BRINGING EQUALITY HOME

PROMOTING AND PROTECTING THE INHERITANCE RIGHTS OF WOMEN

A SURVEY OF LAW AND PRACTICE IN SUB-SAHARAN AFRICA

CENTRE ON HOUSING RIGHTS AND EVICTIONS

GENEVA, SWITZERLAND
Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: 
A Survey of Law and Practice in Sub-Saharan Africa

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Copies are available from:

COHRE
83 Rue de Montbrillant
1202 Geneva
Switzerland
Tel: +41.22.734.1028
Fax: +41.22.733.8336
Email: cohre@cohre.org
http://www.cohre.org

Written and prepared by: Birte Scholz and Mayra Gomez
Special thanks to: Carla Zepeda (research), Alla Kouirina (translation) and Janet Walsh (review)
Edited by: Rob Stuart
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Very special thanks to all the women who shared their experiences and knowledge. This publication is dedicated to them.
**IS IT A FAULT?**

The world has so much variety  
And that is the source of its beauty.

If men and women coexist  
And live in harmony  
Nature will be in perfect balance  
What has been glaring for centuries  
Is its absence

To be born a woman  
Is it a fault?  
Who knows the patience I lost?  
My sisters and brothers  
Who feels the sacrifices  
I paid in every walk of life?

Is it a fault to be a woman?  
Was I born by choice?  
Please, listen to my voice  
To the cry of misery  
To the tears of a century

To me the world is unfair.  
I am in despair.  
My cries amounted to nothing  
But hot air.

Let me stop and rethink  
To sort out this thing  
I am born a woman  
But still I am human.

Being a woman is not a fault  
Let me get up and act

Being a woman is mighty fine  
Get up sisters!  
Do not be slaves to tradition  
Get up, act, and break the chain  
Act, let your genius shine!!

*Recited by the author in honour of women denied their inheritance rights, during the closing ceremony of the COHRE Workshop ‘Inheritance Rights are Human Rights’, Johannesburg, South Africa, 23 January 2004.*
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Member organisations of the Network for Inheritance Rights of Women in Africa (NIRWA)
For over a decade, the Centre on Housing Rights and Evictions (COHRE) has been campaigning to realise the human right to adequate housing for everyone, everywhere. Through our advocacy efforts, we have come to recognise that taking a gender-neutral approach to housing and housing rights does not always ensure that women’s specific needs, concerns and rights with respect to housing are properly understood, addressed and championed. COHRE has therefore adopted a gender perspective in its housing rights work, taking into account that the impacts of housing rights violations experienced by women are often quite different and more severe than those experienced by men.

Women’s human rights to land and adequate housing are systematically denied — the majority of the well over one billion inadequately housed persons in the world are women. Yet the most blatant gender-specific violation of such rights is the denial of women’s rights to own and inherit housing, land and property. Women throughout the world, after the death of a husband or father, are denied these basic rights and deprived of their homes and lands. The effects are devastating: destitution and homelessness, increased vulnerability to HIV/AIDS infection, physical violence, and other grave violations of women’s fundamental human rights.

In this report, the COHRE Women and Housing Rights Programme (WHRP) documents the tragic reality that, under both statutory and customary law, the overwhelming majority of women in sub-Saharan Africa — regardless of their marital status — cannot own or inherit land, housing and other property in their own right. Instead, in respect of access to land and housing, women are made entirely dependant on their relationship to a male.

As this report demonstrates, issues of women’s inheritance extend far beyond the crucial challenge of establishing the necessary legal frameworks that would allow women to own and inherit property. For in almost all ten sub-Saharan countries examined, the fact that women generally cannot rent, lease, own or inherit land and housing is not just the result of gender-biased statutory law; it is also due to discriminatory customary laws and traditions, as well as social norms and attitudes.

In all the cases addressed in this report, women’s lack of security in the housing sphere stems from entrenched systems of gender discrimination, whether these systems be legal or normative, or a combination thereof. These discriminatory customary laws, traditions and cultural norms only serve to intensify and make more widespread the housing and inheritance rights abuses that are currently being faced by many millions of women in the region.

Inheritance rights are human rights. Under the major international human rights instruments that these sub-Saharan States have ratified, they have clear obligations to respect, protect and fulfil such rights.

Potential solutions to the problem of discrimination against women in the housing and inheritance spheres fall into two main categories:

1. **Administrative and legal reforms** – States should design and revise laws to ensure that women are accorded full and equal rights to adequate housing, and to own land, housing and other property, by means including the upholding and protection of inheritance rights. States should also undertake administrative reforms and other necessary measures to give women the same rights as men to credit, capital and appropriate technologies, as well as access to markets and information.
2. **Active engagement for positive change** – States should actively engage in the transformation of customs and traditions that discriminate against women and deny them security of tenure and equal ownership of, access to and control over land, as well as equal rights to adequate housing and to own housing and other property. In addition, States should ensure the right of women to equal treatment in land and agrarian reform, in land-resettlement schemes, and in ownership of property and access to adequate housing. Furthermore, States should take all other measures that are necessary to promote access to land and housing for disadvantaged women, particularly those who are unable to work for whatever reason, who live in poverty and/or who head households on their own.

The task is daunting, but not impossible. Women’s rights advocacy organisations in Africa are leading the way and making significant progress towards women’s equality. The COHRE Women and Housing Rights Programme (WHRP) is committed to working closely with these local women’s rights groups in a spirit of co-operation and solidarity.

COHRE would like to express its deepest thanks to those organisations that so generously assisted in the production of this report. We hope that it provides useful information on existing practices related to the status of women’s inheritance rights in a variety of countries and cultural contexts.

In addition, we urge all concerned and appropriately placed actors to take account of and act upon the concrete recommendations which we make in various parts of this report, and which are highlighted and listed in Section 5, where COHRE proposes constructive actions aimed at the realisation by all women of their rights to land, adequate housing and, specifically, inheritance of land, housing and other property.

Finally, COHRE wishes to express its sincere thanks to the Netherlands Ministry of Spatial Planning, Housing and the Environment (VROM, Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieu) for its generous support of this project.

Scott Leckie
*Executive Director*
In the world today, approximately 1.5 billion persons are living in homelessness or in housing that is considered to be grossly inadequate, without access to land or proper services. Throughout the world and particularly in developing countries, hundreds of thousands of these ‘housing poor’ find themselves living in slums, without water, electricity or sanitation, squatting in dilapidated apartment buildings, crowded into emergency housing, camping under bridges, or simply on the streets.

Women and girls bear the brunt of this global crisis — a large majority of inadequately housed persons are women and girls, and they grow in number every day.\(^1\)

The denial of the right to adequate housing marginalises women by contributing to their continued poverty and social subjugation. Women, with their multiple burdens of caring for children and other family members, managing the household, obtaining and preparing food, generating income, etc., are particularly badly hit if they have poor or no housing. Lack of security in the housing sphere deprives women of economic autonomy, physical safety and personal dignity. Without adequate housing, women cannot enjoy other fundamental rights, such as the right to privacy, the right to the highest attainable standard of health, and the right to security. Their nutritional and healthcare needs are not given priority, they lack access to education and support services, and their participation in domestic and communal decision-making is minimal.

This reality persists despite the fact that women’s human rights to land and housing are enshrined in dozens of international and regional human rights instruments. Not only do these instruments reaffirm women’s human rights to land and adequate housing; they provide that discrimination against women in respect of having access to, acquiring and securing land, housing and other property, as well as the concomitant denial of women’s right to land, housing and inheritance, constitute clear violations of women’s human rights.

What then, in light of these protections, is the cause of the endemic denial of women’s rights to land, housing and inheritance? The answer is complex. Various systems that directly influence women’s lives — societal, legal, structural and cultural — serve to entrench their subordination. Inadequate legal protection, patriarchal customary norms and traditions, institutional structures, socially manipulated behaviours, culturally mandated relations, entrenched discrimination — all seriously undermine the ability of women to realise their land, housing and inheritance rights.

This report focuses on one area in which the denial of land and housing rights is most blatant — inheritance.

The issue of inheritance is especially vital for women because it relates to the underlying reasons for women’s disproportionately high levels of poverty and housing insecurity in the world today. The feminisation of poverty is growing ever-faster day by day; over the last several years, the number of rural poor women has been increasing twice as fast as the number of rural poor men. Inheritance issues are inextricably interwined with women’s ownership of both land and housing, and therefore with their economic autonomy. Because inheritance rights play such a fundamental role in the transfer of wealth in society, they also directly relate to the protection of women’s right to adequate housing.

\(^1\) http://www.un.org/womenwatch/daw/followup/session/presskit/fs1.htm
Almost every society has predetermined formal laws and informal rules of succession that govern who will receive which share of the deceased person’s property and responsibilities. In principle, laws of succession and inheritance are designed to counteract the disruptive effect of death on the integrity of the family unit. In reality, however, if the law of inheritance is not based upon human rights standards, it often has the opposite effect, effectively robbing widows and girls of their lands and homes, and forcing them into homelessness, destitution and social isolation.

Laws and rules of inheritance and succession are invariably shaped by the society and culture in which they operate. Family structures and the roles they play in society form a very large part of how such laws and rules are formulated and applied. Indeed, inheritance is often viewed as a private matter, which explains the hesitation governments often display in ‘interfering’ with the issue.

In sub-Saharan Africa, inheritance is a vitally important everyday issue. The seemingly unstoppable tragedies of major armed conflict, HIV/AIDS and mounting poverty in many parts of Africa have pushed the widowhood rate up to a full 25 percent of all African women. In some African countries, the figure is much higher: in post-genocide Rwanda, half of all women are widows.

Of course, not all women in sub-Saharan Africa are denied their marital or familial inheritance; nor do all women who are victims of inheritance rights violations just sit idly waiting for their situation to change — they often try to fight the injustice that has befallen them. However, it is sadly true that the prevailing climate of inequality and discrimination against women, as well as an almost systematic denial of their right to access, control and ownership of land and housing, facilitates violations of their inheritance rights with impunity throughout the region. This is because women who are already suffering land and housing insecurity are often truly powerless to act when further rights violations occur. The cumulative effects of these rights denials are often devastating for women.

This extremely harsh reality for women urgently demands that States deal swiftly and adequately with the inheritance issue. Inheritance simply cannot be considered as a private matter, for it is a question of fundamental human rights: States have a clear responsibility towards their own citizens and the international community to ensure that these rights are fulfilled.

This report examines ten sub-Saharan African countries in various parts of the region: Ghana, Nigeria and Senegal in the west; Ethiopia and Rwanda in the east; Botswana, South Africa, Swaziland, Zambia and Zimbabwe in the south.

We review each country’s legislation and administrative policies as they relate to land, housing and, particularly, inheritance rights. This review includes, for example, national constitutions, administration of estates acts, marriage and marital property acts, inheritance and succession laws, and land laws and policies. Case law, where applicable, is also examined. Wherever possible, we also provide an overview of customary law

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2 The terms ‘inheritance’ and ‘succession’ are often used interchangeably, but should be distinguished. Inheritance is the transmission of the right to property such as land and housing, while succession means the transmission of all rights, duties and powers of the deceased, including her/his social position. This report focuses on the issue of inheritance, the transfer of property from one generation to the next. Succession, the transfer of rights and duties as well as property, is discussed incidentally.


4 Note that this report uses the popular term ‘civil law’ generically to denote statutory law, not in its strictly legal sense of a particular legal system in contrast to ‘common law’.
and traditions related to inheritance. We highlight the realities of women’s experience of inheritance rights denial using personal testimony and information from secondary sources. With international human rights as the standard of measurement, we examine the laws and situations in each country and make specific recommendations for the way forward to the respective governments. We request that the governments of the countries in question carefully consider these recommendations.

This legal review and analysis was conducted by the COHRE Women and Housing Rights Programme (WHRP), which complemented its work with a fact-finding mission to South Africa, Zambia and Rwanda in August 2003. During the mission, the COHRE WHRP met with and interviewed representatives and members of various communities, NGOs and government ministries, not only to discuss laws and policies related to inheritance, but also to uncover the reality of women’s experience of inheritance rights — or, sadly, in most cases, their denial.

The information so gathered was corroborated by a COHRE consultative workshop held in Johannesburg, South Africa, in late January 2004, entitled ‘Inheritance Rights Are Human Rights’. The workshop brought together activists from all ten sub-Saharan African countries to discuss inheritance rights in their national contexts – the issues and obstacles, as well as possible strategies and solutions – and to formulate a way forward. The outcome document of this workshop can be found on http://www.cohre.org

This report makes its observations in the knowledge that what is uncovered may not be true for all women in all communities. Clearly, inheritance practices are not uniform, but vary from region to region. Insofar as this report does make generalisations, they are reflective of trends observed directly by concerned women in communities and by the advocates fighting alongside them.

This review is by no means exhaustive, and was not intended to be. Rather, it should be seen as a reference for singling out some of the most important and influential laws and practices on inheritance and exposing the general inheritance rights situation for women in sub-Saharan-Africa in practical terms. This, in turn, should function as a portal into an understanding of the much broader arena of women’s land and housing rights.

This report clearly demonstrates that inheritance rights violations are merely symptomatic of a much larger denial of women’s land and housing rights. The obstacles that prevent women from realising such rights act in disharmonious concert and, thus, cannot be addressed from one particular angle (various angles are examined in Section 4). The search for solutions to the denial and abuse of women’s land and housing rights requires a multi-faceted approach, with internationally accepted human rights standards as the basis.
DENIAL OF RIGHTS TO INHERITANCE, HOUSING AND LAND: MAKING THE CONNECTIONS
1.1 Women’s Rights Are Human Rights

Human rights apply to everyone, everywhere, regardless of sex, race, religion or any other distinction or status. This section examines the foundations for women’s human rights to adequate housing, land and inheritance. In addition, this section exposes the often debilitating consequences that violations of these rights have for women. Although some key legal texts are quoted below, more comprehensive excerpts of the conventions and other documents referred to here may be found in Annex A.

1.1.1 Under International Human Rights Law

The Universal Declaration of Human Rights (UDHR), perhaps the most celebrated international statement of human rights, asserts in Article 2 that:

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.*

Those rights articulated in the Declaration include: the rights to equality before the law and to equal protection; the right to equality with respect to marriage; the right to own property; and the right to an adequate standard of living, including the right to adequate housing. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) elaborate and codify the rights articulated in the UDHR, and also explicitly recognise the right to equality between women and men and the right to non-discrimination.

These rights to equality and non-discrimination have direct implications with regard to women’s access to property and inheritance. General Comment No. 28 of the United Nations Human Rights Committee on Article 3 of the ICCPR (entitled ‘Equality of Rights between Men and Women’) explicitly requires that:

*States parties [to the ICCPR] must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children … 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.*

(Emphasis added.)

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5 Adopted and proclaimed by UN GA Res. 217A (III) of 10 Dec. 1948.
6 UDHR, Art. 7.
7 UDHR, Art. 16.
8 UDHR, Art. 17.
9 UDHR Art. 25. The right to adequate housing is specified in Art. 25(1).
11 See n. 6 above.
12 The UN Human Rights Committee monitors State Party compliance with the ICCPR. General Comments (also called General Recommendations) are issued periodically by all of the UN human rights treaty-monitoring bodies and are widely regarded as authoritative legal interpretations of the rights contained in the respective Covenant or Convention.
13 In other words, divorce must not be granted solely on the grounds that a husband has rejected or disowned his wife, which is still possible in certain States, though a wife cannot obtain a divorce though rejecting her husband.
14 Para. 26, Gen Com 21, adopted by the Committee at its 1834th meeting (sixty-eighth session), on 29 Mar. 2000.
Several other human rights instruments specifically recognise women’s rights to property and inheritance. For example, the Declaration on the Elimination of Discrimination against Women\(^\text{15}\) states in its Article 6 that:

...all appropriate measures, particularly legislative measures, shall be taken to ensure to women, married or unmarried, equal rights with men in the field of civil law, and in particular: (a) The right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage ...

Under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),\(^\text{16}\) the foremost international treaty on gender equality, State Parties agree to take a series of measures to combat discrimination against women.\(^\text{17}\) These measures include (as stipulated in Article 2 of CEDAW):

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(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; and,
(g) To repeal all national penal provisions which constitute discrimination against women.

Much to its credit, CEDAW also recognises that, in many cases, the driving force behind discrimination against women runs deeper than the rule of law. Under Article 5, the Convention requires that State Parties “... 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 ...”. This issue of customs and traditions proves to be highly relevant to inheritance rights.

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15 Proclaimed by General Assembly resolution 2263(XXII) of 7 Nov. 1967.
16 Adopted by UN GA Res. 34/180, of 18 Dec. 1979, entered into force 3 Sept. 1981 To date, CEDAW has been signed by 98 countries and ratified by 175 countries, including the vast majority of sub-Saharan African States (excluding Swaziland).
17 In Jan. 2004, shortly before publication of this report, CEDAW adopted General Recommendation 25, on article 4, paragraph 1, of the CEDAW, on temporary special measures. The Recommendation explains that temporary special measures are to be used to accelerate the improvement of the position of women to achieve equality with men, in all areas of rights. As we will see below, special measures in the form of legislation and/or public education programmes on women’s equality are vital in furthering women’s rights to inheritance, land and housing. COHRE welcomes this new tool in the fight for women’s rights.
With regard to inheritance rights, Article 16 of CEDAW provides that:

*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.*

The United Nations Committee on the Elimination of Discrimination Against Women, the body that monitors State Party compliance with CEDAW, has also issued General Recommendation No. 21 on Equality in Marriage and Family Relations, which states that:

*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.*

The Beijing Declaration and Platform for Action, which was the result of the Fourth World Conference on Women in Beijing, China in 1995, reiterates these concerns and calls upon Governments to: “Undertake legislation and administrative reforms to give women equal rights with men to economic resources, including access to ownership and control over land and other properties, credit, inheritance, natural resources, and appropriate new technology...”

