Law of Succession Act section denies Muslim men and women the freedom to choose a religious or other belief other than that imposed on them by the Act. Moreover, the statute does so explicitly on the basis of their religion. International human rights law prohibits this distinction. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 2(1) (prohibiting any “distinction” based on religion in ICCPR rights), 18(1) (requiring states to recognize each person’s freedom to adopt a religion or belief of his or her choice), 18(2) (prohibiting state “coercion” that impairs a person’s right to choose a religion or belief of his or her own choice), 26 (prohibiting “discrimination” on grounds of religion in any state laws), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), entered into force Mar. 23, 1976, acceded to by Kenya Mar. 23, 1976, *available at* <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter IC-CPR]; U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 36/55, arts. 1-4, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (Nov. 25, 1981), *available at* <http://www2.ohchr.org/english/law/religion.htm>; African (Banjul) Charter on Human and Peoples’ Rights, art. 8, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, acceded to by Kenya Jan. 23, 1992, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> [hereinafter African Charter] (“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may . . . be submitted to measures restricting the exercise of these freedoms.”).

3. Interpretation

(1) In this Act, except where the context otherwise requires -

“**active service**” means service with the armed forces or merchant marine on a field of military operations or at sea, or proceeding to or from, or under orders to proceed to, or in being in some place for the purpose of proceeding to a field of military operations, or sea;

“**administrator**” means a person to whom a grant of letters of administration has been made under this Act;

“**agricultural land**” means land used for agricultural purposes which is not within a municipality or a township or a market but does not include land registered under the provisions of any written law;

“**authorised investment**”, with reference to the investment of any fund, means an investment of such type as is authorized for investment of that fund by any will applying thereto, or as is for the time being authorised by any written law for the investment of trust funds;

“**charitable purpose**” includes the relief of poverty, the advancement of education, the advancement of religion, and any other purpose of a public nature and capable of administration by a court of law which benefits the community at large or the inhabitants or a particular class of inhabitants of a particular locality;

“**codicil**” means a testamentary instrument made in relation to a will, explaining, altering or adding to its dispositions or appointments, and duly made and

executed as required by the provisions of this Act for the making and execution of a will;

“**competent witness**” means a person of sound mind and full age;

“**court**” means a court having jurisdiction under this Act in the matter in question;

“**demonstrative legacy**” means a testamentary gift which is in its nature general but which manifests an intention that the gift shall be primarily satisfied out of a specified fund or a specified part of the property of the testator, but shall, upon failure of that fund or property, be met from the general estate;

“**estate**” means the free property of a deceased person;

“**executor**” means a person to whom the execution of the last will of a deceased person is, by the testator’s appointment confided;

“**free property**”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his or her lifetime, and in respect of which his or her interest has not been terminated by his or her death;

“**full age**” means having attained the age of eighteen years;

“**general legacy**” means a testamentary gift, whether specific or general, of property described in general terms to be provided out of the general estate of the testator, whether or not also charged on any specific part of his or her estate;

“**general power of appointment**” means an unfettered power of appointment to such object or objects as the appointor may think fit;

“**general residuary bequest**” means a testamentary gift of all the property of the testator not otherwise disposed of;

“**house**” means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife;

This definition of “house” is deleted, because the revised Act no longer uses this term. Referring to a woman and her children collectively as a “house,” which is an inanimate object, likens the woman and children to possessions of the deceased and is therefore degrading to their dignity.

“**income**” includes rents and profits;

“**independent witness**” means a witness who is not a beneficiary under a will or the spouse of any such beneficiary;

“**intermeddling**” or “**intermeddle**” includes:

(a) taking possession of or disposing of or using the property of the decedent in any way without lawful right or title;

(b) ejecting, by force or by coercion (whether physical, emotional, financial, by harassment, or by any other methods) a surviving spouse or minor child from the matrimonial home;

(c) conspiring with another to eject by force or by any form of coercion a surviving spouse or child from the matrimonial home;

(d) where the matrimonial home is rented, ejecting, or conspiring with another to eject, whether by force or by any form of coercion, a surviving spouse or child

from the matrimonial home for a period of three months after the death of the decedent, or until the end of the lease, whichever is greater.

This definition of “intermeddling” or “intermeddle” is a new provision intended to accompany the amendments to section 45, the section which currently prohibits “intermeddling” but provides no definition of the word. The definition is intentionally broad to include taking, disposing of, or using any property of the decedent to which one does not have title, ejecting a widow (or widower) or children from the matrimonial home, and conspiring to eject a widow (or widower) or children from the matrimonial home. Thus, the amended section 45 will prohibit all these actions as wrongful intermeddling. The current section 45 does not prohibit eviction of the surviving spouse and children or conspiring with another to do so, so the new definition expands the scope of the section 45 prohibition.

“invalid monogamous marriage” means a purported marriage, undertaken pursuant to any system of law that does not permit polygyny, and that is invalid under Cap. 150, Cap. 151, Cap. 157, or any other law because one of the parties thereto at the time of the celebration of such marriage is married to any person other than the person with whom such marriage is had.

“invalid polygynous marriage” means a purported marriage under customary law or custom or under any system of law permitting polygyny where either of the parties thereto at the time of the celebration of such marriage is validly married in a monogamous marriage in accordance with any system of laws that does not permit polygyny, including Cap. 150, Cap. 151, Cap. 157, or any other law.

These definitions of “invalid monogamous marriage” and “invalid polygynous marriage,” in conjunction with the amendments to subsections 3(5)-(8) below, are intended to preserve the legal effects of a valid monogamous marriage under the Law of Succession Act and recognize that a husband in a valid monogamous marriage may not enter into a valid polygynous marriage. They also preserve the legal effects of a valid polygynous marriage under the Law of Succession Act and recognize that a husband in a valid polygynous marriage may not enter into a valid monogamous marriage. These definitions reflect provisions of the Marriage Act, Cap. 150, which declare that: no monogamous marriage is valid if either of the parties is already married to another under customary law or custom; a monogamous marriage under the Marriage Act is “good and valid in law to all intents and purposes,” and; no person married under the Marriage Act is capable of contracting a valid marriage under any customary law or custom during the continuation of such marriage. Marriage Act, (1902) Cap. 150 §§ 35(t), 36, 37; see also Hindu Marriage and Divorce Act, (1960) Cap. 157 § 3(t)(a) (a marriage may not be solemnized if either party has a living spouse.).

Any person who, while validly married in a monogamous marriage, purports to enter into a polygynous marriage, commits a criminal offense punishable by up to five years imprisonment. Marriage Act, (1902) Cap. 150 § 50; see also African Christian Marriage and Divorce Act, (1931) Cap. 151 § 9(3), Penal Code, Cap. 163 §§ 171, 172. Similarly, any person who, while validly married under customary or Islamic law, purports to enter into a monogamous marriage, commits a criminal offense punishable by up to five years imprisonment. Marriage Act, (1902) Cap. 150 § 49, Penal Code, Cap. 163 § 172. Finally, any attempt to contract a polygynous

marriage under the Mohammedan Marriage, Divorce and Succession Act, Cap. 156, while being at the time married under “the Marriage Act or in accordance with the law of any Christian country” or while married to another person under customary law and custom results in an invalid marriage and is likewise punishable by up to five years imprisonment. Mohammedan Marriage, Divorce and Succession Act, (1806) Cap. 156 §§ 5, 6.

“limited residuary bequest” means a testamentary gift which, but for some specific limitation therein expressed or implied, would constitute a general residuary bequest;

“matrimonial home” means the house or structure lived in either by the deceased and his or her surviving spouse, or by the surviving spouse alone, at the time of death or previously, including any surrounding residential land and any surrounding property that provides the basic sustenance or income necessary to support the surviving spouse and children or other dependants;

The definition of “matrimonial home” has been added to section 3(i) of the Act so that the entire home will be distributed to a surviving spouse absolutely as amended Sections 35, 36, 40, 42A and 66 provide. The definition is not limited to the house, but includes any farmland on which the house is located that has been or could be used to support the surviving spouse and dependants. Vesting full ownership of the home in the surviving spouse protects widows (and widowers) from property grabbing and unlawful evictions. This change not only provides the surviving spouse with shelter and adequate living conditions, a right guaranteed under international law, but also a means to provide for her or him and any dependants. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”), art. 2(2) (no sex-based discrimination in ICESCR rights), art. 3 (women are ensured equal rights with men as to any ICESCR right), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), entered into force Jan. 3, 1976, acceded to by Kenya May 1, 1972, *available at* <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR]; and Convention on the Rights of the Child, G.A. Res. 44/25, annex, art. 27(1) (“States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”), art. 2(1) (no discrimination against the child based on the parent’s sex as to any CRC rights), U.N. GAOR, 36th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Dec. 12, 1989), entered into force Sept. 2 1990, ratified by Kenya Sept. 2, 1990, *available at* <http://www2.ohchr.org/english/law/crc.htm> [hereinafter CRC]. See also Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 14(2)(g)-(h), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (Dec. 18, 1979), entered into force Sept. 3, 1981, acceded to by Kenya Apr. 8, 1984, *available at* <http://www2.ohchr.org/english/law/cedaw.htm> [hereinafter CEDAW] (“States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (g) [t]o have access to agricultural credit and loans . . . and equal treatment in land and agrarian reform... ; [and] (h) [t]o enjoy adequate living conditions, particularly in relation to housing...”).

“**minor**” means any person who is not of full age;

“**monogamous marriage**” means a valid marriage in which the two parties may only marry each other under Cap. 150, Cap. 151, and Cap. 157, or any other law that prohibits a man from marrying more than one wife while he has a living wife.

“**Muslim**” means any person who professes the religion of Islam and accept the unity of God and Mohammed as his prophet;

“**Muslim Law**” means the law applicable to a person who is a Muslim at the time of his death;

“**Muslim**” means any person who chooses to identify as a Muslim by specifying in a valid will, as set forth in Part II relating to wills, that Muslim law should apply to his or her estate;

“**Muslim law**” means the law applied by the Kadhi’s Court to determine the distribution of property in the testate estate of a “Muslim” person, as defined above;

It is necessary to amend the definitions of “Muslim” and “Muslim law” to incorporate the changes proposed for sections 2(3) and 2(4) above, which are designed to give Muslims the same right to religious freedom that other Kenyans enjoy.

“**net estate**” means the estate of a deceased person after payment of reasonable funeral expenses, debts and liabilities, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any;

“**net intestate estate**” means the estate of a deceased person in respect of which he or she has died intestate after payment of the expenses, debts, liabilities and estate duty set out under the definition of “net estate”, so far as the expenses, debts, liabilities and estate duty are chargeable against that estate;

“**particular residual bequest**” means a testamentary gift of all of a particular property not otherwise disposed of;

“**pecuniary legacy**” includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the specified fund or property, and any other general direction by the testator for the payment of money, including all death duties free from which any gift is made to take effect;

“**personal and household effects**” means clothing and articles of personal use and adornment, furniture, appliances, pictures, ornaments, food, drink, utensils, motor vehicles not used exclusively for business purposes, simple agricultural equipment, livestock, and all other articles of household use or decoration normally to be associated with a matrimonial home, but does not include any motor vehicle used exclusively for business purposes or any other thing connected with the business or profession of the deceased;

The proposed amendment to the section 3(1) definition of “personal and household effects” adds important items so it is clear that the spouse inherits them absolutely under Section 35(1)(a). Simple agricultural equipment and livestock are especially important to the rural woman because she needs them to sustain herself and her children. A motor vehicle can also aid a surviving spouse, both in securing a living to help raise any children and in transporting children for their edu-

cational, religious, or medical needs. The items are taken from similar definitions in Ghana's statute, Intestate Succession Law, (1985) P.N.D.C.L. 111 § 18 (Ghana) ("household chattels' include; simple agricultural equipment; motor vehicles other than vehicles used wholly for commercial purposes, and household livestock;"), and from Zambia's law, The Intestate Succession Act, (1995) Cap. 59 § 3 (Zambia) ("personal chattel' means... simple agricultural equipment... motor vehicles... but does not include chattels used for business purposes...").

"personal representative" means the executor or administrator of a deceased person;

"polygynous marriage" means a marriage in which a man is validly married to more than one woman at one time.

The proposed references to "polygamy" in the Act are changed to "polygyny." "Polygamy" is a general term referring both to marriages in which one woman is married to two or more men at a time (polyandry) or in which one man is married to two or more women at one time (polygyny). Because polyandry (one woman being married to two or more men at one time) is not practiced in Kenya, the use of the word "polygamy" is overly broad in this context. The word "polygyny" (one man being married to two or more women at one time) more accurately reflects the type of marriage that is practiced in Kenya.

"portion" means provision by a parent or person in loco parentis to establish a child in life;

"power of appointment" means power vested in some person to determine the disposition of property of which that person is not the owner;

"probate" means the certificate of a court of competent jurisdiction that a will, of which a certified copy is attached in the case of a written will, has been proved a valid will with a grant of representation to the executor in respect of the estate;

"purchaser" means a purchaser for money or money's worth;

"representation" means the probate of a will or the grant of letters of administration;

"residue estate" means the remainder of the net intestate estate after the matrimonial home and personal and household effects have been distributed or otherwise transferred pursuant to sections 32, 35, 40, 42A, and 66;

This definition of "residue estate" has been added to make it clear that this term refers to the remainder of the net intestate estate that is left over once the matrimonial home and household and personal effects have been distributed to either the surviving spouse or children.

"special legacy" means a testamentary gift of a particular part of the property of the testator, which identifies that part by a sufficient description, whether in specific or in general terms, and manifests an intention that that part shall be enjoyed or taken in the state and condition indicated by that description;

"special power of appointment" means power of appointment to such object or objects within a special description or class as the appointor may think fit;

"trust corporation" means an incorporated banking or insurance or guarantee or trust company having a subscribed capital of not less than five hundred thou-

sand shillings, or any body corporate which has a subscribed capital of not less than five hundred thousand shillings and which is for the time being empowered (by or under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers), to undertake trusts, but for so long a time only as that body corporate shall not, by any prospectus, circular, advertisement or other document issued by it or on its behalf, state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund in respect of any act or omission of that body corporate when acting as an executor or administrator:

Provided that a body corporate which would be a trust corporation but for the fact that its subscribed capital is less than five hundred thousand shillings may act as executor or administrator in any case with the leave of the court on giving such security as the court may determine, and thereupon for the purpose of so acting as executor or administrator that corporation shall have all the rights and privileges conferred on a trust corporation by this Act;

“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and widower” shall have a corresponding meaning;

“will” means the legal declaration by a person of his or her wishes or intentions regarding the disposition of his or her property after his or her death, duly made and executed according to the provisions of Part II, and includes a codicil.

(2) References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) ~~and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility, a child born in or out of wedlock, a child adopted under either statutory or customary law, and any person recognised by the person in question as his or her child or recognised by law to be the child of such person.~~

The proposed revisions to sections 3(2)-(3) would ensure the equal right to inheritance of all biological children and all adopted children, whether or not their parents are married. The current provisions discriminate against the children of men who do not marry their children’s mother by denying inheritance rights to such children whenever their father does not expressly recognize or voluntarily assume personal responsibility for them. The amendments also ensure that men cannot escape caring for their children by refusing to recognize, accept, or voluntarily assume permanent responsibility for them. This modification is necessary to come into compliance with art. 18(3) of the African Charter of the Rights and Welfare of the Child, which ensures that “[n]o child shall be deprived of maintenance by reference to the parents’ marital status.” African Charter on the Rights and Welfare of the Child, art. 18, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, acceded to by Kenya July 25, 2000, *available at* http://www.africanunion.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf [hereinafter ACRWC]. See also CEDAW, *supra* pp. 177-78, at art. 16(1)(d) (“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to...family relations and in particular shall ensure, on the basis of equality of men and women: ... (d) [t]he same rights and

responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount...”). [Emphasis added.] In an age when DNA tests can quickly identify the biological parental status of an unmarried father, it makes no sense to relieve such a man of responsibility for his children’s welfare, whether through maintenance payments while their father is alive or through inheriting his property when he dies.

The statutory language is based on provisions taken from the *Zambian Intestate Succession Act*, (1995) Cap. 59, § 3 (Zambia) (“child” means a child born in, or out of marriage, an adopted child, a child who is conceived but not yet born;” and the *Ghana Intestate Succession Law*, (1985) P.N.D.C.L. III § 18 (Ghana) (“child’ includes a natural child, a person adopted under any enactment for the time being in force or under customary law relating to adoption and any person recognised by the person in question as his child or recognised by law to be the child of such person...”).

~~(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have the same relationship to other persons through her or him as though the child had been born to her or him in wedlock.~~

(3) A child born out of wedlock shall have the same relationship to other persons through his or her father or mother as though the child had been born in wedlock.

(4) Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he or she has apparently attained the age of eighteen years, and shall not otherwise be so treated.

~~(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.~~

(5) A woman married in a valid monogamous marriage is, where her husband has purported to enter into a subsequent invalid polygynous or monogamous marriage, a “wife” for the purposes of this Act, and

(a) The woman in the valid monogamous marriage is entitled to the protections of sections 29, 35, and 36 of this Act.

(b) Any woman whose purported polygynous or monogamous marriage is invalid because her husband was already validly married to another woman in a monogamous marriage is entitled to the protections of section 29 as a dependant.

(6) A woman validly married under a system of law which permits polygyny is, where her husband has purported to enter a subsequent invalid monogamous marriage to another woman, a wife for the purposes of this Act, and

(a) If such woman is the sole surviving wife in a valid marriage, she is entitled to the protections of sections 29, 35, and 36 of this Act.

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(b) If there is more than one surviving wife in a valid polygynous marriage, each such wife is entitled to the protections of sections 29 and 40 of this Act.

(c) A woman whose purported monogamous marriage is invalid because her husband was already validly married to another woman is entitled to the protections of section 29 of this Act as a dependant.

(7) Where the deceased is a woman, a man whose marriage to the deceased woman is invalid because he took either of the actions described in subparagraphs (5) or (6) above is entitled to the protections of section 29 as a dependant.

(8) The children of any relationship described in subparagraphs (5)(b), (6)(c), or (7) and the children of parents who never purported to marry each other, are entitled to the protections of section 29 as dependants and are also entitled to be treated as children with the same rights as all other children of the deceased.

The proposed changes to section 3 through the deletion of subsection (5) and the substitution of new subsections (5) – (8) are intended to preserve the legal effects of a valid monogamous marriage and of a valid polygynous marriage. They bring the Law of Succession Act into compliance with the Kenyan law defining valid and invalid marriages and setting criminal penalties for those who purport to enter into marriages that are legally invalid. See *supra*, pp. 176-77, for the relevant provisions in the: Marriage Act; Hindu Marriage and Divorce Act; African Christian Marriage and Divorce Act; Mohammedan Marriage, Divorce, and Succession Act; and the Penal Code.

Converting a monogamous marriage to a polygynous one is a particularly egregious violation of a woman's right to equality in marriage. Both the Human Rights Committee and the CEDAW Committee have recognized that laws permitting polygyny violate women's equality rights in marriage under the respective treaties. Thus in interpreting ICCPR article 23(4), providing the right to equality in marriage, the HRC states: "Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist." Human Rights Committee, General Comment No. 28: Equality of rights between men and women, Article 3, para. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), *available at* <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC General Cmt. 28]. In interpreting CEDAW article 16(1), requiring equality in marriage law, its Committee also takes a strong stand: "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited." Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21, Equality in marriage and family relations, para. 14, U.N. Doc. A/49/38 at 1 (1994), *available at* <http://www2.ohchr.org/english/bodies/cedaw/comments.htm> [hereinafter CEDAW General Rec. 21].

New section 3(5)(a) seeks to prevent at least the loss of the wife's equal rights monogamous marriage, with its requirement that both spouses receive the same share of inheritance when the other dies. See the CEDAW Committee ruling: "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...property at his death

than would widowers... Such provisions contravene the Convention and should be abolished." CEDAW General Rec. 21, at para. 35. With the proposed amendments, sections 35 and 36 of the Act provide equal inheritance rights to both monogamous spouses. The proposed amendments to section 40 on inheritance rights in polygynous marriages seek to give wives with a shared husband more equal rights with him than they now have. However, these amendments cannot grant full equality between the husband and the wife in each polygynous marriage, because equal rights and responsibilities between the wife, who has entered one marriage, and a husband, who has entered more than one marriage, are mathematically impossible.

Similarly, the proposed new sections 3(6)(a) and 3(6)(b) seek to protect the legal effects of valid polygynous marriages for women whose husbands purported to marry other women monogamously while already legally married under a system of law permitting polygyny. In each situation, the spouses in the purported but invalid marriages are given protections as dependants under sections 3(5)(b), 3(6)(c), and 3(7). Finally, the proposed section 3(8) ensures that any child of the deceased, whether or not his or her parents were married, will have the same protections under the Act as a child of married parents.

4. Law applicable to succession

(1) Except as otherwise expressly provided in this Act or by any other written law-

(a) succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicile of that person at the time of his or her death;

(b) succession to the movable property of a deceased person shall be regulated by the law of the country of the domicile of that person at the time of his or her death.

(2) A person who immediately before his or her death was ordinarily resident in Kenya shall, in the absence of proof of domicile elsewhere, be presumed to have been domiciled in Kenya at the date of death.

PART II

Wills Capacity

5. Persons capable of making wills and freedom of testation

(1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his or her free property by will, and may thereby make any disposition by reference to any secular or religious law that he or she chooses.

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he or she is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he or she is doing.

(4) The burden of proof that a testator was, at the time he or she made any will, not of sound mind, shall be upon the person who so alleges.

6. Appointment by will or executor

A person may, by will, appoint an executor or executors.

7. Wills caused by fraud, coercion, importunity or mistake

A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.

Formalities

8. Form of wills

A will may be made either orally or in writing.

9. Oral wills

(1) No oral will shall be valid unless -

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he or she died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

10. Proof of oral wills

If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

11. Written wills

No written will shall be valid unless-

(a) the testator has signed or affixed his or her mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him or her, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his or her mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his or her signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

12. Incorporation of papers by reference

If a testator, in a will or codicil, refers to another document then actually written, and expressing any part of his or her intentions, that document, where it is clearly identified as the document to which the will refers, shall be considered as forming part of the will or codicil in which it is referred to.

13. Effect of gift to attesting witness

(1) A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person attesting it, or to his or her spouse.

(2) A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void unless the will is also attested by at least two additional competent and independent witnesses, in which case the bequest shall be valid.

14. Witness not disqualified by being executor

No person, by reason of his being an executor of a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

15. Existing wills

Notwithstanding the provisions of this Part, any written will executed before the commencement of this Act shall, whether the testator dies before or after the commencement of this Act, be treated as properly executed if it was executed according to the requirements of the law in force at the date of execution.

16. Formal validity of other wills

Notwithstanding the provisions of this Part, every will, whether of movable or immovable property, and whether executed before or after the commencement of this Act, shall be treated as properly executed if its execution conformed, either at the time of execution or at the time of the testator's death, to the law in force -

(a) in the state where it was executed; or

(b) in the state where the property is situated; or

(c) in the state where, at the time of its execution or the testator's death, he or she was domiciled; or

(d) in a state of which the testator was a national either at the time of its execution or on his or her death.

Revocation, Alteration and Revival

17. Will may be revoked or altered

A will may be revoked or altered by the maker of it at any time when he or she is competent to dispose of his or her free property by will.

18. Revocation of will

(1) Save as provided by section 19, no will or codicil, or any part thereof, shall be revoked otherwise than by another will or codicil declaring an intention to revoke it, or by the burning, tearing or otherwise destroying of the will with the intention of revoking it by the testator, or by some other person at his or her direction.

(2) A written will shall not be revoked by an oral will.