The Istanbul Declaration and Habitat Agenda of 1996 additionally define obligations regarding women’s housing and inheritance rights. The signatory governments committed themselves to:

*(b) Providing legal security of tenure and equal access to land to all people, including women and those living in poverty; and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies.*

The right of women and girls to adequate housing, land and inheritance has been further supported in various resolutions passed at the UN Commission on Human Rights, a standing body of select Member States that examines all human rights issues. Most recently, in a resolution entitled ‘Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing’, the Commission affirmed that discrimination in law against women in relation to the accessing, acquiring and

18 In other words, whether property be given away or be sold.
19 Para. 35, Gen. Rec. 21, adopted by the CEDAW Committee at its thirteenth session (1994).
21 Ibid., para. 63(b).
23 Ibid., para. 40(b).
24 A resolution, while not legally binding per se, indicates a political willingness on the part of a government that has voted for it, to support and work towards the achievement of its content.
securing of housing and land constitutes a violation of the human right to non-discrimination. It therefore urged States to ensure that “women are accorded full and equal rights to own land and other property, and the right to adequate housing, including through the right to inheritance, and to undertake administrative reforms and other necessary measures” to ensure such rights, including the transformation of customs and traditions that discriminate against women.26

1.1.2 Under regional instruments

Regional human rights instruments also protect the rights of women to non-discrimination on the basis of sex and recognise women’s rights to equality before the law. Significantly, they do so by calling upon governments to fulfil their international obligations. Article 2 of the African Charter on Human and Peoples’ Rights27 states that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

The African Charter makes clear that discrimination should be eliminated and integrates international legal standards, for example in Article 18 (3):

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.

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa28 is a vital step towards raising the status of women. The Protocol provides, in Article 16 on the right to adequate housing, that:

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, State Parties shall grant to women, whatever their marital status, access to adequate housing.

Article 16 further states that women should not suffer discrimination due to their marital status.

In addition, the Protocol specifically recognises women’s right to inheritance, and in Article 21 stipulates that:

A widow/widower shall have the right to inherit each other’s property. In the event of death, the surviving spouse has the right, whatever the matrimonial regime, to continue living in the matrimonial house.

26 Ibid., paras. 3-5.
27 The African Charter came into force on 21 Oct. 1986 and has been ratified by all Member States of the Organization of African States (now the African Union).
28 The Protocol was adopted in July 2003, and, as of January 2004, had been signed by 21 countries, but not yet ratified by any one country. The Protocol comes into force when 15 countries have ratified it.
Under Article 21, women and girls are also ensured the right to inherit their parents' properties in equal shares with boys.

These articles on inheritance are groundbreaking in that they clearly articulate a free-standing right of women to inherit, outside of the procedural scope of equality and non-discrimination. COHRE eagerly awaits the coming into force of this document, as it will provide much-needed support in the fight for inheritance rights.

Such rights have now also been given a formal system of enforcement. The Optional Protocol to the African Charter on the Creation of an African Court of Human Rights came into force in late 2003, and the Court was established on 25 January 2004. It has the power to consider cases of human rights violations referred to it either by the African Commission on Human and Peoples’ Rights (which was established pursuant to the African Charter), or by State Parties to the Protocol, or, where a State Party accepts such a jurisdiction, by individuals and non-governmental organisations (NGOs). Unlike the African Commission, the Court has the authority to issue a binding and enforceable decision on cases brought before it. This offers a regional mechanism for truly binding states to their Charter obligations, including those related to women’s rights to housing, land and inheritance.

1.1.3 Housing as a human right

It is vital that we use the human right to adequate housing as a tool to enforce women’s rights to equal inheritance of housing and land, for not only does it address inadequate housing; by its very nature, it encompasses many other rights, such as the right to be free from discrimination, the right to equality and the right to self-determination.

The fact is that women, just like men, have housing needs – including efficient services, water, sanitation and safety – that must be met if they are to live in security, peace and dignity. But to view these solely as physical needs would be to underestimate the importance of housing in people’s day-to-day lives, and to undermine the notion of the essential human dignity that human rights ideals are meant to uphold and protect.

This becomes even more evident when we realise that housing rights refer not only to the physical manifestation of a structure called the ‘home’, but also embrace procedural, remedial, security-related and other non-material aspects. In many respects, these are more fundamental than the material issue of housing availability and adequacy. In 1991, the Committee on Economic, Social and Cultural Rights, the body that monitors States’ compliance with the Covenant on Economic, Social and Cultural Rights, established a clear definition of the right to adequate housing in its General Comment No. 4.29

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29 General Comment No. 4, adopted by the Committee at its sixth session (1991), contained in document E/1992/23. Through its General Comments, the Committee gives guidance to governments on the substantive content of particular rights, State obligations in respect of their implementation, and possible violations.
ADEQUATE HOUSING

The right to adequate housing includes seven elements: 21

1. **Security of Tenure:** All persons should possess a degree of security of tenure which “guarantees legal protection against forced eviction, harassment and other threats.”

2. **Availability of services:** “An adequate house must contain certain facilities essential for health, security, comfort and nutrition.” As women are often responsible for food procurement, cooking, household care and providing their own and their children’s sanitation, it is necessary that these services not only be available, but also be close at hand and easily accessible.

3. **Habitability:** Housing must be habitable, protecting the inhabitants and providing them with adequate space, heating and shelter from the elements. It must also be structurally sound, and safe from disease.

4. **Accessibility:** This relates to “disadvantaged groups” having full and sustainable access to adequate housing resources. Adequate housing must be made accessible to all those who are entitled to it.

5. **Affordability:** The right to adequate housing requires that costs associated with housing should be at “such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.” However, as women typically earn less than men do, this aspect of adequacy requires special attention on behalf of women.

6. **Location:** Housing must be close to employment options as well as health-care, education, child-care and other social facilities, in both urban and rural areas.

7. **Cultural Adequacy:** Housing should reflect the culture of the person living in it and enable the expression of cultural identity.

30 Ibid., para. 7.
31 As articulated in Gen. Com. 4, para. 8.
1.1.4 Why apply a human rights perspective?

As we have seen above, the human right to housing relates to far more than just a material ‘need’ that is to be fulfilled only when possible, or through charity or good-will. Human rights in general rise above societal aspirations, political rhetoric and empty promises. Through their codification in international law, human rights attain “timeliness, absoluteness and universal validity.”\(^{32}\) The right to adequate housing is no exception. Adopting a comprehensive human rights approach to address and seek redress for violations of housing rights, including inheritance rights, has a whole range of advantages.

While denying the equality of women is a human rights violation in and of itself, and indeed a primary component of the overall denial of women’s inheritance rights, it is not the only component that leads to such a denial. It stands to reason, then, that an equality argument does not suffice to fully address and seek redress for violations of women’s inheritance rights. This is because the denial of women’s inheritance rights is comprised of the cumulative denial of a number of independent entitlements of women: their rights to housing and land; to self-determination; to live in security, peace and dignity; not to be forcibly evicted, and other related human rights which are especially vital to women.

After all, women’s relationship to the home and the land is unique, and violations of that relationship have consequences for women which are similarly unique, and which require separate and special attention beyond the basis of mere ‘equality with men’. In this respect, a comprehensive human rights framework, recognising the applicability of a variety of interdependent rights, is necessary to fully address the issue of women’s inheritance rights.

The hardships that women endure when their housing, land and inheritance rights are violated are often viewed as a matter of individual responsibility, and thus disregarded as a private matter. Yet under human rights law, it is clear that the State has an essential duty to protect women from sex- and/or gender-based discrimination, and to fulfil their economic, social and cultural rights, including the right to adequate housing and inheritance.

It should be stressed that addressing such hardships by means of a human rights framework does not in any way diminish individual responsibility. However, it does challenge the international community, individual States and authorities to make the realisation of these rights a reality in the lives of the world’s poorest and most marginalised people – those who cannot fulfil their rights due to obstacles that they are powerless to remove. In the case of women, the main obstacle – just one of the many they face – is the entrenched discrimination that they all too often encounter.

Accordingly, a human rights approach provides for a system of accountability and a framework within which advocates and victims can hold States and other actors accountable. When States voluntarily enter into international agreements, recognising and affirming human rights, they agree to be bound by them, and thus must fulfil the obligations thereunder. Such obligations include ensuring that women realise their rights to adequate housing and land and to inheritance.

Finally, a human rights approach to inheritance, fully taking into account the interdependence of all human rights, provides a broad framework for examining the true consequences of its denial to women and for determining the best strategies to address and ameliorate them.

If we are to fully understand the real-life consequences of human rights abuses against women and combat the practices that systematically disadvantage them, we must make the connection, in plain terms, between violations of human rights standards and the actual suffering endured by millions of women.

Highlighting the human costs of unequal inheritance rights is just one objective of this research. Another critical objective is to review the legislation and policies that impact upon inheritance, in order to determine whether governments are fulfilling their obligations to ensure women’s inheritance rights, not only through such legislation and policies, but also through their implementation. A third objective is to explore effective solutions to inheritance rights violations and ways in which women, and men too, can work to reshape and reclaim their cultures on the basis of gender equality. Transforming cultural norms that deny women’s equal access to property ownership and inheritance is a process in which all must actively engage.

At both international and regional levels, strong standards exist which recognise the right of women to inherit housing and land. Unfortunately, however, much work remains to be done to translate these principles into practice on the ground. Inequality in terms of power, in both the legal and cultural spheres, often makes it practically impossible for ordinary women to realise and enforce their rights. Indeed, in some cases women are even unaware that they are entitled to be treated without discrimination, or they have been made to believe that they do not have their own rights and entitlements.

### 1.2.1 Housing insecurity

The fact that women cannot inherit land and housing after the death of their spouse or relative reflects the more general violation of women’s right to adequate housing. For millions of women in sub-Saharan Africa, the systematic denial of housing and property inheritance rights lies at the heart of their economic marginalisation and housing poverty.

If women are unable to legally own, control and inherit property, they have little economic and personal autonomy because they fundamentally lack access to wealth. Women’s economic contribution to their families, which is essential, remains unremunerated and invisible.
Women who do not control their own housing and are unable to access housing independently are placed in a position in which they may face homelessness and destitution at any given moment. Especially in sub-Saharan Africa, a woman’s access to housing usually depends upon her relationship to a male, in most cases either her husband or father. Rarely are women able to gain housing and land in their own right. This dependency is the breeding ground for violence and exploitation.

When a woman becomes homeless, she loses much more than just a house (although this alone is catastrophic enough), she is also deprived of her personal security and social status. In addition, given the central function that the home often has for a woman in terms of economic production, its loss may well signal the end of economic and food security for herself and her family. Furthermore, her ability to care for her children and keep them healthy becomes greatly impaired, and she loses many of her relationships and much of her social network, on which she depends for day-to-day survival.

Often, a widow can access housing through male relatives or in-laws only on the condition that she works for the family, and/or displays ‘good behaviour’. A woman’s fate is thus placed at the mercy of the will and whim of her in-laws. This is usually a grim situation for a woman, as her role within the family essentially becomes that of servant, and she is even more vulnerable to ill-treatment at the hands of relatives. If a woman suddenly becomes unable to work, her situation may deteriorate further still, and she may face an uncertain and precarious future. Abandonment is a very real possibility as a woman ages and becomes less able to do her share of the family’s workload.

The phenomenon of in-laws taking over the home and land of the widow has become so commonplace throughout Africa that it has gained the popular tag ‘property grabbing’. The police or other authorities have generally done little or nothing to address such incidents, so the practice still runs rampant throughout the region. The widow is ejected from her home by means of intimidation, threats, physical violence or a combination thereof. This is often done under the guise of custom and tradition. The widow, often unaware of her rights and/or afraid of attracting retribution or disfavour from the in-laws, generally complies with the demands and is forced to abandon the premises. Frequently, the premises are taken over without the widow’s knowledge, when she is not there. COHRE found that stories of a woman returning home from the marketplace, a social visit or even her husband’s funeral, only to find her property stolen and her home barricaded, are all too common.

Sometime, the widow is forced to engage in discriminatory and often dangerous rituals so that the in-laws may ‘allow’ her to stay on the premises. To this end, the in-laws demand rituals such as widowhood ‘cleansing’ practices, where the widow is forced to have sex with a man specially hired for the purpose by the family; or ‘wife inheritance’, where the widow is forced to marry the brother or even the father of her deceased husband. If she refuses, she is evicted from the home and ostracised from the community.

34 It should be noted that some women, on very rare occasions, may consent to such practices. This consent is often due to a misplaced belief that such a ritual is acceptable, often instilled in women by patriarchal ideologies.
In Zambia, where property grabbing is an acute problem, a widow who refused to leave the home she had shared with her deceased husband was victimized by her brother in law, who continuously buried dead persons around the premises of the house, attempting and finally succeeding to force her off the land.\(^{35}\)

The widow often cannot return to her own family, for she is no longer considered a member of it, or her family is unable to look after her. Often, she falls victim to social stigma and feels that it is simply inappropriate for her to go back to her childhood home. With nowhere else to go, she is often left destitute and homeless.

**PROPERTY GRABBING AS FORCED EVICTION**

General Comment No. 7 on forced evictions has defined the term ‘forced eviction’ to mean “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”\(^{36}\) The practice of ‘property grabbing’ falls within this category of housing rights violations.

Forced eviction is considered by the Committee to be a *prima facie* violation of human rights. As in this case:

*Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.*\(^{37}\)

Pursuant to Paragraph 8, the State has a specific obligation to ensure that “the law is enforced against third parties who carry out forced evictions.”

The insecurity that many women face when their husbands die – denied the right to inherit their marital home, forced to marry a brother or husband, or simply subjected to psychological pressure by in-laws claiming their property – often drives them from rural areas to urban centres. Without options, turned away from their marital and even natal home, they are compelled to migrate to cities in an attempt to find an income, a home and a new life, often with children and other dependents.

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36 General Comment No. 7, adopted by the Committee on Economic, Social and Cultural Rights (CESCR) during its sixteenth session (1997), and contained in document E/1998/22, annex IV.
37 Ibid., para. 10
Once in the overcrowded urban areas, women rarely find the better employment opportunities and economic advances that they seek. There, they often end up squatting in shabby housing, paying exorbitant rents for slum dwellings, or living on the streets, subjected to harassment and violence. Rural women, often with little to no education, have no alternative but to find work in the informal sector, selling food items, doing domestic labour or similar work, which makes them vulnerable to exploitation, abuse and often sexual and other forms of physical violence. Women are often forced into prostitution for a meagre income to support their children, which greatly increases their chances of becoming infected with HIV/AIDS.

“Unequal gender relations and unequal access to economic resources mean that women tend to be poorer than men.... Women’s unequal access to economic resources and their economic dependence on men means that they are often unable to negotiate safe sex. ... Many women are forced to resort to exchanging sex for survival, as men provide them with necessary goods... Others may be forced to resort to different forms of sex work in order to survive. [The Expert Group Meeting recommends] Governments should urgently, by 2005, enact, implement and enforce laws that grant women equal rights to inheritance and ownership of property, including land, to improve their economic status”...

1.2.2 Land and food insecurity

“Women are essentially temporary custodians of land passing from father to male heir, even though they may be de facto heads of household. As unpaid labourers on their husbands’ land, while also cultivating separate plots in their own right, African women usually lose the rights to land following the death of their spouse. Widows and divorced women have virtually no tenure or inheritance rights with which to ensure food security for themselves or their children.”

In much of sub-Saharan Africa, housing insecurity cannot be separated from land and food insecurity. Indeed, many of the cultures that forbid women to inherit property upon the death of a spouse are also agrarian and therefore depend heavily on their own food production for their survival. Often, such societies also depend heavily on women’s agricultural production, as it is usually the women who are charged with producing food for themselves and their families. Africa’s women produce 78 percent of the continent’s food, mainly through subsistence agriculture and on small land-holdings. When a woman loses her house to her in-laws, she almost always loses her land as well. In that event, she also loses the primary means by which she is able to feed herself and her children, affecting her health and economic well-being in a multitude of ways. From a national social and economic standpoint as well, States lose a major source of food production and economic gain when women are denied access to land.

40 Summary note of the panel discussion entitled ‘Empowering Low Income Women’, held during the International Food Policy Research Institute’s Conference ‘Sustainable Food Security for All by 2020’, held in Bonn, Germany, 4-6 Sept. 2001.
The United Nations Food and Agricultural Organization (FAO) has noted that, for women: “Inheritance and contract rights should be made a priority food security issue.” This idea is also reinforced in General Comment No. 12 of the UN Committee on Economic, Social and Cultural Rights (CESCR) on the Right to Adequate Food. In this General Comment, the Committee noted that the States Parties to the International Covenant on Economic, Social and Cultural Rights should develop a national strategy to ensure food and nutrition security for all, based on human rights principles. In particular the Committee noted that any such strategy should:

... give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology ...