19. Revocation of will by testator's marriage

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A will shall be revoked by the marriage of the maker; but where a will is expressed to be made in contemplation of marriage with a specified person, it shall not be revoked by the marriage so contemplated.

20. Effect of obliteration, interlineation or alteration in will

(1) No obliteration, interlineation or other alteration made in a written will after the execution thereof shall have any effect unless the alteration is signed and attested as a written will is required to be under section 11:

Provided that a will as so altered shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to the alteration, or is referred to in a memorandum written at the end or some other part of the will and so signed and attested.

(2) Where a typewritten or printed will purports to have been executed by the filling in of any blank spaces, there shall be a presumption that the will has been duly executed.

21. Revival of will

(1) No will which has been in any manner wholly revoked shall be revived otherwise than by the re-execution thereof.

(2) Where only part of a will has been revoked, that part shall not be revived otherwise than by the re-execution thereof or by a subsequent will or codicil showing an intention to revive it.

Construction

22. Construction of wills.

Wills shall be construed in accordance with the provisions of the First Schedule.

Failure of Dispositions

23. Failure of testamentary dispositions

Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule.

Election

24. Election

Beneficiaries under testamentary gifts or dispositions shall be put to election in the circumstances and manner and to the extent provided by the Third Schedule.

Perpetuities, Remoteness and Accumulations

25. (Repealed by No. 6 of 1984.)

PART III

Provisions for Dependants

26. Provisions for dependants not adequately provided for by will or on intestacy

Where a person dies after the commencement of this Act, and so far as succession to his or her property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion

that the disposition of the deceased's estate effected by his or her will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

27. Discretion of court in making order

In making provision for a dependant the court shall have ~~complete~~ discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him or her by way of periodical payments or a lump sum, and to impose such conditions, except that the order may not violate international and regional human rights treaties binding on Kenya, as it thinks fit. This discretion must be exercised on a sound legal and factual basis, consistent with the provisions of § 28 and § 29, and without any discrimination on the basis of sex, tribe, community, ethnicity, race, religion, creed, parents' marital status, or other prohibited classifications.

This proposed modification to section 27 is intended to clarify and expand the decision in *Rono v. Rono*, which requires that a judge's discretion be exercised in accordance with a sound legal and factual basis. Therefore, this provision explicitly prohibits courts from considering factors, such as sex, race, community, or other classifications that stem from assumptions based on gender or other stereotypes. Cf. *Rono v. Rono*, (2008) 1 KLR (G&F) 803 (Kenya), *available at* <http://www.kenyalaw.org/CaseSearch/> (Civil Appeal 66 of 2002 (C.A. at Eldoret Apr. 29, 2005)).

28. Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to -

- (a) the nature and amount of the deceased's property;
- (b) any past, present or future capital or income from any source of the dependant;
- (c) the existing and future means and needs of the dependant;
- (d) whether the deceased had made any advancement or other gift to the dependant during his or her lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

29. Meaning of dependant

For the purposes of this Part, "**dependant**" means-

- (a) ~~the wife or wives spouse or spouses, or former wife or wives spouse or spouses,~~ and all the children of the deceased whether or not maintained by the deceased immediately prior to his or her death and whether born in or out of wedlock;

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~~(b) any person who is party to an invalid monogamous marriage or to an invalid polygynous marriage with the deceased, as defined in section 3(1), who was being maintained by the deceased immediately prior to his or her death;~~

~~(c) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his or her family as his or her own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his or her death; and.~~

~~(e) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.~~

The proposed changes to section 29 omit unnecessarily gender-specific language, as well as the unnecessary difference in treatment between husbands (who are considered dependants only if they are being maintained by their wives immediately prior to her death) and wives (who are assumed to be dependants). Accordingly, men will now have full equality with women, as international human rights law also requires. See, e.g., ICCPR, supra p. 174, at art. 26 (prohibiting discrimination based on sex). These revisions also make clear that a woman's children are her dependants, just as is the case for men's children. The new subsection (b) permits persons whose marriages are invalid to receive protection as dependants, as do their children under revised subsection (a).

30. Limitation of time

No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.

PART IV

Gifts in Contemplation of Death

31. Characteristics

A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if -

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he or she could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he or she intended it to revert to him or her should he or she survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him or her:

Provided that-

(i) no gift made in contemplation of death shall be valid if the death is caused by suicide;

(ii) the person making the gift may, at any time before his or her death, lawfully request its return.

PART V

Intestacy

32. Excluded property

~~The provisions of this Part shall not apply to—~~

~~(a) agricultural land and crops thereon; or~~

~~(b) livestock,~~

~~situated in such areas as the Minister may, by notice in the Gazette, specify.~~

32. Agricultural Land

~~(1) The provisions of this Part shall govern the devolution of rights to certain agricultural land, as defined in subsection 3(1), situated in such areas as the Minister may, by notice in the Gazette, specify; and subsections (2), (3), and (4) of this section, as the case may be, specify how the Law of Succession Act shall apply to the agricultural land in question.~~

~~(2) Where the matrimonial home is located on agricultural land that is registered pursuant to The Registered Land Act, Cap. 300 (2006) or any other written law, the law applicable to the distribution on intestacy as set forth in this Part shall apply.~~

~~(3) Where the matrimonial home is located on specified agricultural land that is not registered pursuant to The Registered Land Act, Cap. 300 (2006) or any other written law, the law applicable to the distribution of the estate on intestacy as set forth in this Part, including sections 35, 36, 38, 40, 41, 42, and 42A, shall apply, as modified, where necessary, by the substitution of use rights for ownership rights as follows:~~

~~(a) the surviving spouse of the deceased is entitled to the use rights or other rights held by the deceased in such agricultural land; or, if no spouse is surviving,~~

~~(b) all children of the deceased are entitled to the use rights or other rights held by the deceased in such agricultural land in equal shares; and~~

~~(c) for the avoidance of doubt, both a surviving husband and a surviving wife have a use right in the matrimonial home upon the death of the other.~~

~~(4) Where the matrimonial home is located on partly registered land and partly unregistered agricultural land, the law applicable to the distribution on intestacy as set forth in this Part shall apply to any portion of the matrimonial home that is located on registered land as set forth in subsection (2) above, and the law applicable to the distribution on intestacy as set forth in this Part shall apply to any portion of the matrimonial home that is located on unregistered land as set forth in subsection (3) above.~~

~~(5) The Minister shall conduct a study to determine the number of women and men on unregistered agricultural land and help them to register the land in the names of both husband and wife, with a view to reducing the amount of agricul-~~

tural land in the areas designated by the Schedule to the Attorney General's order under paragraph (b) repealed section 32 of the Act, within one year of the [date of assent].

(6) The purpose of the program required by subsection (5) is to enable the greatest possible number of surviving spouses to have clear registration records of the fact that they co-own their matrimonial home, and the Minister shall take this intended purpose into account in issuing the orders required by this section.

(7) The Minister shall issue a new order under subsection (1) to replace L.N. 94 of 1981 within one year of the [date of assent]; the new order shall clearly identify the boundaries of all registered and non-registered land within each of the twelve districts now listed (West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tanu River, Lamu, Kajiado, and Narok) so that judges and magistrates can easily determine whether to apply subsection (2), (3), or (4) of this section in intestacy proceedings.

(8) The Minister shall annually amend the order required by subsections (1) and (7), after reviewing the land areas newly registered during the preceding year and ensuring that the order clearly marks the relevant boundaries within the districts of newly registered land.

33. Law applicable to excluded property.

The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be.

The proposed amendment to section 32 and deletion of section 33 eliminate the exceptions for unregistered agricultural gazetted lands, crops, and livestock, and make those lands, crops, and livestock subject to Part V relating to intestacy, rather than to customary law. Where land is not registered, in lieu of customary law, the amended Act would grant the surviving spouse of the deceased the use rights or other rights that the deceased held in the land, thus ensuring that a surviving widow and widower will have equal use rights, without regard to their sex. All children would also inherit such use rights in equal shares, without regard to their gender or the marital status of their parents. By eliminating the circumstances in which sex-discriminatory customary law is to be applied, this amendment implements the court's holding in *In Re Estate of Lerionka Ole Ntutu (Deceased)*, available at <http://www.kenyalaw.org/CaseSearch/> (Succession Cause 1263 of 2000 (High Ct. at Nairobi Nov. 19, 2008)), in which the High Court found that insofar as Section 32 of the Law of Succession Act would permit the application of any customary law that would abrogate the right of daughters to inherit the estate of a father on an equal basis with sons, such provision is "repugnant to justice and morality" and therefore may not be applied. See *The Judicature Act, (2004) Cap. 8 § 3(2)*. In doing so, the High Court invoked Sections 82(1) and 82(3) of Kenya's Constitution, Article 1 of CEDAW, Article 18(3) of the African Charter, and the Court of Appeal's decision in *Rono v. Rono*.

In keeping with this ruling, the amended provisions would abrogate as far as possible the application of customary law in matters of inheritance because such law typically discriminates against women and violates their equality rights under international and regional human rights law. While the amendments would preserve

the customary principle of “use rights” on non-registered land, they would require that women and men have equal use rights. By the Kenyan government’s own admission, the Law of Succession “denies a woman any interest in her husband’s agricultural land, crops and livestock in cases where the husband dies intestate and is resident in an area gazetted by the minister or has interests in communally owned land, where customary law does not allow women to inherit.” Republic of Kenya, Combined Fifth and Sixth Periodic Reports to the CEDAW Committee, para. 184, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm#k> [hereinafter Kenya 2006 CEDAW Report]. Additionally, custom may place restrictions on the kinds of animals women are allowed to own. Telephone Interview with Claris Ogangah-Onyango, Senior Legal Counsel, FIDA Kenya, in Nairobi, Kenya (Feb. 25, 2008). Therefore, it is particularly problematic for women if those items are governed by customary law.

As observed by the High Court in *In Re Estate of Lerionka Ole Ntutu (Deceased)*, international human rights law does not allow customary law to discriminate against women’s rights to equality and dignity. Indeed, General Comment 28 to the ICCPR instructs state parties to “ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.” HRC General Cmt. 28, *supra* p. 182, at para. 5. Also, CEDAW article 2(f) obligates state parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women....” CEDAW, *supra* pp. 177-78, at art. 2(f). See also CEDAW, *supra* pp. 177-78, at arts. 15, 16(1); CEDAW General Rec. 21, *supra* p. 183, at paras. 17, 34-35. The African Charter likewise requires that “[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” African Charter, *supra* p. 4, at art. 18(3). Therefore, the Kenyan government has an affirmative obligation to eliminate the application of discriminatory customary law to inheritance issues.

Some of the agricultural lands listed in the Gazette notice required by current section 32 have actually been privatized, and, indeed, based upon the Clinic/FIDA-Kenya interviews, the people who live on those lands desire that they be privatized. Thus, these lands and the crops and livestock they sustain should no longer be excluded from the national succession law. Masore Nyang’au, a Nairobi Advocate, explained that “a lot of agricultural land in Kenya, like the Masai now have title, so where people used to [own] land communally [it] should now be under the Succession Law.” Interview with Masore Nyang’au, Advocate, in Nairobi, Kenya (Apr. 1, 2008).

34. Meaning of intestacy

A person is deemed to die intestate in respect of all his or her free property and in respect of all his or her use rights on unregistered agricultural land of which he or she has not made a will which is capable of taking effect.

35. Where intestate has left one surviving spouse and child or children

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(1) Subject to the provisions of subsection 35(3) and section 40 below, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) ~~the personal and household effects of the deceased absolutely; and~~

(a) the entire matrimonial home and personal and household effects of the deceased absolutely; and

~~(b) a life interest in the whole residue of the net intestate estate:~~

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person:

~~(b) one-third of the residue estate absolutely.~~

~~(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.~~

(2) Subject to the provisions of subsection 35(3) and section 40 below, the surviving child or children shall be entitled to share equally in the remaining two-thirds of the residue estate; and for each minor child, his or her portion of the residue estate shall be held in trust by his or her parent, guardian, or caretaker until he or she reaches full age.

(3) Where the deceased has left one surviving spouse and a child or children, and the entire estate is worth 100,000 shillings or less, the surviving spouse shall be entitled to the entire residue estate absolutely.

(4) The Minister may, by order in the Gazette, vary the amount specified in subsection (3).

~~(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.~~

~~(4) Where an application is made under subsection (3), the court may award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to—~~

~~(a) the nature and amount of the deceased's property;~~

~~(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;~~

~~(c) the existing and future means and needs of the applicant and the surviving spouse;~~

~~(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;~~

~~(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;~~

~~(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will if any; and~~

~~(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did; and any other application made under this section.~~

~~(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.~~

Revised section 35(1) gives the surviving spouse an absolute interest in the entire matrimonial home, personal and household effects, and one-third of the residue estate, rather than a mere life interest in the home and an absolute interest only in the personal and household effects. The granting of an absolute interest in the matrimonial home recognizes the surviving spouse's contributions to the marriage and household and protects widows against property grabbing and forced eviction. Amended section 35(1) gives the surviving spouse ownership and control over the matrimonial home, personal and household effects, and one-third of the residue estate so that she or he may use the property as a resource to provide for her or his family. This provision recognizes that a surviving spouse is more likely to look after his or her children than anyone else and will reduce intra-family conflicts and controversy over the property. Granting an absolute interest in the matrimonial home and one-third of the residue estate also protects an adult surviving spouse from being subject to oversight by children or a court as sections 35(3), 35(4), and 37 now permit. See Interview with Leah Kiguatha, LL.M. candidate and Leadership and Advocacy for Women in Africa fellow at Georgetown University Law Center, in Washington, D.C. (February 22, 2008) ("When I was in court and saw someone from my neighborhood, I introduced myself to a woman my mom's age. She said, 'It's so unfair that I have to get my children's permission to do something to the land.'").

Under revised section 35(2), the children will also inherit immediately in equal shares so that they will be protected under the Act. For example, where there are two children, each will take 50% of the remaining two-thirds of the residue estate, which equals one-third of the residue estate for each child.

This section is modeled after the succession laws of Ghana, Zimbabwe, and South Africa, which give the surviving spouse and children an immediate and absolute interest in the decedent's estate. See Intestate Succession Law, (1985) P.N.D.C.L. III §§ 3-5, 14 (Ghana) (providing that a surviving spouse and child inherit "household chattels", the "house", and "the residue of the estate", "in equal shares" "where two or more people are entitled to a share");

Administration of Estates Act, (2001) Cap. 6:01 § 68(F)(2)(b)-(d) (Zimbabwe) (in Part IIIA, "Estates of Persons Subject to Customary Law," providing that "(b) where the deceased person was a man and is survived by two or more wives and had one or more children – (i) one-third of the net estate should be divided be-

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tween the surviving wives in the proportions two shares to the first or senior wife and one share to the other wife or each of the other wives, as the case may be; and (ii) the remainder of the estate should devolve upon – A. his child; or B. his children in equal shares; as the case may be, and any of their descendants per stirpes; (c) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (b)– (i) where they live in separate houses, each wife should get ownership of, or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person’s death, together with all the household goods in that house; (ii) where the wives live together in one house at the time of the deceased person’s death, they should get joint ownership of or, if that is impracticable, a joint usufruct over, the house and the household goods in that house; (d) where the deceased person is survived by one spouse and one or more children, the surviving spouse should get – (i) ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person’s death, together with all the household goods in that house; and (ii) a share in the remainder of the net estate determined in accordance with the Deceased Estates Succession Act . . .”), available at http://www.parlzim.gov.zw/cms/Acts/Title06_SUCCESSION_AND_INSOLVENCY/ADMINISTRATION_OF_ESTATES_ACT_6_or.pdf;

Deceased Estates Succession Act, (1997) Cap. 6:02 § 3A (Zimbabwe) (providing that “The surviving spouse of every person who . . . dies wholly or partly intestate shall be entitled to receive from the free residue of the estate– (a) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person’s death, and (b) the household goods and effects. . .”; under id. § 3(a)-(b), the deceased spouse inherits a share equal to that of each of the children from the residue of the deceased’s estate), available at http://www.parlzim.gov.zw/cms/Acts/Title06_SUCCESSION_AND_INSOLVENCY/DECEASED_ESTATES_SUCCESSION_ACT_6_02.pdf [hereinafter Zimbabwe Deceased Estates Succession Act];

Intestate Succession Act, No. 81 (1987) (South Africa) (providing that “(1) If . . . a person . . . dies intestate . . . and . . . is survived by a spouse as well as a descendant – (i) such spouse shall inherit a child’s share of the intestate estate . . . and (ii) such descendant shall inherit the residue (if any) of the intestate estate . . .”);

Reform of Customary Law of Succession and Regulation of Related Matters Act, No. 11 (2009), 526 GOVERNMENT GAZETTE No. 32147 (21 Apr. 2009) §2(1) (South Africa) (“The estate . . . of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person’s will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act . . .”), available at <http://www.info.gov.za/view/DownloadFileAction?id=99544>.

This revised section 35(2) protects the children of the deceased, in addition to the protection available under Section 26, which gives courts discretion to provide for dependants who are not reasonably provided for under the law of intestacy. The Children Act, Cap. 8 (2001), also provides protection by requiring that “[i]n all actions concerning children, whether undertaken by public or private social welfare

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Children Act, (2001) Cap. 8 art. 4, para. 2 (Kenya).

The proviso to current subsection 35(1) that denies a widow the right to her home upon remarriage has been deleted so that widows will be treated equally with widowers. Kenya is required by international law and treaties to which it is a party to enact laws that guarantee equal treatment of widows and widowers and nondiscrimination on the basis of gender. *See, e.g.*, CEDAW, *supra* pp. 177-78, at arts. 16(1) (c), (h) (“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women... (c) The same rights and responsibilities during marriage and at its dissolution; ... (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.”); African Charter, at art. 18(3) (“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman... as stipulated in international declarations and conventions.”). Thus, Kenya has a duty to eliminate this demeaning and deeply damaging gender-based distinction in its laws.

Taking away widows’ inheritance if they remarry denies them their fundamental and equal right to marry, as set forth in CEDAW art. 16(1)(a), ICCPR art. 23(2) and (4), and UDHR art. 16(1). Widows will have every economic incentive to maintain their property interests even if they do remarry, and taking away their property merely coerces them not to remarry. *See* Interview with Leah Kiguatha, LL.M. candidate and Leadership and Advocacy for Women in Africa fellow at Georgetown University Law Center, in Washington, D.C. (February 22, 2008) (“The life interest provision raises an issue. It restricts [a widow’s] right to get married because she’ll lose her property.”). Revised section 35(1) is modeled after the succession laws of Rwanda which allow a surviving spouse to keep his or her interest in the matrimonial home upon remarriage. Succession Law of 1999, (1999) art. 75 (Rwanda).

36. Where intestate has left one surviving spouse but no child or children

(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled ~~out of the net intestate estate to~~ to the entire net intestate estate absolutely.

- ~~(a) the personal and household effects of the deceased absolutely; and~~
- ~~(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and~~
- ~~(c) a life interest in the whole of the remainder.~~

Provided that if the surviving spouse is a widow that life interest shall be determined upon her re-marriage to any person.

(2) ~~The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).~~

~~(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.~~

Section 36, as amended by the proposed bill, provides that where a decedent leaves behind a surviving spouse, but no children, the surviving spouse will be entitled to an absolute interest in the entire net intestate estate. This gives the surviving spouse complete control over the property to use as a resource. Providing an absolute interest in the net intestate estate, rather than the current life-time interest, terminable at remarriage, also ensures that no portion of it will escheat to the state. Under current sections 26, 36(1) and 39(2), that can happen if the surviving wife's life interest is terminated by her remarriage (section 36(1)) and there are no other living "kindred" of the deceased (section 39(2)) or other "dependants" (section 26). Telephone Interview with Claris Ogangah-Onyango, Senior Legal Counsel, FIDA Kenya, in Nairobi, Kenya (Jan. 30, 2008) ("When someone dies and there are no dependants, whatever is left goes back to the government. It will be good for this person [a widow] to have it absolutely so she can sell it or dispose of it.").

37. Powers of spouse during life interest.

~~A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance.~~

~~Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.~~

Because the proposed amendments to sections 35 and 36 give a surviving spouse an absolute interest, section 37, governing the powers of the spouse during a life interest, is no longer needed. The bill therefore deletes section 37 entirely.

38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

~~(a) father; or if dead~~

~~(b) mother; or if dead~~

(a) biological or adoptive parents in equal shares, where parent means natural mother and father and any persons recognized by law to be the mother or father of the intestate; or, if none,

~~(c) (b) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none~~

~~(d) (c) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none~~

~~(e)~~ *(d)* the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) (d) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

The proposal to amend Section 39 of the Law of Succession Act will give male and female parents equal priority in intestate estates where the intestate left no surviving spouse or children. The current law only allows mothers to inherit under this Section if the father is not alive. Preferring fathers over mothers violates women's right to equality with men under CEDAW, the ICCPR, the ICESCR, and the African Charter. The revisions give the deceased's father and mother equal net intestate shares after the deceased's death. Former subsections 39(1)(c)-39(1)(e) have been renumbered as 39(1)(b)-(1)(d) to reflect the changes to subsections 39(1)(a) and 39(1)(b).

40. Where intestate was polygamous a spouse in a valid polygynous marriage

~~(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.~~

~~(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.~~

(1) Where an intestate man was validly married to more than one woman under any system of law permitting polygyny, and is survived by more than one wife, and had one or more children:

(a) Where each wife had a separate matrimonial home:

(i) Each wife shall be entitled to the matrimonial home and personal and household effects absolutely.

(ii) Each wife shall be entitled to equal shares with the other wife or wives of one-third of the residue of the net intestate estate absolutely.

(iii) Each child of the deceased shall be entitled to an equal share with the other children of two-thirds of the residue of the net intestate estate absolutely.

(b) Where two or more wives shared a single matrimonial home, each wife residing in the matrimonial home shall be entitled to an equal share in the matrimonial home and in the personal and household effects absolutely.

(i) Subject to paragraph (ii) of subsection (1)(b), the wives shall be entitled to one-third of the residue of the net intestate estate absolutely, to be divided equally among them.

(ii) Subject to paragraph (iii) of subsection (1)(b), the children shall be entitled to the remaining two-thirds of the residue net intestate estate absolutely, to be divided equally among them.

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(iii) If the residue estate has a value of 100,000 shillings or less, the wives shall be entitled to the entire residue estate absolutely, to be divided equally among them.

(2) Where the intestate man was validly married to more than one woman under any system of law permitting polygyny, and is survived by more than one wife, but had no children:

(a) Where each wife had a separate matrimonial home:

(i) Each wife shall be entitled to the matrimonial home and personal and household effects absolutely.

(ii) Subject to paragraph (iii) of subsection (2)(a), each wife shall be entitled to equal shares with the other wife or wives of the residue of the net intestate estate absolutely.

(iii) If the residue estate has a value of 100,000 shillings or less, the wives shall be entitled to the entire residue estate absolutely, to be divided equally among them.

(b) Where two or more wives shared a single matrimonial home, each wife residing in the matrimonial home shall be entitled to an equal share in the matrimonial home and in the personal and household effects and in the residue estate absolutely.

(3) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygyny and had another wife or more than one wife living, each wife living in a separate matrimonial home, and she is survived by her husband and had one or more children:

(a) Each child, upon reaching full age, shall be entitled to the matrimonial home and personal and household effects absolutely, to be divided equally among them.

(b) The husband and each child, upon reaching full age, shall be entitled to the deceased's residue estate absolutely, in equal shares among them.

(4) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygyny and had another wife or more than one wife living, and the deceased shared her home with one or more of her husband's other wives, and she is survived by her husband and had one or more children:

(a) Each child, upon reaching full age, shall be entitled to co-ownership of the deceased's share of the matrimonial home and personal and household effects, in equal shares among them.

(b) The husband and each child, upon reaching full age, shall be entitled to the residue of the net intestate estate absolutely in equal shares among them.