“The failure to reform the legal and social status of widows has meant that for many widows in Zambia, widowhood equals poverty. They are also invisible to government policies that do not identify widows as a distinct social group. A recent study conducted by the Catholic Church in Zambia revealed that about 75 percent of Zambia's 10 million population barely survive on one meal and live in poverty. The most affected people as a result of food insecurity are widows, orphans, unemployed and the disabled.

1.2.3 Violence

Disputes over lack of rights to inheritance, land and property ownership frequently expose widows to physical harm and even death at the hands of male relatives. Often, relatives abuse widows with impunity, as their activities are seen as ‘family matters’, falling within the private sphere. For this reason, police and other authorities are often lax, or unwilling to intervene.

Legislation to criminalise traditional practices and ensure widows can inherit, own land and property is often poorly implemented. Interpretations of customary, traditional and religious law may take precedence over modern law and ratified international treaties ... causing widows to lose their homes, access to land and food security.

In some cultures, upon the death of her husband, a woman herself may be inherited, as she is seen to ‘belong’ to her late husband’s family. The wife is regarded as having been bought through the payment of bride price, or lobolo. Consequently, they are handed down as part of the property of the husband. As we mentioned above, ‘wife inheritance’, where a male member of the deceased husband’s family, often the father or brother, ‘takes over’ the widow, to secure the deceased’s estate and the labour of the widow, is still common in some areas, most notoriously enforcing the concept that women are ‘bought’.

41 United Nations Food and Agricultural Organization (FAO), Women: The Key to Food Security.
43 Ibid., para. 26
46 This word is used in a number of South East African countries.
All too often, women themselves are blamed for the death of their husbands, either due to ‘witchcraft’ or to HIV/AIDS infection. In many parts of sub-Saharan Africa, widows must often endure abusive and degrading treatment meant to ‘cleanse’ them after the death of their spouse. As we will see throughout this report, these ‘cleansing’ rituals can range from forced sex with male in-laws, to semi-starvation, forced nudity, prolonged isolation, and other treatment humiliating to the widow, such as cutting off all her hair or making her eat off dirty plates.47

To add to this torment, as noted above, a woman’s property is often forcibly seized by in-laws, which involves direct or indirect violence. On the one hand, if a woman fights for her inheritance rights, she may be ostracised by her community or, worse still, become the target of violence. In particular, a widow who seeks to keep land or property after the death of her spouse – property which was shared during marriage – may suffer physical violence at the hands of her in-laws. On the other hand, if a widow renounces her right to inheritance, she may be left to face a future of housing and food insecurity, forced to live either in destitution or, for her day-to-day survival, in complete dependency on male relatives (in particular, her sons, if any). In either situation, she may be the victim of violence.

In addition, because widows are one of the most vulnerable and marginalised groups within many African traditional societies, they may be subjected to further violence and ill-treatment by the in-laws or community, with little recourse to formal judicial remedies or other forms of justice. Without options and facing chronic impoverishment, many widows turn to prostitution to provide for themselves and their children, leading to the potential of even more violence.

Violence against women within the context of inheritance disputes reflects women’s low status within societies, and in particular the low status of widows. The violence which women may experience upon the death of a spouse is critical to understanding the intense cultural reverberations of the inheritance question, and highlights the serious context in which women must make their decisions about whether or not to fight for their rights to be upheld. Either way, women pay a very high price. Choosing between violence and ostracism on the one hand, and dependence and hardship on the other, many opt simply to maintain the status quo, forfeiting their inheritance rights in the process.

47 Especially extreme and degrading are practices in Nigeria and Zambia. See also Subsections 2.4.5 and 2.9.3.3 on these countries for further information.
1.2.4 Gender & culture

As is the case with so many violations of women’s human rights, culture and gender are the terrain on which women’s advocates must wage their struggle for the recognition of women’s human rights. Time and again, COHRE found that cultural barriers to women’s inheritance rights, even where legal standards were in place prohibiting discrimination against women, presented major obstacles to women’s equality in this area. For example, in many traditional societies, men are allowed to take multiple wives, although women are not allowed to take multiple husbands. In sheer terms of property and wealth distribution, polygamous systems disadvantage women.

Unfortunately, as with many women’s human rights issues, culture is often misappropriated and misused as a justification for women’s subjugation. In this respect, inheritance rights are no exception. To fight for individual inheritance rights is often viewed as an affront to culture and tradition. Many argue that the fundamental precepts of culture are that women should be protected. This ‘protection’ inevitably results in a denial of individual rights of women, and especially in the case of housing and land, a dependency on their relationship to men.

Bride price is sometimes cited as an example of culture, as originally it was seen as symbolic of the worth that women brought into the home. As noted above, it is now often used as a justification to abuse the wife, as she has been ‘bought’. Clearly, the effects of culture, no matter what the underlying intent, can often be made debilitating to women.

Traditions and culture change, as do the attitudes underlying them. It would be misdirected to say that culture and tradition should be discarded. Yet, in order for culture and tradition to work in women’s favour, women must be allowed to claim them for themselves, to redefine the pervasive negative attitudes as positive ones, and to claim their rights because of, not in spite of, culture and tradition.

1.2.5 Lack of legal protection

Unfortunately, discrimination abounds, not only in customary systems. Traditional justice systems are patriarchal in nature, and fail to fully recognise or provide for women’s rights. As mentioned above, women’s rights are not accorded the same value and importance as men’s, for women’s needs are often classified as secondary – a woman is usually regarded as a ward of a male, whether it be her husband, father or other male relative. This perspective translates into women finding it extremely difficult to access rights-protection mechanisms, whether they be the formal courts, informal traditional structures, police or other authorities, or administrative systems. Entrenched discrimination in the justice system is a silent yet pervasive barrier to women, often rendering bigoted decisions against their rights merely on the basis of their gender. As will be seen, COHRE interviews with magistrates from local courts often revealed that women are still viewed as second-class citizens and, in the eyes of the magistrates, do not have any rights (besides a limited entitlement to maintenance) when it comes to property and land.48

National legislation is often ineffective and rife with shortcomings, which are reflected in the exclusion from any benefits or remedies of large segments of the female population, such as unmarried women, women in a cohabitation relationship, and women married under certain forms of religious and/or customary marriage rites. In addition, in an attempt to provide for individual choice between customary or civil law application, legislation is often written to provide a ‘choice’ of legal regimes at the time of marriage. Such a

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48 See Subsection 2.7 on South Africa for a more in-depth review.
decision is normally left to a male, who tends to choose the marriage regime which benefits him. This is only one example of specific provisions that are allegedly added to ‘protect’ women, but often only serve to further entrench discrimination and inequality.

Laws and policies are usually written in ‘legalese’ and are far too complicated for non-lawyers to understand, making such laws inaccessible to often uneducated and illiterate women. There are few, if any efforts, on the part of governments and lawmakers to disseminate easily understandable information on the existence of the law, let alone on its contents and uses. If the law is not known or properly understood by women, no matter how well that law is formulated, it is completely ineffectual for women.

1.3 EFFECTS ON THE GIRL CHILD

Inheritance rights also affect girl children, who in many cases are unable to inherit equally with their brothers, despite the fact that inheritance rights are vital to their well-being and security. Girls are often denied their inheritance rights for much the same reasons that widows are denied theirs. In both cases, the rationale stems from gendered (that is, gender-based) expectations. These are in themselves conducive to an unequal situation, which then often becomes even more imbalanced in conditions of poverty and hardship.

Extended families often fear that it is inappropriate for a girl to be given property because she will one day marry and become part of her husband’s family, taking with her any wealth that her parents accumulated, and leaving her blood relatives with nothing. Similarly, a boy child is also expected to grow up, to marry, and to have children. However, in marrying, a young man is not regarded to be ‘joining another family’, at least not in the same way that a young woman is, and so the parents’ wealth is seen to remain within the family. In addition, traditionally the husband is seen to have the role of providing for the well-being of his family, and so it is argued that boys are more suitable guardians of the family’s inheritance.

As with women’s inheritance rights more generally, the issue of girls’ inheritance rights has become all the more pressing given the current HIV/AIDS pandemic which has ravaged so much of sub-Saharan Africa. HIV/AIDS has led to an explosion not only in the number of widows, but also in the number of orphaned girls who now find themselves as the sole heads of households. These girls face especially dire circumstances, and many live in extreme poverty with the formidable task of taking care of themselves along with their younger siblings. Lacking personal security, adequate housing, education, and protection from abuse and exploitation, these orphaned girls live in situations in which all their human rights are being violated on a daily basis. Many girls end up as street children, extremely vulnerable to sexual exploitation. They are often forced into prostitution for their survival.
According to a recent joint report from UNAIDS, The World Health Organization and the United Nations Division for the Advancement of Women, in countries with high HIV/AIDS prevalence, and in ‘child-headed’ households:

**It is often girls who take on the burden of care and who are forced to seek work outside the home. Their youth, vulnerability and lack of skills means that they are forced to work in marginal sectors such as sex work, domestic and farm labour.**

### 1.4 THE IMPACT OF HIV/AIDS, WAR AND POVERTY IN AFRICA

In Africa, women are being widowed at alarming rates. War, famine and HIV/AIDS have devastated many parts of the continent, and the high mortality rates have meant that in some countries, as many as 50 percent of women are widows. This tragic reality has raised the profile of national debates on the importance of upholding women’s inheritance rights.

#### 1.4.1 HIV/AIDS

Human Rights Watch has noted that:

*The staggering number of AIDS deaths expected in Africa in the coming years will result in millions more women becoming widows at younger ages than would otherwise be the case. These women and their children (who may end up AIDS orphans) are likely to face not only social stigma against people affected by HIV/AIDS but also deprivations caused by property rights violations. Women with AIDS, many of whom were infected by husbands or regular male partners, are condemned to an early death when the women’s homes, lands, and other property are taken. They not only lose assets they could use for medical care, but also the shelter they need to endure this debilitating disease.*

The impact of HIV/AIDS is highly complex and, at the same time, disturbingly simple. The staggering rate of HIV infection in sub-Saharan Africa is increasing the death toll to unprecedented levels. Women have tended to outlive their husbands, the general trend at the household level being that the husband dies first. It has been found that over 55 percent of all HIV infections in sub-Saharan Africa occur in women. In fact women are considerably more likely, at least 1.2 times, to be infected with HIV than men, and for women aged 15-24, this ratio increases to 2.5 times as likely. This staggering rate for women is ascribed to the subordination of women and the gendered nature of poverty.

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After the death of the husband, disputes over land and housing are common, often resulting in the widow, herself ailing with the disease, being ejected from the house by greedy in-laws. This leaves women in a terrible predicament — not only homeless, but also dying of the disease. Even if a woman is able to hold on to her home and land, she is often forced to sell them in order to meet the costs of medical and other care for herself, her family and others, such as orphans in her care. At the very least, women-headed households usually have to sell off farming equipment or other vital assets, which often leads to eventual destitution.

“Besides the human suffering, AIDS threatens sustainable agriculture and rural development. Sickness and death of an adult family member can result in the inability of a household to cultivate the land. Tending for the sick can take a considerable amount of time, which is then no longer available for agriculture. As a result, more remote fields tend to be left fallow, and switching from labour-intensive to less labour-intensive crops is more likely. Families can wind up having to sell off their livestock.

“AIDS widows may have no legal rights to land and property after their husbands’ death due to customary inheritance laws. Many women therefore often have to leave their homes and are facing severe poverty.”

Conversely, the lack of housing and property inheritance rights may also increase women’s susceptibility to the AIDS virus in several ways. First, as Human Rights Watch goes on to note:

... the failure to ensure equal property rights upon separation or divorce discourages women from leaving violent marriages. HIV risk is especially high for women in situations of domestic violence, which often involve coercive sex, diminish women’s ability to negotiate safer sex and condom use, and impede women from seeking health information and treatment.

The stigma attached to AIDS makes life for the widow and children of an afflicted family particularly hard. The widow’s in-laws often blame the widow for the husband’s death. As noted above, they may try to force her to marry or co-habit with a brother-in-law. She risks transmitting infection or receiving it. She may not be able to remarry, and is thus further stigmatised. She and her children may suffer abuse and violence, even from family members. In spite of the high risks involved, prostitution is sometimes the only alternative to starvation for herself and her children, thus spreading disease.

UNAIDS has also made the case for women’s inheritance rights in the context of the HIV/AIDS epidemic, noting that:

Women must have access to health care and education, credit schemes, and equality in employment and inheritance rights.

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54 Ibid.
1.4.2 Conflicts and war

According to the United Nations Development Fund for Women (UNIFEM):

*Nowhere is the impact of unequal land rights more acutely felt than when women find themselves obliged to fend for themselves and their families as a result of conflicts which have cost them the husbands, brothers or fathers in whose name land and property was traditionally held and passed on. On returning home to the fields they used to work and the house they used to keep, women in many countries find themselves denied access, often by their former in-laws or neighbors.*

War creates multiple hardships for women. Not only are they vulnerable to gender-based violence during war and armed conflict, they also suffer disproportionately in post-conflict situations, especially if they become widowed. Indeed, war and other conflict may serve to further diminish women’s precarious right to inheritance. Often as a result of conflict, houses are abandoned or destroyed, title deeds or other vital papers lost, family members killed, with nothing and no one to support the woman’s claim to be able to inherit marital land and housing.

As has been noted by experts:

*The position of women with regard to land and property ownership is further weakened by both conflicts and the ensuing reconstruction process in societies where their access to land and property is already precarious. The usual imbalance in power relations between women and men is sustained and even deepened throughout the conflict and continues up to the stage of reconstruction. Breakdown in social stability and in law and order leaves a socio-economic vacuum in which the subordinate position of women, their social support systems and their access to land and property are compromised by traditional and customary laws.*

In addition, when violent conflicts occur, many women who own land jointly with their husbands lose any proof of joint ownership, making their restitution claims much more difficult to process. Once again, as in other cases, if a woman’s husband dies as a result of the conflict, his relatives seize the home and the land. The enormous scale of recent conflicts in several sub-Saharan African countries makes inheritance a pressing issue for many African women.

1.4.3 Poverty and famine

Sub-Saharan Africa is one of the most impoverished regions in the world: several of the countries examined have well over 50 percent of their population living on less than one US dollar a day. For example, in Zambia, 64 percent of the population lives in such desperate poverty; in Ethiopia, the figure is a staggering 82 percent. Poverty in the region as a whole is reported to be on the increase. Of those considered poor, the majority are women. This feminisation of poverty is a trend which has recently come to the attention of experts.

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58 World Bank Development Indicators, 2003, ‘Measuring the percentage of population living on less than US$ 1 a day, 1990-2001’.

59 Some reports say that up to 70% of the world’s poor are female, World Bank, 2001.
of the world. It is stunning to realise that women make up more than half the world’s population, yet they own less than one percent of the world’s property.

Women suffer more than men as a direct result of poverty. Almost always, women have significantly less wealth than do the men in their communities, and such poverty is exacerbated by any disturbance in the household, in the community or in the nation.

Famine, for example, leaves women and children far more vulnerable than men, not only to starvation but also to violence, disempowerment and being outcast by the family. Women who lack access to housing and land are especially vulnerable during these periods. At times, famine situations may serve to retrench traditional unequal gender-based power relationships, making it even more difficult for women to exercise control over their resources. As mentioned above, a widowed woman who, under normal circumstances, would be allowed to stay on her land after the death of her spouse, may be forced to leave by her late husband’s relatives as they can no longer afford to support her. She is then told to go back to her own family. They too, however, often have no means of supporting her, or see it as inappropriate or no longer their duty to maintain her, and thus reject her.

The 2002 report by the UN Independent Expert on Human Rights and Extreme Poverty compiled questionnaire responses from States, national human rights institutions and NGOs. Part of the questionnaire addressed the connection between extreme poverty and inheritance rights. The Independent Expert noted a striking connection:

> [t]he results of the survey of inheritance-related caseloads as concerns women dramatically demonstrate the relationship: extreme poverty was a feature of over half (54 per cent) of the cases. It must also be recognized that the actual percentage of disinherited women who face extreme poverty will be higher in the general population, as the women represented in the study were those who had sought legal assistance in regaining their property, and as a result would fare better than the vast majority of women who are unable to access any form of legal services.\(^\text{60}\)

> While most countries have some measures of protection allowing women to pursue inheritance claims, such protections are blocked in practice by customary law or practices. For those impoverished by disinheritance, there is virtually no material State assistance. The information provided illustrates the causal connection of the denial of women’s inheritance rights and conditions of extreme poverty, and the noted dearth of preventive and remedial action at the level of the State to address this widespread problem.\(^\text{61}\)

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\(^\text{61}\) Ibid.
The connections between extreme poverty and the denial of human rights such as inheritance must be made, for they clearly affect each other. Poverty leaves women far more vulnerable to violations of inheritance rights, and a denial of such rights makes women far more susceptible to a life of poverty.

1.5 THE MYTHS SURROUNDING INHERITANCE RIGHTS

The issues related to the right to inherit are multiple and complex, as we have already emphasised and will further highlight in the following sections. However, we must first expose several false assumptions which undermine the right to inherit.

Firstly, there is the fallacy of arguing that inheritance rights only start once the end has come, so to speak; in other words, of addressing the issue from the starting point that the husband or father has died, and that, from then on, the widow should be entitled to retain and own that for which she has worked since she was a very young girl. The truth is that even before the death of her male ‘protector’, she was entitled to own, access and control that land and housing as an inherent right. Inheritance rights pre-date death.

It is revealing of a larger and endemic problem that widows are ejected from the home, that girls turn to prostitution after the death of their father, that widows are killed by their in-laws if they try to stay in their marital home. All this illustrates a more general and more widespread denial of women’s rights, which is rooted in entrenched patriarchy. It is at this most basic level of the denial of women’s rights that the fight for women’s inheritance rights should begin.

Secondly, there is the myth that inheritance is a private matter and should therefore be dealt with privately. This assumes that the woman’s best interests will be taken care of, which, as we have already surmised and will become abundantly clear in subsequent sections, is rarely the case. It is vital that governments and authorities be made to challenge such assumptions. Governments must actively intervene in inheritance rights situations, and must do so with a willingness to ensure that women realise their rights to own, access, and control housing and land, in their own name and in their own right.
Thirdly, there is the prevailing attitude that culture is the primary culprit in the denial of women’s inheritance rights. Indeed this assumption is often cited by families claiming land and housing that does not belong to them, and by complacent governments which do not wish to deal with the realities of women being denied their inheritance rights. Yet, as we have already indicated and will examine further, custom is not the only factor that contributes to the denial of women’s rights. Furthermore, even though culture is often discriminatory in nature, it can and must change to provide for real equality for women.

Fourthly, the true function of inheritance and succession rules must be stressed. Indeed, such rules, whether formal or informal, should work to minimise the disruptive affect of the death on the family unit. The denial of inheritance is thus not only a violation of a widow’s rights to inherit her marital housing and land, but also goes against that which inheritance and succession rules have set out to do. The ill-based practice of in-laws or others who grab a widow's property, in the end unlawfully receiving a ‘windfall’ from the intestate estate of a deceased, must be adequately addressed.

This, lastly, leads to the issue of responsibility. While inheritance rights are violated by many actors – family, acquaintances, community members and authorities – the State bears ultimate responsibility for ensuring that the right of women and girls to inherit from their husbands and families are respected. We must not forget that this right is imbedded in the right to housing and land. In this sense, it becomes even clearer that the obligation to protect women’s housing and land rights does not begin at the death of their marital partner or male relative – rather it is a constant entitlement that must be respected, protected and fulfilled by the State.

The following section examines ten countries of sub-Saharan Africa and determines the extent to which they have or have not fulfilled their obligations.
OVERVIEW OF TEN SUB-SAHARAN STATES
Under their duty to fulfil women's human right to own and inherit housing and land, States must take positive measures to ensure that this human right is progressively realised. One major avenue to achieving this is for States to pass and implement national legislation upholding and protecting this and all related human rights.

This section examines the domestic laws of the ten sub-Saharan countries in question, insofar as those laws relate to or impact on inheritance. Constitutions, civil codes, family laws, succession and inheritance laws, marriage laws, maintenance acts, administration of estate laws, will acts, property or land rights policies, children’s acts — all act together to influence women’s inheritance rights; some negatively, others positively.

Each statute explained in this section has been selected for examination because it is directly relevant to inheritance rights specifically, and to housing and land rights more generally. Constitutional provisions are examined to determine whether the country in question has a framework of equality and non-discrimination. Any other provisions or policies that impact on women's rights, specifically their rights to property, to land and to housing, are also subjected to scrutiny. Land policies are reviewed for any special provisions regarding women’s land ownership. Marriage and maintenance acts are examined because they often determine marital property regimes, which have great impact on a widow's right to inherit from her husband. Administration of estate laws, will acts, and succession and inheritance laws are considered for obvious reasons. All other relevant laws and issues of the legal, judicial, societal and administrative systems are referred to insofar as they have an influence, either positive or negative, on whether a woman can claim her right to inherit.

In addition, each of the ten country-subsections reviews the customary laws (some of them codified), traditions and practices that influence women's experience of inheritance. Of course, the lives of most women in Africa, especially those in rural areas, are almost entirely governed by customary laws and traditions, so it is essential to review the bearing that these have on women's inheritance.

Wherever possible, examples are given of practices and the reality on the ground for women in Africa. These examples are derived from: (i) information gathered directly by COHRE during its fact-finding missions; 62 (2) testimony passed on by COHRE's partners in the field; (3) interviews given or personal presentations made at the COHRE workshop ‘Inheritance Rights are Human Rights’; 63 and (4) information received through secondary sources, where appropriate.

Each country-subsection concludes with COHRE's general indications of the way forward for the country in question, followed by a number of specific recommendations with regard to women's inheritance rights. These recommendations are based on: (i) a review of the current situation, both legal and practical; (2) field visits to and consultations with local communities, as well as local NGOs and activists where applicable (Rwanda, Zambia and South Africa, as well as Ghana); and (3) extensive consultations with women activists and organisations working in the field of inheritance rights in the countries in question. Each day, in their various capacities, such activists and organisations witness the devastating effects on women of the denial of their inheritance rights, and are aware, from first-hand knowledge, of the solutions that are needed to ensure that these rights are realised.

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It is unfortunate but true that not one of the sub-Saharan countries reviewed has adequately met its obligation to fulfil the women’s right to equally inherit housing and land. Some have tried, others have not, but the fact remains that, overall, there is still a very long way to go.

2.1 BOTSWANA

The time that women were treated as chattels or were there to obey the whims and wishes of males is long past, and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the ground of sex... 

DOMESTIC LEGAL PROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS

• Botswana Constitution 1966
• Marriage Act 2000
• Married Persons Property Act 1971
• Deeds Registry Act 1996
• Administration of Estates Act 1979
• Tribal Land Act 1993

2.1.1 Background

‘The Batswana’, a term used inclusively to denote all citizens of Botswana, also refers to the country’s major ethnic group. Before the influence of the Europeans was felt in the region, the Batswana were primarily herdsmen and farmers under tribal rule. During the Zulu wars of the 1880s, they migrated to the area from what is now South Africa.

In 1885, the British Government placed the area of ‘Bechuanaland’ (now Botswana and neighbouring areas of South Africa) under its ‘protection’. The southern territory eventually become part of South Africa; the northern territory remains as present-day Botswana.

An expansion of British central authority and the evolution of tribal government resulted in the 1920 establishment of two advisory councils representing Africans and Europeans. In 1934, proclamations regularised tribal rule and powers, and served to entrench patriarchal custom and norms.

In June 1964, Britain accepted proposals for democratic self-government in Botswana, and the first general elections were held in 1966. Botswana has been considered a democracy ever since.

Recent changes in legislation and the ground-breaking decision of *Unity Dow v. Attorney General of Botswana*, as well as subsequent decisions, have conclusively outlawed sexual discrimination in Botswana. This is one of the few cases in Africa in which international law was successfully utilised in favour of women’s rights.

Interestingly, Botswana has only recently ratified several of the major human rights conventions, acceding to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995, and the International Covenant on Civil and Political Rights in 2000. It has so far failed, however, to ratify the International Covenant on Economic, Social and Cultural Rights, a glaring omission for a country that seems ready to adopt human rights standards and norms into its national legislation.

The Courts of Botswana, having successfully relied upon CEDAW in favour of women’s rights in the *Unity Dow* decision, have shown a certain degree of commitment to integrating and enforcing the human rights of women as set forth in the international covenants. The COHRE Women and Housing Rights Programme (WHRP) welcomes this commitment, and urges Botswana to continue and expand it.

This commitment to women’s rights is critical in Botswana. Botswana has the highest HIV/AIDS rate of any country in the world, with an estimated 39 percent of the population suffering from HIV/AIDS. Over 52 percent of these are women, and close to 40 percent of pregnant women aged 15-24 are HIV positive. Inheritance is a major issue for women in Botswana. While steps have been taken, much more needs to be done for Botswana’s women.

### 2.1.1.1 Tenure systems in Botswana

The land tenure system consists of three land categories adopted from the colonial administration: Tribal or Customary Land (72 percent), State Land (23 percent) and Freehold (5 percent).

All adult citizens, irrespective of sex, are allowed to access a 50-year fixed period renewable State grant or lease on State Land. Freehold lands are individually owned parcels of land, available for a price, and over which the State exercises no control.

Customary Land, found primarily in the rural areas, is accessible to all eligible citizens for free. Customary Land is very important, as it constitutes the majority of the land holdings, and it is here that the majority of the people live. This land, previously administered by chiefs and tribal heads, is now administered by the Tribal Land Boards of Botswana. However, it is still largely governed by the various tribal traditions, norms and customs.

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65 *Unity Dow v. Attorney General of Botswana* [1991] BLR 231. This case decided the validity of Botswana’s discriminatory citizenship acts. The decision was ground-breaking for African women everywhere.


68 Found mostly in the urban areas, State Land is land in the ultimate custody of the State.

69 Amendment of 1993 to the Tribal Land Act established such Tribal Land Boards.
The existing Tribal Land Act was amended in 1993 to allow all adult citizens rights to use and occupy tribal land anywhere in the country; all who are eligible receive Customary Land grants and common law leases on tribal land. However, despite this equality on paper, men and women are not treated equally when applying for land.\textsuperscript{70}

\begin{quote}
**WOMEN-FRIENDLY TRIBAL LAND BOARDS**

Under the Land Board system, any person, regardless of sex, can apply for land or have land transferred to them. However, entrenched patriarchal systems and predominantly male Land Boards have made these boards ineffective in granting land to women. Botswana has recognised a need to ensure that women be on the Tribal Land Boards, and has committed itself to raising women’s representation on these boards in order to make them more women-friendly.\textsuperscript{71}
\end{quote}

Botswana’s Land Policy 2002 states that the Government should:

\begin{quote}
Remove discrimination, either direct or indirect, in determining the occupation or use of land; attendance at, or participation in, decision-making forums regarding the occupation or use of land; or membership of any structure involved in the administration and management of land rights.\textsuperscript{72}
\end{quote}

However, this has not yet been put into practice, and even the Government acknowledges its shortfalls for women:

\begin{quote}
It is still assumed that married women should depend on their husbands for access to land. Male domination of decision-making in Botswana’s patriarchal society is a major factor in blocking women’s access to land. Information that would empower them to make informed choices does not get through to them as they are not seen as potential users of such information.\textsuperscript{73}
\end{quote}


\textsuperscript{73} Ibid., Sect. 1.3, ‘Land Rights for Women’.
2.1.2 Statutory law

The Botswana Constitution of 1966 defines the fundamental rights and freedoms protected as follows:

... (h) Life and liberty, security of the person and the protection of the law; (i) Freedom of conscience, of expression, of assembly and association; and (j) Protection for the privacy of his home and other property and from deprivation of property without compensation.74

These rights are to be accorded to every person, regardless of, among others, race, political opinions, colour or sex.

Yet in Section 15 of the Botswana Constitution, which prohibits discrimination, sex as a ground for improper discrimination is omitted:

... affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons or another such description.75

This omission has been called by some a sign that Botswana, by its very nature, is a society that wants to allow discrimination against women, and as such, that this discrimination should be condoned.76

However, in the ground-breaking case of Unity Dow v. Attorney General of Botswana [1991], the clause was interpreted as non-restricted to its definition.77 In other words, according to the Court, the clause could be read to include sex discrimination, and Botswana, as was seen by its ratification of CEDAW, was not a country that condoned discrimination based on sex. The Unity Dow case is a precedent-setting case in Africa for its reliance on international legal standards.

74 Botswana Constitution of 1966, Sect. 3.  
75 Ibid., Sect. 15(3).  
76 The opposing counsel in Unity Dow v. Attorney General of Botswana [1991] made such an argument, which was strongly refuted by the judge.  
77 Unity Dow v. Attorney General of Botswana [1991] BLR 231. This case decided the validity of Botswana’s discriminatory citizenship acts. The decision herein cited is by Justice Horowitz, and was ground-breaking for African women everywhere. The case is discussed further in this subsection.
THE CASE OF UNITY DOW: DISCRIMINATION ON THE BASIS OF SEX IS ILLEGAL

Applicant Unity Dow was born in Botswana and married to a citizen of the US. She and her husband established their home in Botswana and had three children, one prior to their marriage and two while married.

The Citizenship Act of 1984\(^\text{78}\) imposed a restriction on citizenship. Being born on Botswanan soil no longer sufficed: if a child was born from a wedded union, citizenship would pass through the father, who had to be a Botswanan in order for the child to gain such citizenship; if born out of wedlock, citizenship could only pass through the mother.

As two of Unity Dow’s children were born in wedlock, they were automatically denied citizenship, for their father was a citizen of the USA. Unity Dow applied for an order declaring that the Citizenship Act violated her constitutional rights to pass her citizenship on to her children, regardless of status, and discriminated against her on grounds of sex.

Both the High Court and the Court of Appeal found that the Constitution did indeed grant Unity the right to be free from sex-based discrimination, and that the Citizenship Act violated this right.

The Courts’ decision was ground-breaking in that they relied on a broad and interpretive reading of human rights clauses in the Constitution, especially the discrimination clauses of Sections 3 and 15. In reaching this decision, the Courts took precedent from and relied on several human rights instruments and conventions, such as the European Convention on Human Rights and Fundamental Freedoms, the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and Peoples’ Rights, and the International Covenant on Civil and Political Rights.\(^\text{79}\)

“I have no doubt that upon the authorities I have quoted – and they come from different jurisdictions and different contexts, social, legal, political and socio-economic – I am driven to take a generous or liberal approach to the questions raised in this matter.”\(^\text{80}\)

“It is my view [that] it is the clear duty for this court when faced with the difficult task of the construction of provisions of the Constitution to keep in mind the international obligations. If the constitutional provisions are such as can be construed to ensure the compliance of the State with its international obligations, then they must be so construed.”\(^\text{81}\)

\(^{78}\) The Citizenship Act repealed Sect. 21 of the Constitution which had originally granted automatic citizenship status on the basis of birth on Botswanan soil.


2.1.2.1 Marriages in Botswana

The Marriage Act of 2000 prescribes the condition for registration of civil and customary marriages. Registration of a marriage is necessary for the marriage to fall under the protections of civil law. The Marriage Act specifically prohibits polygamy, disallowing the marriage to take place if the husband-to-be is engaged in another marriage under customary, Muslim, Hindi or other religious rites not annulled or otherwise dissolved.82

Part One of the Marriage Act deals with civil marriages, considered to be those marriages not entered into under customary law or religious rites.83 The Act invalidates any marriage that is not in compliance with the preliminary requirements of ensuring the ‘legitimacy’84 of the couple, and other special requirements. In addition, the Act defines the methods by which a marriage may be solemnised, and subsequently registered with the national marriage registrar.

Part Two of the Marriage Act sets forth similar requirements to ensure the validity of customary or religious rites marriages, and prescribes a two-month period within which the marriage must be registered. The registration requires that either spouse apply to the registrar of marriage and must provide sufficient information to “convince the Registrar of the validity of the marriage”.85 If he is not convinced, he must not register the marriage. This registration process, controlled by men, is a potential pitfall for women. Often, when men wish to disclaim that a marriage took place to avoid marriage responsibilities, the registrars, men, will stand by their side.86

The certificate of registration acts as the only evidence of marriage. This can lead to problems if the husband passes away and the wife is unaware of the whereabouts of the marriage certificate to prove her relationship for inheritance purposes.

2.1.2.2 Married Persons Property Act

The Married Persons Property Act of 197187 establishes the possibility of choosing between two marriage regimes: ‘in community of property’ and ‘out of community of property’.

If the couple chooses to marry ‘in community of property’, their property is pooled and a joint estate is created with a community of profit and loss. Upon divorce, this estate is shared. However, this principle of joint property underlying the ‘in community of property’ marriage regime is undermined by the fact that the property is registered only in the name of the husband. The Act assigns the husband almost unlimited powers over the marriage property, depriving the wife of any decision-making power over the property — despite the supposed joint ownership. She is thus given a status equivalent to that of a legal minor.

Fortunately, the 1996 Amendment to the Deeds Registry Act sought to eliminate the husband’s ‘marital power’ codified in the existing Deeds Registry Act (for further details, see Subsection 2.1.2.3). The Amendment dictates that, by law, both spouses must be present to register any action affecting land or housing (immovable property), such as sale, transfer or other alienation.