(5) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygyny and had another wife or more than one wife living, and she is survived by her husband, but had no children, her husband shall be entitled to the matrimonial home and personal and household effects absolutely. Her parents and brothers and sisters shall be entitled to the residue of the net intestate estate

absolutely, with the parents entitled to one-half of the residue estate to be shared equally between them and her siblings entitled to the other one-half of the residue estate to be shared equally among them.

The proposed substitution to Section 40 ensures that each person in a polygynous family has a place to live in the event one of the spouses in a polygynous marriage dies. The revision provides that a surviving wife will receive ownership of the matrimonial home and personal and household effects when her husband dies. This is modeled after Zimbabwe's succession statute which gives each wife ownership of the matrimonial home and the household goods when her husband dies. Administration of Estates Act, (1907) Cap. 6:01 § 68F(2)(c) (Zimbabwe) (“[W]here the deceased person was a man and is survived by two or more wives...where they lived in separate houses, each wife should get ownership of...the house she lived in at the time of the deceased person's death, together with all the household goods in that house; ...where the wives live together in one house; they should get joint ownership of...the house and the household goods in that house.”).

The revision also addresses an inequality inherent in polygynous marriages—the husband's automatic entitlement to inherit from each of his wives while each wife is entitled to inherit from only him. Under the current section 40(1), when a polygynous man dies each “house” (i.e., each family unit consisting of a surviving wife and her children) is first allocated a share of the deceased's personal and household goods and of the residue estate, in proportion to the number of children in each “house,” counting the wife as an additional unit. For example, if wife one has four children and wife two has two children, there are a total of eight units, with $\frac{5}{8}$ allocated to the first house and $\frac{3}{8}$ allocated to the second house. Under section 40(2), this residue property is then inherited within each “house” according to the rules set forth in sections 35 through 38. Accordingly, each surviving wife with children has only a life interest in the matrimonial home and the rest of the residue estate allocated to her “house.” She will only inherit once and she will lose her life interest in the home and residue estate upon remarriage, pursuant to current section 35(1)(b)'s proviso.

On the other hand, a man will inherit multiple times if more than one of his wives predecease him, pursuant to current section 35(1). (Current section 40 covers only the estate of the deceased husband, and not that of the deceased wife of a polygynous man; the proposed revision adds this missing coverage.) For example, under current section 35(1) a man who validly married four women gains a life interest in the matrimonial home and the rest of the residue estate from each wife who predeceases him, leaving him with a life interest in four matrimonial homes and the residue estates if they all predecease him, while under current section 40 each wife of a polygynist inherits a life interest in only one matrimonial home (or a share of one home) and the rest of the residue estate allocated to her “house.” Moreover, unlike his wives, he will be able to remarry without losing his life interest in any of his deceased wives' property, again pursuant to current section 35(1).

The proposed revision addresses this inequality in the number of homes owned by the polygynous husband as opposed to each of his wives by giving the children of a deceased wife co-ownership of the matrimonial home she shared with her children. This revision prevents the husband from inheriting multiple matrimonial

homes and from depriving the deceased woman's children of protection when they are most in need. Indeed, in many cases, when a woman married to a polygynous man dies, her surviving spouse may not even be residing with her or supporting the children because he has entered into another marriage or marriages or cohabits with another woman, Interview with Beatrice Nyokabi, the wife of a polygynous man, in Nanyuki, Kenya (March 30, 2008). In any event, the surviving polygynist husband will be able to live in one of the other remaining matrimonial homes. And if a polygynous man loses all but one of his wives, he will have a de facto monogamous marriage when the last wife dies and will inherit the matrimonial home and personal and household effects, plus one-third or all of the residue estate, under amended sections 35 (one-third with children) and 36 (100% without children), as the case may be. Thus, each husband and each wife will be guaranteed ownership of one matrimonial home (or part of one home in the case of a shared home).

Moreover, if one of a polygynist's wives dies leaving no children, he would also inherit another home under the proposed revision. In that situation, the husband would inherit the matrimonial home; and her parents and siblings would share the residue. Similarly, if there is only one home shared by all wives, children, and the husband, the deceased wife's husband and children inherit her share of the matrimonial home and personal and household effects, plus the residue of her net intestate estate, in equal shares.

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate," or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate until they attain the age of eighteen years ~~or who, being female, marry under that age~~, and for all or any of the issue of any child of the intestate who predecease him ~~or her and who~~ until they attain that age ~~or so marry~~ in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he ~~or she~~ not predeceased the intestate.

Section 41, as amended, treats male and female children equally and would eliminate the legal incentive for female children to marry before the age of 18 in order to release property from trust. By encouraging child marriage, the current section 41 violates Kenya's Children Act, (2001) Cap. 8, which defines a child to be someone under 18 in section 2, and prohibits child marriage in section 14 ("No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.") [Emphasis added.] It also violates human rights treaties to permit children to marry, and the African Children's Charter is particularly strict by explicitly defining any person under 18 as a child. The African Children's Charter states: "Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory." ACRWC, *supra* p. 181, at art. 21(2); *see also* CEDAW, *supra* pp. 177-78, at art. 16(2). In addition, by failing to offer daughters the same protections as are granted to sons, the current section 41 denies girl children the fundamental right to freedom from discrimination on the basis of gender, in violation of Kenya's international

human rights obligations. See, e.g., ACRWC, *supra* p. 181, arts. 3, 21(2); CEDAW, *supra* pp. 177-78, arts. 2(a), 2(f), 15(i), 16(i)(a); ICCPR, *supra* p. 174, arts. 2, 24(i), 26.

42. Previous benefits to be brought into account

Where-

(a) an intestate has, during his or her lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or ~~house~~ spouse; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,

that property shall be taken into account in determining the share of the , net intestate estate finally accruing to the child, grandchild or spouse.

42A. Automatic ownership of home or continuing rental for surviving spouse.

(1) In any circumstance where the deceased has left only one surviving spouse and such surviving spouse lives or has lived in a matrimonial home on land owned and registered to the deceased, the spouse shall be automatically the owner of the matrimonial home by operation of law, except in the circumstances set forth in subsections 40(3)-(4).

(2) In any circumstance where the deceased has left more than one spouse, each living or having lived in a separate matrimonial home or in a shared matrimonial home on land owned and registered to the deceased, each spouse shall be automatically the owner of her matrimonial home or her share of the matrimonial home by operation of law.

(3) In any circumstance where the deceased has died and left one or more spouses living or having lived in a matrimonial home that is rented or leased in the name of the deceased, each spouse shall be entitled to remain in the separate or shared matrimonial home, as the case may be, for the duration of the lease or for three months after the death of the deceased, whichever is greater, by operation of law.

(4) Any person who becomes the owner of property under this section 42A may register such property in his or her own name but is not required to do so to be recognized as the legal owner. The failure to go to court or to register the property shall not affect the person's ownership rights in any way, and in any court procedure concerning the matrimonial home, including application for and confirmation of grants under Part VII, the court shall insure that the ownership or rental interests of surviving spouses are automatically recognized, and shall provide sufficient information and documentation to enable a surviving spouse to register the property in his or her name under The Registered Land Act, Cap. 300 (2006) or other relevant law.

Proposed new section 42A gives widows and widowers automatic ownership of the home in the immediate aftermath of the death of a woman's husband or a man's wife. Protecting the ability of widows and their children to continue to live in the matrimonial home is an essential aspect of preserving their rights under international human rights treaties. These rights include the right in CEDAW "to enjoy adequate living conditions, particularly in relation to housing" on "a basis of equality for men and women," CEDAW, *supra* pp. 177-78, at art. 14, para. 2(h). See also ICESCR, *supra* p. 177, at art. 3, which requires "the equal right of men

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and women” to article 11(1)’s right to an “adequate standard of living,” including “housing.” The right to equal protection of the law, ICCPR, *supra* p. 174, article 26, also requires the government of Kenya to protect widows from being evicted from their homes so that they can enjoy the right to the home on an equal basis with widowers; similarly, article 23(4) requires member states to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution,” including dissolution upon death. Proposed new language in section 32 requires that where there are use rights, the surviving widow or widower will inherit that use right to the matrimonial home.

The provision automatically giving the widow or widower the right to the home is similar to the provisions of the Zimbabwe Administrations of Estates Act, which ensures that the “the surviving spouse should get...ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person’s death...,” Administration of Estates Act, (2001) Cap. 6:01 § 68F(2)(c-d) (subsection (c) also uses substantially similar language: “where the deceased person was a man and is survived by two or more wives, ...the wives should receive...ownership of or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person’s death...”). This provision takes that a step farther, making sure that ownership of the land is immediately transferred to ensure the safety of the widow and family.

PART VI

Survivorship

43. Presumption of survivorship

Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, the deaths shall, for all purposes of this Act, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder:

Provided that in the case of spouses who died in those circumstances, the spouses shall be presumed to have died simultaneously.

PART VII

Administration of Estates

44. Application of Part

~~(1) The provisions of this Part shall not, in cases of intestacy, apply to those types of property mentioned in section 32.~~

~~(2) The Minister may, after consultation with the Chief Justice, by order in the Gazette, suspend in any area referred to in the order all or any of sections 45, 46, 48 and 49.~~

~~(3) Where the operation of sections 48 and 49 is suspended in any area, the High Court may make a grant of representation in respect of the estate of a deceased person whose last known place of residence was in that area, whether the value of the estate exceeds or does not exceed one hundred thousand shillings.~~

~~(4) In this section “area” means a province, district or other part of Kenya.~~

Section 44—which permits the Minister to exclude women (and men) living on certain agricultural lands from the protections of sections 45 (no intermeddling), 46 (duties of officers re report of death and protection of property), 48 (providing for magistrate jurisdiction), and 49 (territorial jurisdiction and transfer to another magistrate)—is deleted in accordance with the proposed deletion of the Section 32 exemption for those certain agricultural lands.

Protection

45. No intermeddling with property of deceased person

~~(1) Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.~~

(1) As of the moment of the deceased's death, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person or any use rights in the matrimonial home pursuant to section 32, unless he or she is authorized to do so by section 42A as a matter of law or by a grant of representation and a subsequent confirmation of the grant under this Part.

(2) Any person who contravenes the provisions of this section shall—

~~(a) be guilty of an criminal offence and liable to a fine not exceeding ten less than one hundred thousand shillings or and to a term of imprisonment not exceeding one year less than five years or to both such fine and imprisonment; and~~

(b) be answerable to the rightful executor or administrator or owner by operation of law or holder of a use right by operation of law to the extent of the assets with which he or she has intermeddled after deducting any payments made in the due course of administration.

The proposed modifications to section 45 do three things, largely through the incorporation of the new section 3(1) definition of intermeddling:

(a) taking possession of or disposing of or using the property of the decedent in any way without lawful right or title;

(b) ejecting, by force or by coercion (whether physical, emotional, financial, by harassment, or by any other methods) a surviving spouse or minor child from the matrimonial home;

(c) conspiring with another to eject by force or by any form of coercion a surviving spouse or child from the matrimonial home;

(d) where the matrimonial home is rented, ejecting, or conspiring with another to eject, whether by force or by any form of coercion, a surviving spouse or child from the matrimonial home for a period of three months after the death of the decedent, or until the end of the lease, whichever is greater.

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First, revised section 45(1), as amended by the new definition of intermeddling, would now explicitly prohibit ejecting survivors from the matrimonial home, giving greater protection to the widow and children of a deceased man. This fulfills Kenya's obligation under the ICCPR to "ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." ICCPR, *supra* p. 174, at art. 23, para. 4. Provisions in the international treaties covering dissolution also include dissolution because of death, as the Human Rights Committee's General Comment 28 makes clear: "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." HRC General Cmt. 28, *supra* p. 182, at para. 26; see also CEDAW, *supra* pp. 177-78, at arts. 16(1)(c), (h), 15(1); CEDAW General Rec. 21, *supra* pp. 182-83, at para. 35; African Charter, *supra* p. 174, at art. 18(3). Because widowers are not evicted by their in-laws at the death of their spouse, but widows are, Kenya has an obligation to enact legislation to protect women in this situation. Nevertheless, the revised section is written so that it protects both widows and widowers, as required by international law.