83 Ibid., Sect. 2.
84 The pre-nuptial requirements include posting notices of the upcoming marriage to ensure that the prospective spouse is not already married and attempting to enter into a polygamous union.
85 Marriage Act 2000, Part 2, Sect. 23(2).
86 Ibid., Sect. 27: “Chiefs and headmen of record shall be the ex-officio district registrars of customary marriages in their respective areas of jurisdiction.”
87 Married Persons’ Property Act, CAP. 29:03.
Under the Married Persons Property Act, a woman married ‘out of community of property’ retains her legal status as a single woman, with proprietary and contractual capacity. Under this regime, the property gained by each party before the marriage remains their individual property; there is no system of profit and loss, but property gained during the marriage is governed by a marriage agreement into which the parties enter. However, in reality the wife is in no better position than under the ‘in community of property’ regime, for the husband is usually the one who has control over such property, even though the Amendment to the Deeds Registry Act attempted to reduce the husband’s power (see Subsection 2.1.2.3). Furthermore, if the wife has property of her own, it is usually worth less than that of the husband: normally, it is not property such as housing or land, because women generally have lower economic status.88

The Married Persons Property Act, in Section 7(1), also mandates that estates of marriages under customary law shall devolve pursuant to customary law. However, the couple may choose to be exempted from this requirement if they so desire. In that event, under Section (7)(2), the couple, prior to their wedding ceremony and in the presence of witnesses, must sign a document expressing their intention that their customary marriage estate be subject to civil law. The couple must then decide which property regime they prefer: ‘in community of property’ or ‘out of community of property’.

2.1.2.3 Deeds Registry Act, before and after the 1996 Amendment
As we have seen in Subsection 2.1.2.2 above, prior to the 1996 Amendment of the Deeds Registry Act,89 a husband’s ‘marital power’ allowed him to sell, mortgage, deed, or deal with property in any way he saw fit, without his wife’s consent.

According to the amended Deeds Registry Act, both parties must be involved in any dealings with their joint property, which involvement is evidenced either through written consent or physical presence. If neither can be obtained and the spouse wishing to deal with the property can convince the court of the necessity of so doing, she/he may receive a court order overriding the consent requirement. This system is highly susceptible to fraud, which is more frequently committed by the male spouse, as the courts tend to believe men rather than women.

Previous to the 1996 Amendment, the Deeds Registry Act provided that immovable property could not be transferred or deeded to a woman married ‘in community of property’, unless the property was specifically excluded from the community or the ‘marital power’. It required that a woman be assisted by her husband in executing a deed or any other legal document.90 The Amendment has now eliminated all references to “the need for assistance from a husband” in executing or registering a deed.91

This change in law, though on the face of it an improvement, fails to adequately address underlying issues facing married women. The 1996 Amendment only covers the issue of immovable property — the husband still maintains complete control over the movable property. Furthermore, the new requirement for joint consent is open to much deception and coercion. Written consent may be forced or fraudulently obtained or copied, and the husband may falsely persuade the court of the necessity of the sale of the home, while the wife is completely unaware that the sale is pending. Once the property is alienated, wives are often left destitute and homeless.92

88 Mtunzi (n. 70 above).
90 Ibid., Sect. 18.
Additionally, despite the 1996 Amendment, it has been found that the Registry Office still insists upon the husband’s consent and, in most instances, will not register property in a woman’s name without such consent.\textsuperscript{93} Thus, whereas the law states that women are entitled to be registered as owners of immovable property, in reality this is not the case. Women are still effectively deprived of their personal capacity, as if the newly amended law did not exist.

2.1.2.4 Administration of Estates Act
This Act\textsuperscript{94} governs the administration of estates under civil law. If a deceased person was married under the ‘in community of property’ regime, in her/his will, she/he may only dispose of her/his half of the joint estate — thus the surviving spouse is legally (though not always in reality) protected. However, if married ‘out of community of property’, major problems may arise, for under this marriage property regime, a spouse is free to completely omit her/his spouse from the will.

Most of the valuable property in an ‘out of community of property’ marriage, especially the home, is likely to be registered in the husband’s name. Women have no protection and do not automatically receive a share of the property: it is in the man’s name and he has power over it. He has full legal ability to bequeath her whatever he wishes — which may be absolutely nothing.

Article 28 of the Administration of Estates Act grants letters of administration to the executor “duly appointed by persons so dying” or chosen by a High Court official who acts as Master of the estate. A spouse is not automatically the executor. While Article 47 of the Act does allow a spouse (male or female) to take over the estate, this is at the discretion of the Master and the executor. The widow is thus at the whim of a High Court official.

\begin{center}
\textbf{SINGLE WOMEN AND COHABITING COUPLES}
\end{center}

Unmarried women in a relationship of cohabitation are excluded from any inheritance scheme under civil law, and are similarly ignored under customary law.

When cohabiting couples separate or one of the partners dies, disputes often arise between the two families as to who may lay claim to the property. It is generally accepted that disputes over the property of cohabiting couples cannot be heard in the customary courts, and as civil law makes no provision for cohabiting partners and courts are inaccessible due to the high costs involved, there is also little chance for redress in the civil courts.

Under customary law, property is normally allocated to families or lineages through males. It is most likely that any property the couple shared is in the name of the male. Thus, when the male co-habitant dies, the female is usually considered to be an outcast and the male descendants take the property.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{93} Ibid.
\item \textsuperscript{94} Administration of Estates Act 1979, CAP. 31:01.
\item \textsuperscript{95} Adapted from Mtunzi (n. 70 above).
\end{itemize}
2.1.3 Customary law

Customary law applies to devolution of the property of a deceased Botswanan who was married by customary rites, unless she/he has written a will.\(^{96}\) As will-writing is quite rare, it follows that the estates of native Botswanans are most often devolved through customary law.\(^{97}\)

A number of traditional laws enforced by tribal structures and customary courts generally restrict women’s property rights and economic opportunities. A woman married under customary law is held to be a legal minor and requires her husband’s consent to buy or sell property, apply for credit, and enter into legally binding contracts.\(^{98}\)

> “Customary law encourages men to indulge in relationships outside of their marriage and [to] expect the women on the other hand to accept this practice. In customary settlement of disputes, the woman is constantly reminded that ‘mona ke thlogo ya lolwapa’, meaning that the man is the head of the family. The woman is therefore discouraged from questioning his power.”\(^{99}\)

For the most part, Botswanan customary law is based on a system of primogeniture, whereby the eldest son inherits the bulk of his father’s estate. Along with that property, however, the child inherits certain obligations, such as the duty to support dependants including his mother and his siblings, regardless of their sex.

The eldest male thus maintains control, although ideally he should support the dependents in consultation with his mother.\(^{100}\) Under the primogeniture system, eldest daughters only have the right to maintenance from the estate: they are not entitled to receive any actual property from the estate. Girls may only receive property belonging to their mother, and, potentially, various items set aside for them by their father during his lifetime. However, the fulfilment of this bequest depends upon the good graces of the eldest son and ultimate heir: if he chooses to ignore such gifts, the daughter may not protest.

Once a woman is married, she is considered to be part of a new family, and consequently loses any rights she may have had at her natal home. Thus, her brothers can deny her any rights that her father may have conferred upon her at his death.

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96 This is confirmed in the Married Person’s Property Act 1971, Sect. 7(3). However, should the couple wish to be exempt from customary law, they may sign a waiver to be exempt from the provision of customary law. (Sect. 7(2)).
97 Mtunzi (n. 70 above).
100 If relations with the mother are not good, he is not obligated to consult with her.
2.1.4 The way forward

While recent changes in Botswanan civil law have attempted to address women’s lack of inheritance rights by altering the ‘marital powers’ and property registration scheme, it is clear that there is still a long way to go. The Unity Dow verdict, a ground-breaking decision upholding women’s human rights to equality, reflects a commitment by the justice system to apply human rights standards. However, this commitment has so far proven to be ultimately fruitless for women, especially in the area of housing, land and inheritance, due to inadequate legislation.

Legislation should be made stronger in terms of enforcing the elimination of ‘marital power’ and ensuring complete equality between the sexes in marriage relationships. In addition, marriage law should ensure that customary and religious rites marriages are recognised, taking them out of the realm of discriminatory customary devolution practices. Encouraging from a women’s rights perspective is the clause in the Married Persons’ Property Act which allows for a couple married in customary rites to choose from the proprietary regimes set forth in the civil law. However, this choice is difficult to enforce: there appears to be no mechanism in place to ensure that those marrying under customary rites are even informed of this option, let alone of how it can affect their inheritance rights.

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101 Embassy of Botswana website, http://www.botswanaembassy.or.jp/culture/body2_2.html

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**BOSWA (INHERITANCE) UNDER TRADITIONAL LAW**

**Boswa** is the inheritance of the deceased person’s estate. In traditional Tswana society, the eldest son inherited the lion’s share, which consisted mainly of cattle. Other younger sons were given a smaller share and the daughters even less. The expectation was that the eldest son would look after his mother and the entire household following his father’s death. The reason for passing the family cattle to the son was that the cattle would thus remain in the family. If they were given to the eldest daughter, she would remove them from the family upon her marriage. This was also a form of risk-aversion in the event the widow re-married and the new husband used the cattle without regard for the well-being of the step children.

The last-born son is usually entitled to inherit the family homestead. This arrangement is intended to ensure that at least one of the siblings remains in the home to look after the ageing mother, and to secure the traditional family birthplace. The argument is that only a male can inherit the homestead, for only a male can continue the family name and guardianship.

This insistence upon a male heir, however distantly related, often leads to a total loss of property for the females. Following the advent of the HIV/AIDS pandemic, some families have lost all their males, and in the search for a male to inherit the property, it may end up being passed on to distant relatives and ultimately be completely lost to the females in the family.
Furthermore, the law ignores cohabiting couples. With the spread of HIV/AIDS, many couples are entering into non-formalised unions, as widows or widowers not wanting to formally remarry. Economic hardships are further increasing the number of cohabiting couples, often, for example, because bride price is unaffordable and a formal marriage therefore unattainable.\textsuperscript{102} The Government of Botswana should acknowledge cohabitation and install mechanisms to protect those couples who prefer this form of union to marriage. Other countries have already taken this step.

One of the main problems with Botswana’s legislation is that it is not enforced: registrars should certainly not be allowed to apply it selectively, still insisting on the husband’s ‘marital powers’. Moreover, the system that Botswana has established relies too heavily on administrative mechanisms to enforce women’s rights, and these mechanisms are not monitored. ‘Marital powers’ are clear violations of the right to equality and non-discrimination, and also of the right to self-determination, which is a foundation of human rights. ‘Marital powers’ also entrench the repugnant notion that women should not be allowed to acquire and hold land and housing in their own right, on the grounds that they are helpless to administer it without their husbands. This notion that the husband is superior in marriage is sexist and must be dispelled, not only through legislation, but also through education and sensitisation. For this reason, and especially in the area of customary law and practice, the equality of women and men must be foremost on the sensitisation agenda of any governmental or non-governmental body.

**SPECIFIC RECOMMENDATIONS**

1. A system of genuine joint ownership and administration of property between wife and husband should be put in place, which should require meaningful consultation between the marital partners with respect to their property.

2. ‘Marital power’ – that is, the husband’s position as head of household and final decision-maker – should be replaced with a system of joint decision-making. Furthermore, marriage ‘in community of property’ should be amended by ending the husband’s unique role as administrator of the joint estate and introducing a system of joint administration.

3. The customary law estates of marital partners should be administered by the surviving spouse in consultation with her/his children, and only upon the death of the other parent should property be equally divided between the children, irrespective of their sex or marital status.

4. Property should be divided equally between disputing cohabitants who have lived together for a certain length of time.

5. Female and male children should have equal rights to inherit their parents’ property, irrespective of their sex or marital status.

\textsuperscript{102} Emang Basadi Women’s Association (n. 99 above), p. 37.
In addition to the deep-rooted cultural obstacles, the Committee was concerned with still existing discriminatory laws at the national level, as well as persistent discrimination in the family. ... The Committee suggested that a review of all existing customary laws in ethnic groups be carried out in order to evaluate them as to their substance and their compatibility with international conventions and national legislation.\textsuperscript{103}

### DOMESTIC LEGAL PROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS

- Constitution 1995
- Civil Code of the Empire of Ethiopia 1960
- Family Law Code 2000
- Federal Rural Land Administration Proclamation 1997
- Mohammedans Act 1944
- Land Reforms 1997

#### 2.2.1 Background

To say that Ethiopian women have an ancient history is an understatement. The fossilised bones of Lucy, a young woman living in the area over 3.5 million years ago, were found in Ethiopia in 1974. She is of the genus Australopithecus, possibly early ancestors of modern humans, and has become the most famous woman in the world of palaeoanthropology.

Another famous woman, the Queen of Sheba, is an ancestor of Ethiopia’s first emperor, Menelik I. His dynasty ended with the last emperor, Haile Selassie, who ruled from 1930 until 1974.

In 1974, as students, workers, peasants and the army rose against him, Haile Selassie was deposed and a military dictatorship took power. Under the leadership of Mengistu Haile Mariam, the oppressive military government, the Derg, threw out Americans, jailed trade union leaders, banned the church and turned to the USSR for economic aid. Imports were halted, especially of luxury items. No dissent or opposition was tolerated, and human rights abuses went unchecked.

Dissent grew among the populace; in May 1991, a rebel coalition led by the Ethiopian People’s Revolutionary Democratic Front (EPRDF) overthrew the oppressive Mengistu regime. They inherited six million people facing famine and a shattered economy, but attempted to make moves toward democracy.

A new constitution was ratified in 1995, notably allowing any of Ethiopia’s nine regions to become independent if they so wished. The country’s first parliamentary elections were held in 1995. In June 1998, armed conflict broke out with Eritrea. Two years later, the border war came to a close when Ethiopia defeated Eritrea and a peace agreement was signed.

As a result of its tumultuous history, self-serving governments and economic mismanagement, Ethiopia today suffers what is among the world's most severe and widespread poverty and famine. Despite this, it is the country with the third largest population in Africa, with close to 70 million inhabitants. The population grows by approximately 3 percent each year. A staggering eighty-two percent of the population lives on less than US$ 1 a day.

Eighty-five percent of the population is engaged in agriculture, the major portion of Ethiopia's GDP. About 78 different ethnic groups or nationalities exist in Ethiopia, the largest being the Amhara, followed by the Oromo. More than thirty political parties, most of them ethnically based, exist in a country divided into fourteen ethnically based regions, with local autonomy and police forces. There is a variety of religions, Christianity and Islam being predominant.¹⁰⁴

Despite their famous ancestors and the fact that Ethiopia has ratified several major international human rights instruments,¹⁰⁵ women in Ethiopia face deeply entrenched discrimination and oppression. On average, an Ethiopian woman gives birth to seven children. Violence against women is widespread, especially within the family. Female genital mutilation is still widely practiced. Women make up the vast majority of those living with HIV/AIDS. Of the 6.4 percent of the population, or 1.9 million persons, living with the disease, 1.1 million are women, close to 58 percent.¹⁰⁶

Over 85 percent of Ethiopian women live in rural areas, where families engage in subsistence agriculture. Even in urban areas, where education and healthcare opportunities have improved in recent years, women mostly hold low-paid jobs. Some women with access to higher education are able to find professional employment.

2.2.1.1 Land in Ethiopia
The pre-1974 land tenure system in Ethiopia has been widely dubbed as one of the world’s most complicated and misunderstood. This was mainly due to the country’s geographical, ethnic and cultural diversity, as well as centuries of feudalism.¹⁰⁷

The current 1995 Constitution provides that all land belongs to the State. A former principle of land belonging to the tiller has been abrogated, creating a window through which female heads of households can now have greater access to land. In the case of married women, however, they continue to access land only through their husbands.

The population of the Amhara Regional State is close to 16 million, 4.8 million of them females. The previous land policy, of the Derg government, did not give women access to land. However, the current land policy of the ruling EPRDF clearly stipulates that women have the right to own land.\footnote{108} Based on this provision, the Amhara State formulated a land-redistribution proclamation.

Under the land redistribution programme, 403,028 landless farmers were given land. Of these, 33 per cent were women. Landless women thus benefited, as the policy targeted single women and women engaged in small trading. The President of the Amhara State said that giving land to single women was aimed at helping them get husbands.\footnote{109}

2.2.2 Statutory law

Like most African countries, Ethiopia operates under a dual legal system, giving credence to both formal legislation and customary law. Statutory laws governing inheritance and succession consist of the Constitution of 1995, the Civil Code of 1960 and the Family Code of 2000. Customary law consists of religious and ethnic laws, which vary greatly from region to region.

2.2.2.1 Constitution

The current Constitution was adopted in 1995. It is a notable piece of legislation, which attempts to address many issues that specifically affect women. Articles 13 to 42 of the Constitution of the Federal Democratic Republic of Ethiopia pertain to fundamental rights. These fundamental rights are grouped under several headings. The Constitution guarantees rights and freedoms, \emph{inter alia} equality before the law, equal protection of laws, freedom of speech and expression, freedom of religion, belief and opinion, freedom of assembly and association, freedom of person, freedom against jeopardy and \emph{ex post facto} laws, and the right to property.

Pursuant to Article 9 of the Constitution, international law automatically becomes an integral part of the national law. Article 9(1) sets the Constitution as the supreme law of the land; all laws, customary practices and State decisions which are inconsistent with the Constitution are to be considered null and void.

According to Article 10 on Human and Democratic Rights:

\begin{enumerate}
\item \textit{Human rights and freedoms as inherent rights of man are inalienable and inviolable.}
\item \textit{The human and democratic rights of peoples and citizens shall be protected.}
\end{enumerate}

\footnote{108} Art. 16/1989.
\footnote{109} Emory University School of Law workshop “Women and Land Reform in Ethiopia”, \url{http://www.law.emory.edu/WAL/Advocacy/day3.htm}
Article 25 states that:

> 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 guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, **sex**, language, religion, political or other opinion, property, birth or other status.\(^{110}\)  
> [Emphasis added.]

The rights of women are specifically enumerated in Article 35, which guarantees women’s equality with men. The Constitution calls for affirmative action to remedy past discrimination and to enable women to participate and compete equally with men, in all fields, both publicly and privately. Importantly for women’s inheritance rights, the State is assigned the duty to guarantee the right of all women:

> ... to be free from the influence of harmful customary practices. All laws, stereotyped ideas and customs which oppress women or otherwise adversely affect their physical and mental well-being are prohibited.

> 7. Women shall have the right to acquire, administer, control, enjoy and dispose of property. They shall, in particular, have equal rights with men regarding the use, transfer, administration and control of land. **They shall enjoy the same rights with men with respect to inheritance.**\(^{111}\)  
> [Emphasis added.]

Article 34 (Marital, Personal and Family Rights), Section 5, states:

> This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.

This indicates how dangerous it can be to defer to customary law in resolving personal and family law disputes. There are no mechanisms for defining “consent of the parties”, and thus women may be forced to consent to the use of customary law. In addition, women may not be aware that certain practices under customary law are discriminatory, and thus may unwittingly submit themselves to discriminatory treatment.

> “Ethiopia’s constitution grants women equal inheritance rights and equal rights to access, use, administer and transfer of land. However, it was left to Ethiopia’s individual states to implement these constitutional guarantees, and to date only the Amhara National State has done so. Though all land is state-owned, the Amhara state has provided for equal distribution between males and women. However, even this encouraging development is limited: married women and those supported by their families do not have access to these lands. They are distributed only to single, income-generating women.”\(^{112}\)

^{111}\) Ibid., Art. 35, Sect. 7.  
Under Article 40, all land is declared State land. The State is the only entity vested with the right to own rural and urban land. However, land is listed as an “inalienable common property of the nations, nationalities and peoples of Ethiopia.”

The independence of the Judiciary is enshrined in the Constitution, and Article 78(5) provides for establishment or recognition of religious or customary courts.

In this regard, the Judiciary has the power and duty to ensure effective and speedy enforcement of the rights of individuals. However, to ensure the fundamental rights effectively and speedily, the courts in Ethiopia have yet to develop full capacity.

2.2.2.2 Family Code
The Family Code of 2000 governs marriage and related personal matters such as divorce, adoption and succession. It sets civil law above customary and religious law, and contains some excellent provisions to protect women. The legal minimum marrying age for females and males is 18 years.

The Code sets forth requirements for registration of marriages, which is necessary for their recognition under civil law. Article 62 determines that:

[A]ll income derived by personal efforts of the spouse and from their common or personal property shall be common property.

The Code provides for “irregular unions” (that is, co-habiting couples), and also prescribes that property acquired during such relations is common property, provided that the relation has lasted for no less then three years.

The Code further rules out family arbitrators as a means of settling marital disputes in lieu of the court system. It allows for the joint administration of all marital property, thus making all marital property ‘in community of property’. It also requires the courts to take into account the situation of children in the event of divorce or separation.

Article 16 stipulates a 180-day period of ‘widowhood’ after the husband’s death, during which the widowed woman may not marry another man. This provision does not apply to males and is therefore highly discriminatory.

2.2.2.3 Federal Rural Land Administration Proclamation
Under the Federal Rural Land Administration Proclamation of 1997, the Federal Government confirmed “the equal rights of women in respect to use, administration and control of land”. More specifically, the Proclamation ensures women’s right to lease land from the Government, which owns all land in Ethiopia. The Proclamation states that each regional Council shall assign land title to all, without differentiation between the sexes. According to the law, any person who is willing to personally cultivate land shall be given land. However, such an open clause is obviously susceptible to negative assumptions based on gender.

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113 Constitution of the Federal Democratic Republic of Ethiopia (n. 110 above), Art. 40(3).
The Proclamation allocates land to the head of the ‘household unit’, considered to be the eldest male in the household, and so reaffirms discriminatory practices with regard to women.

2.2.2.4 Civil Code
The Civil Code of the Empire of Ethiopia of 1960 calls for uniform legal provisions which govern all personal matters. However, it is based on a monarchical constitution, and ultimately treats women as if they were children or disabled persons.

In what is claimed to be an invalidation of customary laws in the areas regulated by the Code, women have a de jure right to an equal portion of common household property (in Subsection 2.2.2.2 above, we learned that the Family Code enforces this by stating that all property in marriage is ‘in community of property’). Upon divorce, a woman is entitled to her own property and to half of the common property. In matters of inheritance, she is not to be discriminated against. Both legitimate and illegitimate children are entitled to inherit. The Civil Code makes no other specific provision as regards inheritance.

At another level, however, the Code codifies certain customary practices: it designates the husband as the head of the family and gives him the authority to administer household property. The husband is given the right to control and manage common property and to make all decisions regarding such property. Whereas the Code requires that the husband act judiciously and not alienate property without the consent of his wife, strong traditional and cultural beliefs discourage women from enforcing this requirement.

“Discrimination against women was most acute in rural areas, where 85 percent of the population lived. The Civil Code and the Penal Code, both of which were under review by the Ministry of Justice, contained discriminatory regulations, such as the recognition of the husband as the legal head of the family and the sole guardian of children over 5 years old. Domestic violence was not considered a serious justification to obtain a divorce. There was only limited juridical recognition of common law marriage. Irrespective of the number of years the marriage existed, the number of children raised, and joint property, the woman was entitled to only 3 months’ financial support should the relationship end. A husband had no obligation to provide financial assistance to his family and, as a result, women and children sometimes were abandoned when there was a problem in the marriage.”

2.2.3 Customary law
Ethnic groups have, for the most part, continued to apply their own norms and customs. In 1995, the Constitution, while reiterating the concept of gender equality and non-discrimination on the basis of sex, legally reopened the issue of the applicability of customary law. It provided that if parties to a dispute of personal status agreed to the applicability of customary law, then this law would apply. Legislation is yet to clarify whether such agreement includes application of sex-discriminatory customary laws.

Outside the major cities, customary law continues to govern intra-family relations including inheritance. This is especially true in the Muslim-dominated areas, and in certain other parts of the country (the Oromia, Gemo Gofa and Shoa regions), all of which have inheritance rights systems that differ greatly from the civil law.

Inheritance is usually patrilineal and occasionally matrilineal. Indeed, few of Ethiopia’s 89 distinct ethnic groups traditionally practice matrilineal systems of property. Even then, most matrilineal systems do not actually benefit women. In both patrilineal and matrilineal customary tenure systems, land is allocated to males and transferred from men to men.

**CASE STUDY: WOMEN’S LAND OWNERSHIP IN THE OROMIA REGION**

“A young woman, 18 years old, had a husband. When he died, his family forced her to marry his younger brother. The young woman was locked in the house for a long time. She finally managed to get out and reported the case to the police. However, as the family and the community believe in wife inheritance, all kinds of force and pressure are still being placed on her to force her to remain with her brother-in-law.”

In patrilineal customary tenure systems in Ethiopia, both lineage and property are traced through the male line and, most often, land is transferred from father to son. Although men provide cultivation or usufructuary rights to their wives, daughters and other female relatives during their lifetimes, at their death only sons and other male relatives assume control and ownership of housing and land. Wives and daughters almost never inherit land allocated to households.

Widows, and especially widows with young children, can retain access and cultivation rights to their deceased husbands’ lands as long as they remain in their husbands’ community, in ‘good standing’, and until their sons are old enough to inherit the land. At that point, they become dependent on their sons’ wishes — if they are allowed to remain on the land at all.

Under many customary systems, women themselves are considered to be property of their husbands. As they leave their birthplace and join their husband, they are considered ‘taken care of’. This perceived dependency breeds a falsehood: that women cannot be good property-holders. It is reported that even parents hesitate to bequeath property to their daughters. Even during their lifetimes, whereas girl children may use land and housing, when they go off to live their own life – which almost invariably means marriage – they receive little, perhaps a token head of cattle.

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121 http://www.law.emory.edu/WAL/WAI-studies/ethiopia.htm, p. 5.
2.2.4 The way forward

Ethiopia has made great strides in attempting to integrate international human rights law into its national laws and policies. The current Constitution and the new Family Code of 2000 contain provisions that protect women’s equality and right to non-discrimination. However, these laws contradict each other on many fronts.

While the Family Code sets civil law above custom and tradition, the Constitution makes provisions that allow for deference to customary and religious laws in family or personal law disputes. While it is clear that an attempt to balance custom and statutory law is being made, this deference to custom can often lead to the continuation of severe discrimination against women. Provisions allowing for the application of customary law must be conditioned by a subsequent provision that such customary law may not discriminate against women.

The Civil Code of 1960 further confuses the legislative morass. While making some provisions for children’s inheritance, and purportedly overriding customary law in personal law matters, the Code actually serves also to codify women’s perceived lower status, making the husband the head of the household and establishing his ‘marital power’. It fails to truly address the issues which discriminate against women in inheritance. The prevalence of customs and traditions that discriminate against women and subordinate them is disturbing.

Especially in the rural areas, it seems that women are unaware of their rights, or their ability to claim them. A nationwide education and sensitisation programme on human rights and women’s equality is needed, especially for certain ethnic tribes.

Thus Ethiopia, like so many other African countries, stands at the crossroads between civil and customary law, with no clear sense of direction. Unfortunately, women are the ones who usually suffer the consequences of such confusion.

Ethiopia should work to ‘finish what it has started’: to fully integrate human rights principles into its laws. It should revamp the Civil Code, bringing it into line with these other laws, and, more importantly, ensure that all its laws work consistently to protect women’s rights. It should also enforce those rights so that they act over and above the particular customs and traditions that violate women’s equality and right to non-discrimination. It must take steps, not merely to integrate human rights standards into its legislation, but also to ensure that these are implemented on the ground.

**SPECIFIC RECOMMENDATIONS**

1. The Civil Code should be reformed to eliminate ‘marital powers’ of husbands and to combat the subordination of women.
2. Human rights education and sensitisation programmes should be implemented nationwide to dispel notions of women’s inferiority. This is especially crucial given the high rate of violence against women.
3. Women and men must be educated on the benefits of the Family Code and the provisions of the Constitution that protect women’s rights and enforce their equality.
4. A uniform inheritance rights law should be established, to be applicable nationwide and enforceable in lieu of customs and traditions that discriminate against women (see Section 5.7).
5. The court system must be made more ‘women-friendly’. Free legal aid should be provided by the State. If the State is unable to afford such legal aid, at the very least it should encourage and support the work of existing legal networks for women.
The proceeds of this joint effort of man and wife and/or children, and any property which the man acquires with such proceeds, are by the customary law the individual property of the man.\textsuperscript{123}

### DOMESTIC LEGAL PROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS

- Constitution 1992
- Marriage Ordinance 1884
- Marriage of Mohammedans Ordinance 1907
- Intestate Succession Law 1985: PNDC Law 111
- Intestate Succession (Amendment Law) 1991: PNDC Law 264
- Wills Act 1971 (Act 360)
- Children’s Act 1998 (Act 560)
- Probate and Administration Rules 1991: LI 1515
- Customary Marriages and Divorce Registration Law 1985: PNDC Law 112
- Customary Marriages and Divorce Registration Law (Amendment) 1991

### 2.3.1 Background

In the 35-year period following Ghana’s independence, the country experienced a broad spectrum of government rule: nine different types of administration (three civilian and six military), including a Westminster-style parliamentary democracy, a Socialist single-party republic, and several military regimes that came to power in coups.

Ghana, the heart of the Gold Coast, struggled under colonial rule from the early 15\textsuperscript{th} century to the mid 1900s. The first European rulers were the Portuguese, followed by Danes, Germans, Swedes and finally the British.

The long period of colonial rule, followed by a governmental system in constant flux, has resulted in laws that are riddled with inconsistencies. Surprisingly, though, women have been able to achieve some recognition of equality through the law.

Since colonial times, women have been subject to multiple systems of law governing marriage. The various legal types include marriage under customary law, ordinance marriages, both polygamous and monogamous marriages, and consensual unions. Marriages may be contracted under any of these systems, though it is believed that up to 80 percent of all marriages are still entered into under the customary system.\textsuperscript{124}

\textsuperscript{123} Quartey v. Martey (1959) Ghana L. Rep. 377. High Court held that the widow’s right is maintenance and support from the family of the husband, but she is not entitled to a share in her husband’s estate upon his death intestate.

Even though Ghana is a signatory to many international human rights conventions and has made seemingly genuine attempts to integrate these laws into its domestic legal system, women still suffer various discriminatory practices, including ‘property grabbing’ following the death of their father or spouse.

Women in Ghana cultivate over 40 percent of all the cultivable land. Despite this, they are far less likely than men to exercise independent control over their land: they do not control the proceeds from the land and are unable to dispose of the same through sale or inheritance. Women-headed households make up about 30 percent of the rural households.

Education is a rare commodity for Ghanaian women: in 1994, girls comprised 47 percent of primary school pupils and only around one-third of senior secondary school students. At university level, only about one quarter of the students were women.

As far as HIV/AIDS is concerned, women face the greatest burden. At the end of 2001, over 51 percent of the population suffering from HIV/AIDS were women. Of course, this extra burden greatly exacerbates the consequences of any denial of women’s human rights.

2.3.2 Statutory law: Constitutional protections

Ghana has gone through a series of Constitutional regimes. The 1979 Constitution protected spouses’ ability to inherit from their husband or wife. It provided that:

No spouse may be deprived of a reasonable provision out of the estate of a spouse whether the estate be testate or intestate.

Though the 1979 Constitution was abolished following the coup led by Flight Lieutenant Jerry Rawlings, his government’s charter maintained the provisions for equality of division of property in an intestate estate.

The next Constitution, of 1992, further preserved the substance of the previous provisions by providing, in Article 22(1), that a:

... spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
In this way, the provisions of Article 22(1) reach beyond the context of intestate succession, permitting courts to override a will if the same does not provide adequate protection for the surviving spouse and children.\footnote{133}

The current Constitution, in Article 17, protects the right to equality and non-discrimination of all:

1. All persons shall be equal before the law.
2. A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status. \[Emphasis added.\]

Article 17 further ensures that:

4. Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide –

   ... (b) for matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

Under Article 11, customary law is deemed to be part of the common law of Ghana, which is one of five categories of law. The common law includes the “doctrine of equity and rules of customary law.”\footnote{134}

2.3.2.1 Marriage under the Ordinances

The Marriage Ordinance of 1884\footnote{135} and Section 10 of the Marriage of Mohammedans Ordinance of 1907\footnote{136} limited the application of customary law on intestacy. The Marriage Ordinance prescribes monogamous marriages similar to ‘western-style’ marriages. The Marriage of Mohammedans Ordinance provides for marriages under Islam, which may be polygamous.

Under the Marriage Ordinance, marriage is strictly monogamous, though the economic rights of women in Ordinance marriages do not differ significantly from those of women in customary marriage. Indeed, this conception of marriage imposes upon women a similar situation to that of western-style marriage: the woman must lose her identity in favour of her husband’s. Under the Ordinance, women have no greater claim to property acquired during marriage than women married under customary law. The property still remains the husband’s.

Prior to the Intestate Succession Law of 1995 (see Subsection 2.3.2.2 below), inheritance was determined by provisions of the Ordinance. Spouses and children had rights to specified shares in the intestate estate. The Marriage Ordinance, in Section 48(1), provided that two-thirds of an estate devolved under the ‘laws of England’,\footnote{137} and one-third devolved in accordance with customary law.\footnote{138} As this system was difficult to apply, the common practice was for a widower to take two-thirds of the non-customary portion and a widow to receive only one-third, the reminder going to the extended family or lineage.\footnote{139}

\begin{footnotes}
\item[133] Furthermore, Art. 22(3) states: “With a view to achieving the full realization of the rights referred to in clause (2) of this article: (a) Spouses shall have equal access to property jointly acquired during marriage; (b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.”
\item[134] Constitution of 1992, Ch. 4, Art. 11, Sect. 2.
\item[135] Marriage Ordinance (Cap. 127) of 1884.
\item[136] Mohammedans Ordinance (Cap. 129) of 1907.
\item[137] Laws of England relating to the distribution of personal estates of intestate, entered into force on 19 Nov. 1884.
\item[138] Marriage Ordinance, Cap. 127, Sect. 48 (1884).
\end{footnotes}
The Mohammedans Ordinance provided for the registration of marriages (including limited polygamy) and divorces pursuant to the terms of Islamic law. Section 10 of the Mohammedans Ordinance provided that the succession of an intestate spouse registered under the Ordinance would be regulated by Islamic law.¹⁴⁰

Despite the existence of Ordinance marriages, the majority of marriages (80 percent) were still taking place under customary law.¹⁴¹ The law therefore did not provide for a stable inheritance system for women and their children.¹⁴²

### 2.3.2.2 Intestate Succession Law

Under pressure from women’s rights groups, religious organisations and other interested parties, and desiring to comply with international standards in order to end discrimination against women, the military government passed in the 70s and 80s, by decree, a series of personal laws related to women. These provided a framework for a more equitable division of property on the death of an intestate spouse. This division was not dependent on the type of marriage entered into. These reforms rise to the Intestate Succession Law of 1985.