Second, revised section 45(1) will exempt the surviving spouse who automatically owns the matrimonial home (under section 42A) from the intermeddling prohibition, just as it now does for the person holding a grant of representation. Similarly, section 45(2)(b) will entitle a surviving spouse to the return of the assets or their value in money from anyone who has wrongfully intermeddled with the matrimonial home, just as an executor or administrator is now entitled to that return.

Third, amended section 45(1)-(2)(a) makes it a criminal offense for anyone to evict the family from the matrimonial home or to evict a family from rented property earlier than three months after the man or woman's death or before the end of the lease, if the remaining lease is longer than three months. The concepts in this amendment are taken from Intestate Succession Law, (1985) P.N.D.C.L. 111 § 16A(1) (Ghana), as inserted by Intestate Succession (Amendment) Law, (1991) P.N.D.C.L. 264 § 1 (Ghana) ("No person shall...eject a surviving spouse or child from the matrimonial home— (a) where the matrimonial home is the self-acquired property of the deceased; (b) where the matrimonial home is rented property...."). The term of imprisonment was raised from one year to five years, based on interviews with several Kenyans who believed the jail term should be longer than one year. Several interviewees believed a five-year jail sentence would be appropriate. Interview with Geoffrey S. Birundu, Collector of Stamp Duty, Ministry of Land, in Nairobi, Kenya (Apr. 1, 2008); Interview with Millie Odhiambo Mabona, Nominated Member of Parliament, in Nairobi, Kenya (Apr. 1, 2008); Interview with Cecilia Mbaka, Assistant Commissioner, Ministry of Gender, in Nairobi, Kenya (Apr. 4, 2008). The fine was raised from a maximum of 10,000 shillings to a minimum of 100,000 shillings, based on a suggestion by Claris Ogangah-Onyango, Senior Legal Counsel for FIDA-Kenya, who stated that 10,000 would not be an adequate deterrent. Telephone Interview with Claris Ogangah-Onyango, Senior Legal Counsel, FIDA Kenya, in Nairobi, Kenya (Apr. 30, 2008).

45A. Prohibition of forced or coerced widow inheritance and widow cleansing

(1) No one shall engage in actions or behaviours, including but not limited to, acts of physical violence or unwanted contact, threatening words, harassment,

coercion of any kind, or the destruction of property, in order to force or compel a surviving spouse to undergo widow cleansing or widow inheritance.

(2) Included under the prohibitions of this section are actions or behaviours to force or compel a surviving spouse to cohabit with or marry any person or engage in any sexual act in order to inherit the property of the deceased.

(3) No person shall exchange money or property for widow cleansing services of a sexual nature, and no person shall exchange widow cleansing services of a sexual nature for money or property.

(4) Any person who contravenes the provisions of this section shall be guilty of a criminal offence and liable to a fine of not less than one-hundred thousand shillings or to a term of imprisonment not less than two years or to both such fine and imprisonment.

Section 45A is a proposed new section designed to prevent the practices of forced or coerced widow inheritance and widow cleansing. These practices violate women's right to be free from gender-based violence. Kenya has an obligation under international law to protect women from violence, particularly family and domestic violence. CEDAW General Recommendation 19 states: "Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention." Committee on the Elimination of Discrimination Against Women, General Recommendation 19: Violence Against Women, para. 7, U.N. Doc. A/47/38 at 1 (1993) [hereinafter CEDAW General Rec. 19], available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>. In the Kenyan government's 2006 report to the CEDAW Committee, it specifically recognized "wife inheritance (taking over of women by her husband's relatives upon the husband's death)" as a form of "gender-based violence." While Kenya reported that the National Human Rights Commission was taking steps in one province to "discourag[e] the negative practise of widow inheritance," it reported no legislative action to ban the practice. Kenya 2006 CEDAW Report, *supra* p. 191, at paras. 132, 62. CEDAW's General Recommendation No. 19, however, specifically requires such action: "States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including;[e]ffective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family; ." CEDAW General Rec. 19, at para. 24(t)(i). *See also* Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, at art. 4(c)-(d), U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993)(DEVAW), available at <http://www2.ohchr.org/english/law/eliminationvaw.htm> ("States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: ... (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons; (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence....").

The Human Rights Committee has specifically condemned widow inheritance. “The right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status. This right . . . implies that women may not be treated as objects to be given, together with the property of the deceased husband, to his family.” HRC General Cmt. 28, *supra* p. 182, at para. 19.

Proposed section 45A (1)(a) borrows ideas from Kenya’s African Christian Marriage and Divorce Act, which protects Christian women from widow inheritance. *See* The African Christian Marriage and Divorce Act, Cap. 151 § 13 (Kenya) (which states that a widow “shall not be bound to cohabit with the brother or any other relative of her deceased husband or any other person or to be at the disposal of such brother or other relative or other person . . .”). This language, however, gives protection only to African Christians, which discriminates on the basis of race and religion. Therefore, this law violates international law, which prohibits discrimination on the basis of race and religion. *See* ICCPR, *supra* p. 174, art. 26 (“[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . race, colour . . . [or] religion . . .”); African Charter, *supra* p. 174, arts. 3, 2 (“Every individual shall be equal before the law . . . [and] entitled to equal protection of the law” without “distinction of any kind such as race, . . . religion . . .”). By extending the protection to all Kenyan widows, section 45A ends this discrimination.

46. Duties of officers in relation to protection, etc., of deceased’s property

(1) Whenever it becomes known to any police officer or administrative officer that any person has died, he or she shall, unless aware that a report has already been made, forthwith report the fact of the death to the assistant chief of the sub-location or to the chief or administrative officer of the area where the deceased had his or her last known place of residence.

(2) Any person to whom a report is made under subsection (1) shall -

(a) at the request of any person who appears to have a legitimate interest in the estate of the deceased; or

(b) if no application for representation in respect of the estate has been made within one month after the date of the death of the deceased,

forthwith proceed to the last known place of residence of the deceased and take all necessary steps for the protection of his or her free property found there, for ascertainment of his or her other free properties (if any), for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of his or her estate, and for the guidance of prospective executors or administrators as to formalities and duties:

Provided that if the last known place of residence of the deceased is situated in a municipality, or when the deceased dies outside Kenya wherever his or her property is situated, the person to whom a report is made under subsection (1) shall not take the action which he or she is required to take under this subsection unless and until he or she has first reported the death to the Public Trustee, who may if he or she so wishes himself take the action instead of that person.

(3) If any person to whom a report is made under subsection (1) finds that there is any free property of the deceased, or that the person appearing to have the greatest legitimate interest in succession to or administration of his or her estate is resident in any other sublocation or area, he or she shall forthwith report those facts to the assistant chief, chief or administrative officer of that other sublocation or area, who shall thereupon take, in respect of the property or persons, the steps prescribed by subsection (2).

(4) An assistant chief, chief or administrative officer becoming aware that there is in his or her sublocation or area any free property of a deceased person, or that there are resident in his or her sublocation or area any persons appearing to have the greatest legitimate interest in succession to or administration of the estate of a deceased person, but that no grant of representation in respect of that estate has yet been made, shall, at the request of any person who appears to have any legitimate interest in that estate, and without waiting for a report under this section, forthwith take, in respect of the property or persons, the steps prescribed by subsection (2).

(5) A person who is required to take the steps referred to in subsection (2)-
(a) shall forthwith report to the Public Trustee the death of the person concerned; and

(b) notify the Public Trustee of the steps taken by him or her pursuant to that subsection.

(6) “Any assistant chief, chief, or administrative officer to whom a report is made under subsection (2) shall-

(a) Ensure that all persons who appear to have a legitimate interest in the estate of the deceased receive all accurate and necessary information to redeem any legal claims they may have in the estate of the deceased.

(b) Ensure that such information and all forms are written in simple English or the relevant local language if necessary and that they include:

(i) Accurate information on the state of Kenyan intestacy law, including especially

(A) the rights of widows and daughters to inherit property and to remain in the matrimonial home equally with widowers and sons under sections 27, 32, 34, 35, 36, 38, 40, 41, and 42A of this Act,

(B) the fact that surviving spouses automatically acquire ownership of the matrimonial home or continuing right to rent the home, as the case may be, pursuant to section 42A,

(C) the right of widows and children not to be subjected to eviction under section 45, and of widows not to be subjected to widow cleansing or widow inheritance under section 45A, and of widows’ right to administer the estate under section 66(1) and 66(4).

(ii) The location of a magistrate court, resident magistrate court, high court, or other office where petitions related to intestate claims can be submitted;

(iii) The contact information for an advocate or non-governmental organization that provides free legal assistance to indigent persons;

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(iv) All forms necessary to make a claim for grant of representation or any other necessary petition.

(v) All forms or other information necessary to enable the surviving spouse to register the matrimonial home in his or her name.

(c) The administrative officer or other person providing this information shall ensure that the interested parties are able to read and understand the information required by paragraph (b) of subsection (6), and shall also review that information orally with such parties. If the interested party is unable to read, the administrative officer or other person shall communicate this information orally and shall also leave a copy of the written information.

(d) Any assistant chief, chief, or administrative officer to whom a report is made under subsection (2) who negligently fails to provide this information accurately to all apparently interested parties shall be subject to a fine of not less than one-half of one month's salary."

Section 46(6) is a new section intended to ensure that administrative officers, assistant chiefs, and chiefs inform the deceased's family members of their legal rights, in a language that they can understand. Under current section 46(1), the police and administrators already must make a report on the death of the deceased. Under current section 46(2), the assistant chief, chief, or administrative officer to whom this report is made must then go to the residence of the deceased to protect his or her property, find out what other property there is and who may be potentially interested in the estate, and let potential executors and administrators know their legal duties and what the formalities are. The proposed new section 46(6) extends this obligation to cover other basic legal information as well. Widows and daughters should know their rights to receive the same inheritance shares that widowers and sons would receive. Widows need to know their right to remain in the matrimonial home and that they own the matrimonial home without taking further steps. They must also know their right to be free from eviction, widow cleansing, and widow inheritance. The section imposes a fine with a negligence standard to ensure that administrative officers take this duty seriously.

This new provision is necessary to ensure that women have the knowledge necessary to redeem claims under the Intestate Succession Act. International law requires legal rights that exist not only on paper, but in practice. It requires that States "ensure" people's rights and that the protection of such rights must be "effective." Thus, under ICCPR article 26, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...sex...or other status." [Emphasis added]. Similarly, article 2(1) requires that a ratifying State "ensure to all individuals" all ICCPR rights without distinction based on sex or other status, and article 2(2) that the "State adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." [Emphasis added.] See also CEDAW, supra pp. 177-78, at art. 2 (a) (requiring the "practical realization" of equality); art. 2(c) (requiring "effective protection of women" against discrimination). If a widow does not know her rights she can hardly assert them. The proposed new section 46(6) ensures that every widow (and widower) will receive all the information she needs to assert her

rights to equal protection of the law and equal treatment in matters of inheritance. Widowers will have the same rights, of course.

In Kenya, widespread ignorance of legal rights leads to rampant discrimination on matters of inheritance; the vast majority of poor women in rural Kenya are unaware of formal inheritance laws. Interview with Beatrice Wamalwa, FIDA-K client, in Nairobi, Kenya on Apr. 2, 2008. This kind of persistent abuse of rights requires Kenya to take steps to address this problem. The Human Rights Committee has stated, “[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities.... There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts... .” [Emphasis added]. Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>. See also CEDAW, *supra* pp. 177-78, art. 2(e)-(f) (requiring “all appropriate measures” against discrimination “by any person, organization or enterprise” and for the abolition of sex-discriminatory “existing laws, regulations, customs and practices”).

47. Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by magistrates or resident magistrates appointed by the Chief Justice.