In Ghana, only about 20 percent of all deaths are covered by wills,¹⁴³ so intestate succession is a major issue. The Intestate Succession Law of 1985 (PNDC Law 111) significantly altered the system of intestate succession.

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**FAMILY TENSIONS**

“The growing importance of the nuclear family brings with it its own logic of moral justice. Simply put, this argues that a surviving spouse be compensated for his or her services to the deceased spouse, that a spouse is more likely to look after the children on the death of the other partner than anybody else, and that expectations of the spouses are probably best satisfied by giving the property of one to the other on the former’s death.”¹⁴⁴

Recognising the contradictory interests that often plague the extended family, the Intestate Succession Law was passed with the primary purpose of ensuring that the spouse and the children receive the bulk of the estate. The nuclear family was seen as emerging stronger than the traditional extended family, and its needs required attention.¹⁴⁵

The Intestate Succession Law governs the property of all persons subject to Ghanaian law and dying without disposing of the property in a will (that is, dying ‘intestate’). It replaces customary law, which previously governed the devolution of the estate in most cases of intestacy.¹⁴⁶ The Intestate Succession Law repealed sections of the older marriage acts, though they still govern estates distributed before the Law came into force.

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¹⁴⁰ However, the law became effectively obsolete, as the majority of Islamic law marriages were not registered, and thus were regulated largely as marriages under customary law.
¹⁴¹ Fenrich and Higgins (n. 126 above), p. 284.
¹⁴² As women and children depended on the lineage fulfilling their obligations to care for them, if the lineage refused or failed to do so, the women and children were left with nothing.
¹⁴³ Baden, et al. (n. 124 above), p. 54.
¹⁴⁴ Intestate Succession Law, 1985, PNDCL 111 (Memorandum).
¹⁴⁵ Ibid.
¹⁴⁶ Sect. 21 of PNDC 111.
Sections 3 and 4 of the Intestate Succession Law provide that if the estate only includes one house, the surviving spouse and/or child shall be entitled to that house and the household chattels. The spouse and child should hold the house as tenants in common. If the estate has two or more houses, then the spouse and the child shall together determine which of the houses the other shall take. If they cannot decide, a High Court is to decide for them.

The Intestate Succession Law completely rearranged the system of distributing the residual property (that is, the property apart from the house of residence) that the Ordinance system had set forth, as can be seen in the chart below.\textsuperscript{147}

<table>
<thead>
<tr>
<th>Devolve to:</th>
<th>Ordinance</th>
<th>Intestate Succession Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse (female)</td>
<td>$\frac{1}{3}$</td>
<td>$\frac{3}{16}$</td>
</tr>
<tr>
<td>Children</td>
<td>$\frac{1}{3}$</td>
<td>$\frac{5}{8}$</td>
</tr>
<tr>
<td>Family</td>
<td>$\frac{1}{3}$</td>
<td>$\frac{1}{8}$</td>
</tr>
<tr>
<td>Customary Law</td>
<td>$-$</td>
<td>$\frac{1}{8}$</td>
</tr>
</tbody>
</table>

As the chart above shows, Section 5(11) of the Intestate Succession Law sets forth a complicated formula for the division of the residue of the estate. If there are children, three-sixteenths is to devolve to the spouse, five-eighths to the surviving child(ren), one eighth to the surviving parent(s) and one eighth will devolve in accordance with customary law.

If the value of the estate is considered small\textsuperscript{148} under the Law (equal to or less than 50,000 cedis, later amended to 10 million cedis in 1998) then the estate should devolve entirely to the spouse or the child, or if there is not spouse or child, to the parent.

Experience has shown that the incremental divisions actually used rarely conform exactly with the Intestate Succession Act. Rather, the estate is devolved in lump sums roughly conforming with the stipulated fractions.\textsuperscript{149}

It is vital that the house is devolved to the surviving spouse and child, separately from the rest of the estate. This guarantees them a place to live after the death of the other spouse. Women are no longer forced to marry the customary successor if they wish to remain in the house.

Although the Intestate Succession Law is one of sub-Saharan Africa’s most comprehensive pieces of succession legislation, adequately addressing many issues of estate devolution, it is flawed in some respects, especially those related to its application and implementation. There was minimal consultation with women’s groups in drafting the Law, and therefore it does not address all the necessary issues.

\textsuperscript{147} Chart based on Sect. 5(11) of PNDC Law 111, and terms of the Marriage Ordinance. It is assumed that there are children of the marriage.

\textsuperscript{148} Sect. 12 of PNDC Law 111.

\textsuperscript{149} Most inheritance rights disputes settle out of court. Even when the provisions of the Intestate Succession Act are applied, it is almost never in conformity with the exact fractions, unless the parties so demand, which they rarely do. Instead, the stipulated fractions are used as a guide to the satisfaction of the parties. COHRE WHRP interview with Sylvia Noagbesenu, International Federation of Women Lawyers (FIDA), Ghana.
Many men also felt that they had not been consulted and therefore resented the Law when it came in. Initially, men frequently refused to register their marriages as the Law required.

A major flaw of the Intestate Succession Law is that it pertains only to non-lineage property, which often excludes land. Land and housing is often considered as coming from the lineage, and thus cannot be passed on according to this Law. Instead, it remains in the lineage, usually through the male, and will not pass to the female spouse.

Another drawback is that because the term ‘spouse’ is used, in the singular, polygamous marriages are not addressed. This creates serious problems when a man has multiple wives. As only men can have more than one spouse, the Law is discriminatory by default, in that women are the only ones affected by this failure to address multiple spouses.\(^{150}\)

Furthermore, the Intestate Succession Law does not cover non-formalised unions, thereby prejudicing some women who may have depended on a male partner for support: because they were not formally married, they receive nothing from his estate. Neither does the Law provide adequately for aged or needy parents who may have depended on the deceased male's estate.\(^{151}\) In the case of small estates as defined in Section 12 of the Law, aged parents are completely excluded from benefiting.

As we have already seen, a serious shortcoming of this Law is that it is complicated and the scheme of residual estate distribution is difficult to manage. Moreover, the stipulated fractions rarely correspond to the actual needs of the surviving family members. For example, if there were two wives, the house would technically have to be sold to satisfy the law, which is often inconvenient or even impossible.

The situation is especially egregious if the wife must share the home with her own children and others who are not her natural children and who may have only recently moved in, after the death of their father, to obtain support. Under the Intestate Succession Law, they too can inherit. This can be problematical for the children as well as the widow, who must now look after these children. The difficulties of dividing a single house between parties with disparate interests are obvious.\(^{152}\)


\(^{151}\) Many stated that one-eighth of the deceased’s estate is not enough to maintain the elderly parents, especially if they have been depending on the son for support.

2.3.2.3 Intestate Succession Law Amendment

An amendment to the 1985 law, the Intestate Succession Law Amendment 1991\(^\text{156}\) prohibits any person from ejecting a spouse or child from the matrimonial home prior to the distribution of the estate, irrespective of whether the deceased person died testate or intestate. Anyone who attempts to or succeeds in ejecting the surviving entitled spouse, or deprives her/him of the use of the property or any part thereof, or interferes with the property in any way, is liable to a large fine and imprisonment not exceeding one year.\(^\text{157}\) This amendment has helped in keeping women in their marital homes, as well as bringing to justice those who have tried to eject them.

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\(^\text{154}\) The study took place as part of a project on legal pluralism initiated by GTZ. The COHRE WHRP’s contact, Sheila Minkah-Premo, was GTZ coordinator for the Accra region.

\(^\text{155}\) This was confirmed in an interview with FIDA Ghana (n. 153 above). They stated that many women who are evicted by their in-laws after the death of a spouse or father do not know about the Law or, if they themselves are aware of it, cannot convince their in-laws of its existence.

\(^\text{156}\) Intestate Succession Law Amendment 1991, PNDC Law 264.

\(^\text{157}\) Ibid., Sect. 16(a).
Problematic, however, is Section 16(c), which states that a surviving spouse or child cannot be ejected:

... 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;

This clause has been deliberately misinterpreted by some to mean that the widow must be ejected six months after the death of her husband.\(^{158}\) Many evictions of widows have been reported with the in-laws claiming that the law mandates that they be thrown out — and with police often not knowing better. This section of the Amendment definitely needs clarification.

2.3.2.4 Customary Marriages and Divorce Registration Law

The Customary Marriages and Divorce Registration Law\(^ {159}\) came into force on the same day as the Intestate Succession Law (see Subsection 2.3.2.2 above). The Registration Law mandated the registration of all customary law marriages and divorces within three months of the marriage or divorce, as well as the registration of all existing marriages within three months of the Law being enacted. Registration assures validity, and as such, the protection provided by civil law.

However, a number of factors has undermined full compliance and thus protection. While many came forward to register their marriages, those unaware of the new Registration Law, the illiterate, and those that did not understand it, as well as those whose spouse was unwilling to register (the registration process required both spouses to be present at the time of registration), did not benefit.

The Registration Law, while purporting to legitimise customary law marriages and thereby serve women’s equality, actually had the opposite effect. As registration was a condition precedent to application of the Intestate Succession Law,\(^ {160}\) if a marriage had not been registered, for whatever reason, the Intestate Succession Law could not apply. Thus, rather than facilitating the application of the Intestate Succession Law, the Registration Law limited its scope.

In 1991, the Government recognised and addressed this problem by passing an Amendment to the Customary Marriages and Divorce Registration Law,\(^ {161}\) which made registration of marriages voluntary, and eliminated the time limit for their registration. This solved some of the registration problems.

\(^{158}\) Dowuona-Hammond (n. 152 above), p. 7.

\(^{159}\) Customary Marriage and Divorce Registration Law, 1985 (PNDCL 112).

\(^{160}\) Sect. 15 of the Customary Marriage and Divorce Registration Law states: “The provision of the Intestate Succession Law, 1985 (PNDCL 111) shall apply to any spouse of a customary law marriage registered under this Law.”

\(^{161}\) Customary Marriage and Divorce Registration (Amendment) Law, 1991 (PNDCL 263).
2.3.2.5 Probate and Administration Rules
The Probate and Administration Rules of 1991 govern the order of priority for granting letters of administration where the deceased died intestate. Where the deceased was married under the Marriage Ordinance, the surviving spouse is the first in line. However, if the estate devolves solely under customary law, the customary successor of the deceased (usually not the female spouse) is the first in line.\textsuperscript{162}

2.3.2.6 Children’s Act
The Children’s Act of 1998\textsuperscript{163} amends the Intestate Succession Law to provide that the educational needs of minors who are children of the deceased be first met by grants out of the residue of the estate, before it is distributed according to the scheme (shown in the table in Subsection 2.3.2.2 above).

Of great importance is that the Children’s Act alters the definition of ‘child’ in the Intestate Succession Law to include a child born ‘out of wedlock’. Previously, that Law only recognised natural or adopted children.

The Children’s Act fails, however, to adequately address the issue that there may be offspring older than 18 years who still need to be supported out of their father’s estate; for example, those who are disabled or who are otherwise unable to attend school.\textsuperscript{164}

2.3.2.7 Wills Act
Of course, a Ghanaian citizen who does not want her/his estate to be subject to the Intestate Succession Law can make a will. The Wills Act of 1971 governs the making of wills, allowing anyone over the age of 18 and of sound mind to make one. The will’s provisions are guaranteed to be respected, so long as the will is not obtained by fraud or made under duress. Section 13(1) of the Wills Act enables the High Court to make reasonable provision (within three years from the date upon which probate is granted) for the needs of “any father, mother, spouse or child under 18 years of age” if the High Court finds that the testator has not made reasonable provision for their maintenance. This may include the payment of a lump sum or “the granting of an estate or interest in immovable property for life or any lesser period.”\textsuperscript{165}

2.3.3 Customary law
Although a system of civil law is in place in Ghana, customary law still largely regulates family relations. The requirements for marriages, obligations toward and custody of children, ownership of property acquired during marriages, and the rights and duties of husbands and wives are all regulated to a great extent by customary law.

It is important to note the deference that civil law gives to customary law in certain circumstances, as is seen especially in the distribution of the estate.

\textsuperscript{162} Probate and Administration Rules 1991 (LI 1515), Order 2, Sect. 7(b).
\textsuperscript{163} The Children’s Act 1998, Act 560.
\textsuperscript{164} The Children’s Act also amends the Intestate Succession Law to give priority in distribution of the estate to those children who are “minors undergoing educational training”.
\textsuperscript{165} Will Act 1971, Sect. 13(1)(b).
In Ghana, as in most parts of Africa, the concept of family is closely associated with blood ties — marriage itself does not create a new family. Husband and wives are not, as in Western notions of family, seen as “two persons united as in one”.

Men are expected to maintain their wives, and women are, in return, expected to do domestic work and to assist the husband in the development of his trade or business. This concept was supported in *Quartey v. Martley and Anor*, in which a wife's support for a man's labour in his trade or business was deemed her “domestic responsibility”. However, her labour input gives her no rights over the property acquired as a result. Men gain complete sexual rights over their wives — yet women do not enjoy the reciprocity of this right: polygyny is formalised and widely accepted but there is no system of polyandry. Statistics taken in 1989 show that around one-third of all marriages in Ghana are formally polygynous, though more than two wives is rare. The highest rates of polygyny are found among the uneducated women of northern Ghana.

Also commonplace is the acquiring by husbands of ‘concubines’; that is, an informal union with another woman. In such cases, there is little to no social prejudice against the man who fails to formalise such a union. Nor is there any reciprocal social 'allowance' for the women involved.

Lineage is one of the most important notions in Ghana, even today. As in many customary systems, the lineage as a social institution greatly predominates over that of the nuclear family. To a large extent, the importance of the lineage, or the extended family, determines the political and socio-economic organisation of society. It determines the property and succession rights to be enjoyed within the traditional system and is the cohesive force that maintains the social structure of a community.

### 2.3.3.1 The myth of the matrilineal system

If a man dies without a will (that is, intestate) under customary law, his property becomes lineage property and it is distributed accordingly. In neither the matrilineal nor the patrilineal system does the wife (or, for that matter, the husband, if his wife has died intestate) have a right to inherit from the deceased directly. However, there is an inequity in that the man is seen as the owner of the property acquired during marriage. Thus, when the wife dies, the ownership of the property is relatively uninterrupted, for the husband remains in control and possession. However, the wife, as she has gained no proprietary interests in the marriage property, does not.

Every Ghanaian belongs either to a matrilineage or a patrilineage, and the number of tribes practising the former almost equals the number practising the latter. A matrilineage consists of all persons, male or female, who are descended in a direct bloodline from a common female ancestor; in a patrilineage, the common ancestor was a male.

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166 Kuenyehia and Ofei-Aboagye (n. 139 above), p. 135.
In matrilineal systems, the children belong to the mother’s family, the binding relationship being that between mother and child. Thus, siblings born of the same mother usually have strong ties to each other. A matrilineage consists of a woman, her mother, her brothers and sisters, her maternal aunts and uncles, her male and female children, her daughter’s children and so on.

In both types of lineage system, men maintain the positions of authority. In matrilineal systems, the mother’s brother is typically the head of the smaller family unit. He is the guardian of women and children within the extended family, and will most likely have a close relationship with his sister’s children. His own children are not regarded as part of his family, but of his wife’s.\(^{171}\)

In matrilineal systems, the intestate estate becomes ‘family property.’\(^{172}\) If a male dies intestate, his ‘uterine brother’\(^{173}\) is the first in line to inherit his self-acquired property. The next to be considered is the son of a uterine sister. (This is popularly known as ‘nephew inheritance’ among several tribes.) Third in line to the estate is the son of the deceased’s mother’s sister.\(^{174}\) From a deceased female, the preferred order of transfer is first the mother of the deceased, then a uterine sister, and then a daughter.

It is not uncommon, however, even under matrilineal systems where the wife has rights to maintenance and residence from her husband or his successors, for the widow to be thrown out of the home. As it is understood that the matrilineal clan will provide for its women, this is considered acceptable. However, a breakdown of the familial system has rendered this form of ‘protection’ largely obsolete and inapplicable to the real situation for women.

It must be emphasised that neither system protects women’s rights, though many people falsely believe that the matrilineal system does so. The fact that the descendants are from the female line merely implies that the sons of the deceased husband’s sister(s) (that is, his nephews) inherit the property — his wife and any children born of her get nothing. Indeed, far from protecting women’s rights, this system often results in the eviction of the widow from the matrimonial home after the death of her spouse. This is because the matrilineal heirs (her nephews and, rarely, nieces), being further removed in the bloodline, often have no real loyalty to her. In the patrilineal system, where the property passes directly to her children, if any, they may have more sympathy for their mother and allow her to stay.

\(^{171}\) Fenrich and Higgins (n. 126 above), p. 272.
\(^{172}\) Matrilineal systems are also known as abusua systems.
\(^{173}\) That is, a brother born of the same womb, though he may have a different natural father.
\(^{174}\) Fenrich and Higgins (n. 126 above)
In patrilineal systems, the children are considered part of the father’s line. A patrilineal extended family consists of a man, his father, his brothers, his paternal aunts and uncles, his own male and female children, and so on. His sisters are also part of his family — however, their children are not (unlike in a matrilineal system). They are considered part of their father’s (her husband’s) family. The children of the man’s son are part of his lineage, his daughter’s children are not. Therefore, inheritance is almost always to the sons, for the thinking is that the daughters will become members of another lineage upon marriage.