48. Jurisdiction of magistrates

(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate or resident magistrate shall have jurisdiction to entertain any application ~~other than an application under section 76~~ and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate, ~~the gross value of which does not exceed one hundred thousand shillings.~~

~~Provided that for the purpose of this section in any place where both the High Court and a resident Magistrate Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this act.~~

The proposed modifications to sections 47 and 48(1) expand the jurisdiction of magistrate courts and add magistrates who are not resident magistrates to the courts which may hear matters under this Act. Several interviews with judicial officials indicate that high courts impose far greater costs on women trying to pursue inheritance claims than magistrate courts, and magistrate courts are capable of handling these matters on their own. Interview with judicial officials in Nairobi,

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Kenya, on Apr. 2, 2008. This change will make the legal system cheaper and more efficient for poor people in Kenya. It will also provide them with access to courts that are closer to home.

~~(2) For the avoidance of doubt it is hereby declared that the Kadhi's courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates:~~

(2) The Kadhi's courts shall have and exercise jurisdiction, in relation to the estate of a deceased person whose valid will under Part II on Wills requires that Muslim Law govern the distribution of his or her estate, for the determination of questions relating to the distribution of the deceased's property in accordance with Muslim law. With respect to such estates, a magistrate, resident magistrate, and High Court shall continue to have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate, except for the determination of questions relating to the distribution of property under Muslim Law.

49. Territorial jurisdiction of magistrates

~~The magistrate or resident magistrate within whose area a deceased person had his or her last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48:~~

Provided that-

(i) the magistrate or resident magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other magistrate or resident magistrate where it appears that the greater part of the estate is situated within the area of that other magistrate or that there is other good reason for the transfer;

(ii) if the deceased had his or her last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section;

(iii) every magistrate or resident magistrate shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation limited to collection of assets situated within his or her area and payments of debts, regardless of the last known place of residence of the deceased.

50. Appeals to High Court and Court of Appeals

(1) An appeal shall lie to the High Court in respect of any order or decree made by a magistrate or resident magistrate in respect of any estate ~~and the decision of the High Court there shall be final,~~ and to the Court of Appeals from the High Court.

~~(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.~~

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the distribution of the estate of a deceased person

whose valid will under Part II on Wills requires that Muslim Law govern the distribution of his or her estate and, in respect of any such point of Muslim law, to the Court of Appeal, upon the prior leave thereof.

50A. Power to make rules

The Chief Justice may in consultation with the Chief Kadhi, make rules of court for the better carrying into effect in relation to the estates deceased Muslims of the provisions of sections 47, 48, 49 and 50 and, in particular regulating the exercise of the jurisdiction conferred by this Act.

The Chief Justice may, in consultation with the Chief Kadhi, make rules of court for the better carrying into effect in relation to the estate of a deceased person whose valid will under Part II on Wills requires that Muslim Law govern the distribution of his or her estate, in particular regulating the exercise of the jurisdiction conferred by this Act for Kadhi's courts to determine the distribution of property under Muslim law.

The proposed amendments to sections 48(2), 50(2), and 50A permit Kadhi's courts to govern the distribution of property under Muslim law whenever there is a valid will providing for this use of Muslim law. The amendments conform this jurisdiction to match the amendments to sections 2(3) and 2(4), which require the application of Muslim Law only in the distribution of property pursuant to a valid will under Part II on Wills stating the intent of the deceased that his or her property is to be distributed in accordance with Muslim law. The estates of Muslims who choose not to write wills or whose wills do not dictate that Muslim Law should be followed will be treated in the same manner as the estates of all other Kenyans. These amendments are designed to give Muslims the same choices in matters of succession as all other Kenyans, without discrimination or coercion based on their religion and creed. The beneficiaries of Muslims who choose to write valid wills that require the use of Muslim succession laws on the distribution of property will continue to have access to the Kadhi's courts and the expertise of the Kadhis.

Application for Grant

51. Application for grant

(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to -

- (a) the full names of the deceased;
- (b) the date and place of his or her death;
- (c) his or her last known place of residence;
- (d) the relationship (if any) of the applicant to the deceased;
- (e) whether or not the deceased left a valid will;
- (f) the present addresses of any executors appointed by any such valid will;
- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- (h) a full inventory of all the assets and liabilities of the deceased; and

- (i) such other matters as may be prescribed.
- (3) Where it is alleged in an application that the deceased left a valid will -
 - (a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either -
 - (i) an authenticated copy thereof shall be so annexed; or
 - (ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;
 - (b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.
- (4) No omission of any information from an application shall affect the power of the court to entertain the application.

(5) For avoidance of doubt, a person is not required to receive a grant of representation in order to acquire ownership of the matrimonial home, as subsection 42A (4) provides.

52. Wilful and reckless statements in application for grant

Any person who, in an application for representation, willfully or recklessly makes a statement which is false in any material particular shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings ~~or~~ and to a term of imprisonment not exceeding one year ~~or to both such fine and imprisonment.~~

Forms and Grants

53. Forms of grant

A court may-

- (a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either-
 - (i) probate of the will to one or more of the executors named therein; or
 - (ii) if there is no proving executor, letters of administration with the will annexed;
- (b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.

54. Limited grants

A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule.

55. No distribution of capital before confirmation of grant

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution before the grant of representation is confirmed of the surviving

spouse's automatic ownership or rental or use rights as provided for by sections 42A and 32(3)-(4).

(2) (3) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.

(4) The restriction on distribution under subsection (1) does not apply to distribution of assets necessary for the maintenance of dependant family members or the payment of school fees.

(5) No court shall require the payment of any court fees, transfer fees, or any other forms of payment in an application for distribution of assets under subsections (2)-(4).

The high costs imposed by lawyers' fees and bribes to local courts and administrators are also cited as a deterrent in making succession claims. HUMAN RIGHTS WATCH, *DOUBLE STANDARDS: WOMEN'S PROPERTY RIGHTS VIOLATIONS IN KENYA* 41 (Mar. 2003), available at <http://www.hrw.org/sites/default/files/reports/kenya0303.pdf>. Court fees for Succession Act cases, including filing and disbursement fees, also pose obstacles. Proposed new section 55(2)-(4) does away with many of these fees. Fees on succession claims effectively amount to an extremely regressive form of an inheritance tax. If the government feels that it absolutely must raise some revenue in the succession process, a far more equitable way to do so would be in the form of an inheritance tax.

Persons Entitled to a Grant

56. No grant to certain persons

(1) No grant of representation shall be made -

- (a) to any person who is a minor, or of unsound mind, or bankrupt; or
- (b) to more than four persons in respect of the same property.

(2) No grant of letters of administration, with or without the will annexed, shall be made to a body corporate other than the Public Trustee or a trust corporation.

57. Grant to body corporate

No grant of representation shall be made to a syndic or nominee on behalf of a body corporate:

Provided that, where a body corporate applies for a grant of probate or (in the case of a trust corporation) letters of administration, the application may be signed, and any necessary affidavits may be sworn, by an officer authorised in that behalf by the body corporate or the directors or governing body thereof.

58. Number of administrators where there is a continuing trust

(1) Where a continuing trust arises -

(a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is a surviving spouse or the parent of a minor child or where that person is the pPublic Trustee or of a Trust Corporation.

(b) no grant of letters of administration with the will annexed shall be made to one person alone except where-

(i) that person is the Public Trustee or a Trust Corporation, or

(ii) in the will the testator has appointed one or more trustees for the continuing trust who are willing and able to act, or

(iii) in the will the testator has appointed his or her surviving spouse as the executor.

(2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion, except that the court shall not be required to appoint an additional administrator where there is a surviving spouse who is not ineligible under section 66(1)(a) or (b) and where the continuing trust is for his or her children.

These amendments to section 58 are necessary to give effect to the new section 66, which provides that the surviving spouse will, in most cases, be automatically named the administrator of the estate of a person who died intestate.

59. Renunciation of executorship

A person who has been appointed by a will as an executor thereof may, either by oral declaration before the court or by writing under his or her hand, renounce executorship, and shall thereafter be finally precluded from applying for grant of probate of that will.

60. Probate where there are several executors

When several executors are appointed, probate may be granted to them all simultaneously, or at different times.

61. Discovery of codicil after grant of probate

(1) If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

(2) If different executors are appointed by the codicil, the probate of the will shall be revoked, and a new probate granted of the will and the codicil together.

62. No grant of administration until citation issued to executor

When a person who has been appointed by a will is as an executor thereof has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to renounce his or her executorship or apply for a grant of probate of the will:

Provided that-

(i) when one or more of several executors have proved a will, the court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved; and

(ii) there may be such limited grants of letters of administration in accordance with the provisions of section 54 as may, in the opinion of the court, be necessitated by any special circumstances.

63. Grant of administration to universal or residuary legatee

When a deceased has made a will, but -

(a) he or she has not appointed an executor; or

(b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate thereof; or

(c) all proving executors have died before completing administration of all the property to which the will applies,

a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him or her of the whole estate, or of so much thereof as may be un-administered.

64. Right to administration of representative of deceased residuary legatee

When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his or her representative shall have the same right to administration with the will annexed as the residuary legatee.

65. Grant of administration where no executor nor residuary legatee nor representative of legatee

When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he or she had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him, her, or them accordingly.

66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

66. Spouse is automatically administrator of deceased's estate where deceased died intestate and preference to be given to certain persons to administer in other situations

(1) Subject to subsection 66(3) below, when the deceased has died intestate and left one surviving spouse, the surviving spouse shall be automatically named administrator of the estate, unless another party proves to the court's satisfaction, based on reliable evidence and beyond a reasonable doubt, that:

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(a) the surviving spouse is unable to administer the estate for the reasons specified in section 56(1)(a), or

(b) the surviving spouse is unwilling to administer the estate and no other person has coerced him or her to make that choice.

(2) If the deceased has left minor children, the court may exercise its discretion to appoint a co-administrator of the estate to represent the interests of the children, but only if another party proves to the court's satisfaction, based on reliable evidence and beyond a reasonable doubt, that the surviving spouse, based on that person's past conduct, is unlikely to administer the decedent's estate for the best interests of the child or children.

(3) When the minor children of the deceased are entitled to a share of the matrimonial home pursuant to sections 38 and 40(3)-(4) of this Act, the magistrate or judge hearing the case shall appoint a person as administrator who the court determines, based on reliable evidence and beyond a reasonable doubt, will act impartially in the best interests of all heirs.

(4) When the deceased has died intestate and has left more than one surviving spouse, each surviving spouse shall be the administrator of the matrimonial home, or of her respective proportion of a joint home (where there is more than one wife living there), and of all associated personal and household effects, that she shared with the deceased. For the administration of all other property, the magistrate or judge hearing the case shall appoint a person or persons as administrator who the court determines, based on reliable evidence and beyond a reasonable doubt, will act impartially in the best interests of all heirs.

(5) When the deceased has died intestate and has left no surviving spouse, the court shall, except as otherwise expressly provided, grant letters of administration, using the following general guide as an order of preference:

~~(b)~~ (a) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

~~(c)~~ (b) the Public Trustee; and

~~(d)~~ (c) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

The proposed modifications to section 66 create a presumption that spouses will be automatic administrators of their deceased spouses' estates, either of the whole estate for a sole surviving spouse, or of the matrimonial home and personal and household effects where there is more than one surviving spouse. This accords with the fact that proposed sections 35(1) and (3), 36, and 40(1)-(2) and (5), and 42A make the surviving spouse the automatic owner of the home (with limited exceptions in section 40(3)-(4)). The change is necessary because local custom still largely governs matters of succession, despite the Law of Succession Act; therefore, if the widow is not the administrator of her husband's estate, her property could be taken from her under customary law. Some courts still tend to interpret the Law of Succession Act conservatively, so it is unclear whether or not they would use their discretion to follow the guidelines in the current section 66 giving surviving

spouses preference in administration. See THE CENTER FOR REPRODUCTIVE LAW AND POLICY AND INTERNATIONAL REFERRATION OF WOMEN LAYWERS (KENYA CHAPTER) (F.I.D.A.-K), *WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGOLOPHONE AFRICA* 67 (1997), available at <http://www.reproductiverights.org/pdf/WOWAAo4.pdf>, citing Estate of Njeru Kamanga, Succession Case No. 98 of 1991 (Maina 1992) (magistrate court ruling that disinherited daughters because they were married, despite Succession Act sections giving all children equal shares; see Succession Act current sections 35(5), 38, 40(2), and 41)). See also MINISTRY OF GENDER, SPORTS, CULTURE AND SOCIAL SERVICES, NATIONAL GENDER AND DEVELOPMENT POLICY 14 (Nov. 2000) (Kenya), calling for “review of laws that hinder women’s access to and control over economic resources . . . [and] gender sensitization. . . .” If a widow is automatically made the administrator of her husband’s estate and is educated on the provisions of the Law of Succession Act, this problem would be largely alleviated, because she would then be both owner and administrator of the matrimonial home and other property.

Procedure on Grants

67. Notice of application for grant

(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

(2) A notice under subsection (1) shall be exhibited conspicuously in the court house, and also published in such other manner as the court directs.

68. Objections to application

(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow.

(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

69. Procedure after notice and objections

(1) Where a notice of objection has been lodged under subsection (1) of section 68, but no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.

70. Powers of courts

Whether or not there is a dispute as to the grant,

(1) a court may, before making a grant of representation -

(a) examine any applicant on oath or affirmation; or

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(b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or

(c) issue a special, citation to any person appearing to have reason to object to the application.; and

(2) a court shall, before making a grant of representation -

(a) ensure that any surviving spouse appears before the court and is notified in person of his or her right to act as administrator; and

(b) provide simplified forms and information to assist such spouse in the process of administering the estate with or without an advocate; and

(c) notify such spouse of her or his ownership and/or use rights in the estate and of the Act's protections against eviction, widow inheritance, and widow cleansing, using the information and forms required by section 46(6).

Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may -

(a) if it is satisfied that the grant was rightly made to the applicant, and that he or she is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his or her hands or under his or her control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case;

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; ~~and w.~~ In order to satisfy itself of this information, the court shall contact the relevant assistant chief, chief, or administrative official described in section 46(6) and require that person to provide the information about the identities of all such persons. When confirmed the grant shall specify all such persons and their respective shares.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as admin-

istrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

(3) Subject to this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that -

(a) there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case,

immediately issue a confirmed grant of representation.

(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that -

(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case,

immediately issue a confirmed grant of representation.

72. Grants not to be confirmed in certain circumstances

No grant of representation shall be confirmed until the court -

(a) is satisfied that no application under Part III is pending; and

(b) has received a certificate from the Estate Duty Commissioner that he or she is satisfied that all estate duty payable in respect of the estate concerned has been or will be paid, or that no estate duty is payable in respect thereof; or

(c) is itself satisfied that no estate duty is payable in respect of the estate concerned.

73. Duty of court to give notice to holder of grant to apply for confirmation

The court shall, within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.

Alteration and Revocation of Grants

74. Errors may be rectified by court

Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

75. Procedure where codicil discovered after grant

If, after the grant of letters of administration with the will annexed or after confirmation thereof, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

75A. Continuing trust arising

(1) If, after confirmation of the grant of letters of administration at any time there is a continuing trust and only one surviving administrator, that administrator

shall without delay apply to the court to appoint, subject to section 66, as administrators jointly with him or her not less than one or more than three persons as proposed by him or her, which failing as chosen by the court of its own motion.

(2) If a sole surviving administrator fails to apply to the court in accordance with subsection (1) within three months of there being a continuing trust and only one surviving administrator, on the application of any interested party in, or a creditor or debtor of the estate or of its own motion, the court may appoint additional administrators in accordance with subsection (1) and subject to section 66.

76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

Sealing of Commonwealth and Foreign Grants

77. Sealing of Commonwealth and foreign grants

(1) Where a court or other authority, having jurisdiction in matters of probate or administration in any Commonwealth country or in any other foreign country designated by the Minister by notice in the Gazette, has, either before or after the commencement of this Act, granted probate or letters of administration, or ~~an~~ an equivalent thereof, in respect of the estate of a deceased person, that grant may, on being produced to, and a copy thereof deposited with, the High Court, be sealed with the seal of that court, and thereupon shall be of the same force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.

(2) Before sealing a grant under subsection (1) the High Court -

(a) shall satisfy itself as to the payment of estate duty as provided by section 72;

(b) may require such evidence as it thinks fit concerning the domicile of the deceased person;

(c) may, on the application of any creditor of the estate, require that adequate security be given for the payment of debts due from the estate to creditors residing in Kenya.

78. Duplicate or copy of foreign grant to have same effect as original

For the purposes of this Act, a duplicate of any grant sealed with the seal of a court or other authority in a Commonwealth or foreign country, or a copy thereof certified as correct by or duly on behalf of, that court or authority, shall have the same effect as the original.

Powers and Duties of Personal Representatives

79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him or her as personal representative.

80. When grant takes effect

(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his ~~or~~ their duties as such.

(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.

81. Powers and duties of personal representatives to vest in survivor on death of one of them

Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, subject to section 66, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him or her.

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his or her death for his or her estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his or her estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation:

Provided that, except so far as otherwise expressly provided by any will-

(i) no application shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his or her consent, nor for the purpose of a continuing trust without the consent of either the trustee or trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind in which case consent on his or her behalf by his or her parent or guardian (if any) or by the manager of his or her estate (if any) or by the court shall be required.

83. Duties of personal representatives

Personal representatives shall have the following duties -

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him or her;

(b) to get in all free property of the deceased, including debts owing to him or her and moneys payable to his or her personal representatives by reason of his or her death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his or her debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and ~~if required by the court, either of its own motion or on the application of any interested party in the estate,~~ to produce to the court a full and accurate account of the completed administration.

84. Personal representatives to act as trustees in certain cases

Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of the trust, be the trustees thereof:

Provided that, where valid ~~polygamous~~ polygynous marriages of the deceased person have resulted in ~~the that person leaving more than one surviving spouse creation of more than one house,~~ the court may at the time of confirmation of the grant appoint separate trustees of the residue estate property passing to each or any of those surviving spouses and children ~~houses~~ as provided by section 40, except that the court shall respect the automatic grant of representation to each surviving spouse with respect to each wife's matrimonial home and the personal and household effects as required in section 66.

85. Assent necessary to complete legatee's title

(1) The assent of the executor shall be necessary to complete the title of the legatee to a specific legacy.

(2) Assent may be verbal, and either express or implied from the conduct of the executor, and shall be sufficient to divest his or her interest as executor therein, and (subject to any registration required by any other written law) to transfer the subject of the bequest to the legatee.

(3) When the executor is a legatee his or her assent to his or her own specific legacy shall be necessary to complete his or her title thereto as legatee.

(4) The assent of the executor to a specific legacy shall give effect thereto from the death of the testator.

86. Debts to be paid before legacies

Debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy.

87. Personal representatives not bound to pay legacies without indemnity

If an estate is subject to any contingent liabilities, a personal representative shall not be bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

88. Abatement and refunding of legacies

Legacies shall abate and be refunded according to the provisions of the Sixth Schedule.

89. Insolvent estates

(1) Where an application for a grant of probate or letters of administration shows by the inventory therein that the estate the subject thereof will, after payment of funeral and other expenses, be insolvent, the court shall of its own motion order the administration of that estate in bankruptcy as provided by section 121 of the Bankruptcy Act.

(2) If and so soon as any personal representative knows or has reason to believe that the estate in respect of which probate or letters of administration have been granted to him or her will prove to be insolvent, he or she shall forthwith petition for administration thereof in bankruptcy.

(3) This section shall have effect notwithstanding anything contained in the Bankruptcy Act.

90. Investment of funds to provide for legacies and interest on legacies

Personal representatives shall invest funds to provide for legacies in the manner and according to the provisions set out in the Seventh Schedule; and legacies shall carry interest in accordance with those provisions.

91. Transfer of assets from Kenya to personal representatives in country of domicile for distribution

Where a person not having his or her domicile in Kenya has died leaving assets both in Kenya and in the country in which he or she had his or her domicile at the time of his or her death, and there has been a grant of representation in Kenya with respect to the assets there, and a grant of representation in the country of domicile with respect to the assets in that country, the personal representatives in Kenya, after having given such notices as are required by paragraph 5 of the Sixth Schedule and after having discharged, at the expiration of the time therein named, such lawful claims as have come to their notice, may, instead of themselves distributing any surplus or residue of the deceased's property to persons residing out of Kenya who are entitled thereto, transfer, with the consent of the personal representatives in the country of domicile, the surplus or residue to those personal representatives for distribution to those persons.

92. Protection of persons acting on representation

(1) Any person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.

(2) Where a grant of representation is revoked or varied, payments and dispositions made in good faith to a personal representative under that grant before the revocation or variation thereof shall be a valid discharge to the person making them, and a personal representative who has acted under the revoked or varied grant may retain and reimburse himself in respect of any payment made by him or her which any other person to whom representation is afterwards granted might have properly made:

Provided that a personal representative who so acted shall account for all payments, dispositions, retentions or reimbursements made by him or her to the person or person to whom representation is afterwards granted.

93. Validity of transfer not affected by revocation of representation

(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.

94. Neglect or misapplication of assets by personal representatives

When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him or her, or misapplies any such asset, or subjects it to loss or damage, he or she shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

95. Offences by personal representatives

(1) Any personal representative who, as regards the estate in respect of which representation has been granted to him or her—

(a) wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage; or

(b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e), ~~and (g), and (i)~~ of section 83; or

(c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or

(d) knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy, shall be guilty of an offence, and shall be liable to a fine not exceeding five hundred ten thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.

(2) Any personal representative who, as regards the estate in respect of which representation has been granted to him if at any time there is a continuing trust and he is the sole surviving administrator, wilfully fails to apply to the court within three months in accordance with section 75A for the appointment of further administrators shall be guilty of an offence and shall be liable to a fine not exceeding five shillings.

PART VIII

Miscellaneous

96. Sane murderer not to share in victim's estate

(1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

(2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.

97. Rules

(1) The Rules Committee may make rules of procedure generally for the carrying out of the purposes and provisions of this Act and, without prejudice to the foregoing generality, rules of procedure may prescribe—

(a) the procedure to be followed by a court in determining applications under section 26 ~~or subsection (3) of section 35~~;

(b) the procedure to be followed by a court in granting probate or letters of administration;

(c) the procedure to be followed in the case of a dispute as to a grant;

(d) the form and manner in which applications under section 26 ~~and subsection (3) of section 35~~ and applications for grants are to be made, grants are to be issued, grants are to be limited, notices are to be given, or inventories or accounts are to be produced;

(e) the information and simplified forms required by sections 46(6) and 70(2), and permission for advocates and representatives from non-governmental organizations that provide free legal assistance to assist a person to fill out the forms upon request;

~~(f) the fees to be paid on an application or grant, or on any other procedure related thereto, and for their waiver for indigent persons.~~

(2) The Rules Committee shall ensure that its rules apply equally to men and women.

98. Transitional

Any proceedings commenced under any written law or part thereof repealed by this Act shall, so far as practicable be continued under this Act.

99. Repeal

The laws set out in the Eighth Schedule are repealed.

100. Amendments

The Acts set out in the first column of the Ninth Schedule are amended, in relation to the provisions thereof specified in the second column of that Schedule, in the manner specified in relation thereto in the third column of that Schedule.

101. Saving

Except as otherwise expressly provided in this Act, nothing therein shall affect the provisions of -

(a) the Trustee Act;

(b) the Public Trustee Act;

(c) the Trusts of Land Act;

(d) sections 218 to 222 of the Armed Forces Act concerning estates of deceased soldiers.

102. Inflation

The Minister, by issuance of an order, shall annually increase the monetary amounts referenced in Sections 3, 35, 40, 45, 45A, 52, and 95 as necessary to ensure that the amounts reflect the rate of currency inflation that occurred in the previous year for the purpose of maintaining the true value each year of the amounts that were enacted in [year of enactment].