A customary successor, determined by the lineage, is appointed, and in turn determines which child inherits and how large a share she/he gains. Preference is usually given to boys, especially with respect to land. (Girls receive ‘feminine’ chattels). The deceased husband’s lineage has a moral responsibility to maintain his widow until she remarries. Of course, this leads to difficulties, with the widow relying on the good graces of the lineage. The widow has no legal right to enforce these moral responsibilities of the lineage to maintain her. Indeed, these responsibilities are usually ignored.

Polygyny in patrilineal societies complicates matters. In the case of children born of the same mother, each child generally inherits. Children born out of wedlock may also inherit, provided the father acknowledged paternity before he died. If the children are born of more than one wife, then the eldest child of each mother receives a share, these shares then being subdivided among the younger siblings.176

While bride price and dowry practices are still common, widowhood practices such as wife inheritance or cleansing have severely declined, due to a law prohibiting such practices, as well as the influence of Christianity.177

### 2.3.3.2 Lack of community of property

Customary unions, due to the nature of marriage in traditional Ghanaian society, prescribe the duty of the wife to provide labour; the husband’s duty is to provide economic support. The wife is not considered part of the husband’s family178 and thus not part of his economic unit. This common ‘understanding’ entails an asymmetrical relationship vis-à-vis marriage property:

*The proceeds of this joint effort of man and wife and/or children, and any property which the man acquires with such proceeds, are by the customary law the individual property of the man.*179

This notion has been widely and hotly debated in Ghana, and ideas are beginning to change. For example, courts have departed from this strict interpretation in cases where women have made a direct financial contribution to the acquisition of property during marriage.180 Again, though, it is clear that a woman in contributing her labour is merely regarded as fulfilling her marital obligation: she gains no other recognition.

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177 Ibid.

178 Ibid.

179 Quartey v. Martey [1959] Ghana L. Rep. 377. The High Court held that the widow’s right is to maintenance and support from the husband’s family, but she is not entitled to a share in her husband’s estate upon his death intestate.

180 Kuenyehia and Ofei-Aboagye (n. 139 above), p. 35.
Accordingly, community of property is rare. Instead, whatever goods or assets are accumulated by either party during the marriage period remain the property of each. However, under customary law, when the husband dies, it is often difficult for the wife to claim the property, no matter how much labour she has put into acquiring it.

Although, on the face of it, this separation of property seems to be gender-neutral, it actually tends to benefit the man. As women have little to no property of their own in the first place, after dissolution of the marriage or their husband’s death, they still have very little. As far as land is concerned, even in matrilineal systems, men tend to be favoured when it comes to giving large parcels. Women, even if they acquire property from their mothers, usually only acquire small parcels. Married women generally have insufficient time to earn enough money to acquire property on their own, and even if this were possible in principle, their duty to labour for their husband constrains their ability to labour for themselves. This duty also undermines their claim to joint ownership of property jointly acquired during marriage: after all, ‘labour is their duty, so why should they benefit from it?’

OBSTACLES TO INHERITANCE IN GHANA

Where there is property and/or a will, too often the husband’s male relatives take over the negotiations and applications. If the widow challenges their actions she only attracts (more) abuse and violence, including beating and expulsion from her husband’s house and land. For many widows, the hurdles they would have to leap are so high and thorny that they abandon their rightful claims, leaving everything to the relatives. Some men actually ‘watch out’ for widows trying to claim their inheritance and ‘marry’ them under false pretences. Having misappropriated their money, they promptly desert them.

“The nephew made the widow sit on a chair outside the hut, whilst the possessions were divided. In another case, the widow obtained a court order to protect the property, but when she returned home she was butchered by her husband’s nephews in the compound.”

“During the rainy season I had only a small corner of a shed to rest in. When the rain came I had to collect the water in a gourd and throw it outside and then sleep on the wet floor so that I got a fever. I had no money for medicine and I nearly died. (Childless widow aged 53).”

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2.3.4 The way forward

INTERNATIONAL EYES ARE WATCHING

“In Ghana, customary law divests women of individual property rights. Control of property rests with male heads of families. Various laws have attempted to rectify women’s unequal property rights, but are poorly implemented. For example, laws on inheritance ignore the extent to which polygyny diminishes their actual benefit, as the same proportion of property is split among many wives. This is a serious issue as over one-third of women in Ghana are in formally polygynous marriages. Moreover, families often contests wives’ status for purposes of inheritance.”

Ghana has had some success in attempting to integrate international human rights laws and standards, but laws alone cannot bring about a total change on the ground. This is partly due to the appalling lack of education on the inheritance law that affects women’s lives. Women who cannot or do not read do not find out about the law that may protect them, and even those who do become aware of it are informed neither about its contents, nor how to access it. It is shocking that the enforcers of the law themselves, the police, are not told about the law and how it should be enforced. At the time of the fact-finding mission by the COHRE Women and Housing Rights Programme (WHRP), there was talk of limited attempts by the Government to educate the people on their rights, but much remains to be done.

As we have seen, Ghanaian inheritance law includes numerous shortcomings, contradictions and inconsistencies, which make it susceptible to opportunistic misinterpretation. The fact that it makes no provisions for inheritance by elderly parents shows that there is an urgent need to address all the (often conflicting) needs of family members after one of them has died. The law provides for punishment of those who evict a widow from her matrimonial home within six months of her husband’s death. As mentioned above, this has been misinterpreted – tragically – to mean that a widow should be ejected as soon as possible after her bereavement. These and other unclear aspects of the law need to be addressed and clarified.

All in all, Ghana has been making great strides forward. However, until the time when all customary practices violating women’s inheritance rights, and women’s rights in general, are abolished or superseded by appropriate and ‘enforced’ civil law, Ghanaian women will continue to suffer at the hands of those customs and traditions that discriminate against them.

182 Taken from Human Rights Watch, Q&A: Women’s Property Rights in Sub-Saharan Africa, http://www.hrw.org/campaigns/women/property/qna.htm. Human Rights Watch has recently become deeply involved in women’s property issues in Africa, and a strong advocate for appropriate inheritance rights laws and structures. The organisation became acutely aware of the devastating affects of inheritance rights violations through a recent study on women’s property rights in Kenya.
SPECIFIC RECOMMENDATIONS

1. There should be greater convergence between customary law and civil law. Whereas civil law attempts to replace customary law in the case of the Intestate Succession Law, it fails to do so adequately. Civil law should therefore be revised, taking into account regional, tribal and village-specific differences in inheritance rights. The aim should be to reform, not to replace, customary law.

2. Education and sensitisation programmes are needed to inform women about inheritance and succession law, as well as how to access and use it properly. Teaching both sexes about inheritance rights and laws, in secondary schools and adult education programmes, would provide a firm basis.

3. Community-based educational programmes should also be undertaken, using community members trained as paralegals to reach out to their fellow community members in plain language that they can easily understand.

4. The Intestate Succession Law should be amended so that it becomes easier to apply. Its provisions should be clarified, especially with regard to the eviction of widows and the confusing system of estate devolution.

5. Legal aid services should be supported and strengthened in order to improve access to courts and other enforcement mechanisms.
Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate male against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against womenfolk in this country. They are regarded as inferior to the men folk. Why should it be so? 183

DOMESTIC LEGAL PROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS

- Constitution 1999
- Registration of Titles Act 1925
- Land Use Act of 1978
- Marriage Act 1970
- Marriages Validation Act 1971
- Matrimonial Causes Act 1970
- Administration and Succession (Estate of Deceased Persons) Law 1987, Eastern States
- Administration of Estates Law 1959, Western States

2.4.1 Background

The Federal Republic of Nigeria is a country as diverse as it is populous. Indeed, it has the largest population of all African nations: 131 million people, over 60 million of them women. Of the more than 250 ethnic groups, the largest and most politically influential are: the Hausa, Fulani, Yoruba, Igbo (Ibo), Ijaw, Kanuri, Ibibio and the Tiv. Nigeria is home to various religions, including Islam, Christianity and many different forms of indigenous beliefs. It has four main languages, as well as English.

After nearly 16 years of military rule, a new constitution was adopted in 1999 and a peaceful transition to civilian government was completed. Elections in April 2003 marked the first civilian transfer of power in Nigeria’s history.

2.4.1.1 Legal system

Nigeria’s legal system is a hodgepodge of rules based on English common law, Islamic Sharia law (predominantly in the northern states), and traditional civil law. As Nigeria is a federal republic, all three levels of government — the federal, the state and the local governments — have law-making powers. Federal law applies throughout the country; state laws apply only to their particular state jurisdiction. Their laws are further intertwined with the local customary laws, which vary widely from state to state and within individual states; there are even variations at village and clan level.

The court system is divided into Federal Courts, consisting of the Supreme Court of Nigeria, the Court of Appeal and the Federal High Court. The State Courts include the High Courts, the Sharia Court of Appeal and the Customary Court of Appeal. Each federal state is allowed to create, under its applicable state laws, an established magistrate court and a customary court. Customary courts are the lowest in the hierarchy of courts.

With hundreds of ethnic groups, tribes and belief systems within 36 federal states and one federal territory, a complex and often confusing legal system has resulted. This is often especially detrimental to women and offers them little to no protection. While discrimination is illegal under the federal system, under the state, local or — even closer to home — clan system, actions that are blatantly discriminatory are often permitted, and any protections provided by the federal system are inevitably too few, too late.

2.4.1.2 Nigeria’s women

Women in Nigeria have to deal with traditions and customs that condone not only discrimination but violence and mistreatment of women — traditions and customs that government officials rarely make an effort to address. Particularly egregious is the practice of female genital mutilation (FGM). While the Federal Government publicly condemns this practice, it takes no legal action against it. Estimates of the number of Nigerian women who have undergone some form of FGM range from 60 to 90 percent.\(^{184}\)

Spousal abuse is commonplace in Nigeria, especially in polygynous relationships. Men, pursuant to the Penal Code, are permitted to physically chastise their wives, so long as such violence does not result in excessive damage, which is defined as severe internal injuries, facial lacerations, and the like.

Whereas over 75 percent of all males in Nigeria are considered literate, only 60 percent of females are. Only 42 percent of rural women are considered literate, far less than those in the urban areas.\(^{185}\)

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184 UN Development Fund for Women (UNIFEM) statistics, 2002.
The Special Rapporteur on Nigeria to the UN Commission on Human Rights\(^\text{186}\) has identified several traditional practices that detrimentally affect women in Nigeria. These include: female genital mutilation (FGM), early marriages, widowhood practices, discriminatory inheritance and property laws, bride price, lack of contractual capacity, wife-battering, and unequal access to healthcare and education. A conservative estimate is that 52 percent of Nigerian women live under the poverty level. Over 53 percent of the population living with HIV/AIDS at the end of 2001 were women; that is, approximately 1.7 million of the 3.2 million persons infected with the disease.\(^\text{187}\)

\section*{2.4.1.3 Land}

Land in Nigeria is held either by statutory or customary occupancy, and is thus subject either to customary or statutory law. The Registration of Titles Act 1925\(^\text{188}\) governs how and under what circumstances all land, including State and customary land, is to be registered.

Section 34 of the Registration of Titles Act determines that, at death, the land registration must be transferred into the name of the deceased’s legal representative; that is, the “executor or administrator having the lawful or customary right to administer the real estate of the deceased.”\(^\text{189}\)

The Land Use Act of 1978\(^\text{190}\) grants every Nigerian equal access to land. Clearly, it was formulated on the false premise of gender equality, but land still remains largely inaccessible to women as it is almost always registered in a man’s name.

The law does not recognise user rights to land. The registration of customary rights of occupancy threatens the rights of women who only have usufructuary rights, especially as these cannot, under the Act, be converted to ownership rights.\(^\text{191}\)

\section*{2.4.2 Statutory law}

Nigeria’s statutory system is based largely on British common law, but retains heavy influences of tradition and religion. Legal pluralism has created a ‘grey area’: there is too much leeway in permitting choice of laws. While certain laws purport to be statutes of general application, state or local laws are often more accessible and thus more often implemented. There is no clear system and therefore it is difficult to know when the laws are of federal applicability, or whether state law, or even local laws, take precedence.

The interests of Nigeria’s women are particularly seriously affected by the operation of multiple legal systems governing family law. Depending on a woman’s place of residence, type of marriage, ethnic group, or religion, her rights in marriage, her rights to inheritance and ownership, as well as the treatment she receives as a result of widowhood practices may be governed by completely different rules with very different consequences, in comparison to a woman elsewhere in the country and in another social setting.

\begin{flushleft}
\textsuperscript{188} Registration of Titles Act, CAP 546, 1990 edn.
\textsuperscript{189} Ibid., Sect. 34(3).
\end{flushleft}
Especially in matters of personal law, further complications arise because Nigeria's federal system of government places customary law within the legislative competence of the states, but retains federal jurisdiction over statutory marriage.

As in many African countries, regardless of what the statutory law says on paper, it is often ignored in reality. It is rare for Nigerian women to go to court, for most of them do not know the laws, and even those that have some knowledge often do not know how to access or enforce them. This can be a very confusing and frustrating situation for women.

2.4.2.1 Constitution

The 1999 Constitution of the Federal Republic of Nigeria is the supreme law of the land. Discrimination on the basis of sex is prohibited by Article 15(2):

... whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited. [Emphasis added.]

The Constitution provides for the equality of rights, obligations and opportunities. Discrimination is further prohibited in Article 42, which reads:

(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:
(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or ...

Property rights for all are secured by Article 43, which confers upon all Nigerians the right to acquire and own property “anywhere in Nigeria”.

The Constitution places much weight on the actions and legislation of each individual state, and looks to the same to enforce the mechanisms of the Constitution. The states are assigned specific duties vis-à-vis national integration and unity, economic development and ensuring the livelihood, health and safety of their citizens.

Any actions taken by the individual federal state must not contravene laws of the Federation, including the Constitution. If there is a contravention, Article 46(1) provides protection against state violations of any such provisions. The claim for redress can be made immediately to a High Court of the state in question.

Interestingly, Article 21(a) provides for the preservation, protection and promotion of cultures. Fortunately for women, it stipulates that such cultures must “enhance human dignity and [be] consistent with the fundamental objectives [of the Constitution].”

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193 Art. 17(2)(a) of the Constitution.
2.4.2.2 Marriage Act
The Marriage Act of 1970\(^{195}\) makes provisions for the celebration of marriages. It regulates religious and civil marriages, as well as their registration. It prescribes actions for licensing and registration, both before and after a marriage, which must take place in order to make the marriage valid. The Act mandates that if the person wishing to marry is under 21 years of age, either the father or the mother must give consent.\(^{196}\)

The Marriage Act prohibits entering into a customary marriage concurrently with a marriage considered valid under the Act. A marriage is considered null and void if the wedding has not taken place in the office of the registrar or a “licensed place of worship”\(^{197}\) or without a registrar’s certificate of notices or license issued pursuant to the Act. Conversely, the Act does not invalidate marriages considered valid by customary law.

2.4.2.3 Marriages Validation Act
The Marriages Validation Act\(^{198}\) makes any marriage in the Western, Eastern and Northern states of Nigeria valid under law if carried out in designated marriage districts, in front of registrars of marriages. Essentially, it only recognises those marriages carried out in the ‘proper’ manner as prescribed by the Marriage Act. The Marriages Validation Act, however, does not serve to validate marriages under Muslim rites or other customary law.

“Blatant examples of discrimination in the context of marital states exist throughout Nigeria. In one instance in Tarata Mafara local government, single female civil servants were given a three month ultimatum – either get married or lose their jobs. Additionally, financial inducements were provided to encourage women to become married. These examples constitute blatant discrimination, where women are punished, almost criminalized for exercising their rights to determine their marital status.”\(^{199}\)

2.4.2.4 Matrimonial Causes Act
The Matrimonial Causes Act\(^{200}\) prescribes rules for all ‘matrimonial causes’: that is, dissolution of marriage, nullity of marriage, separation, reconciliation, restitution of conjugal rights, etc. The Act applies to all persons domiciled in any state of Nigeria.\(^{201}\) Any person so domiciled may bring proceedings under this Act. It deals with maintenance after dissolution of a civil marriage, primarily for children of the marriage.

However, the Act goes on to prescribe conditions of maintenance, and in that section,\(^{202}\) specifically excludes from the provisions of the Act those marriages entered into under customary or Muslim rites, and the “children of such a marriage.”

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196 Ibid., Sect. 18.
197 Ibid., Sect. 222(2)(a).
201 Ibid., Sect. 2(3).
202 Ibid., Sect. 69.
Thus, while the Act provides the framework for dissolution of all marriages, whether under civil law, customary or religious rites, it specifically excludes certain categories of marriages when prescribing rules of maintenance. The two systems are thus not reconciled, and this can create a potential for violations of women’s property, housing and land rights. This disparity seems to reflect a reluctance on the part of the Federal Government to address property allocation under customary and religious marriages, perhaps due to an ostensible desire to protect the independence of culture and tradition. However, this is detrimental for women.

2.4.2.5 Wills Acts
Testate succession is ruled mostly through a series of laws known as the (federal) Wills Act(s). Each of the Wills Acts applies to different states or regions in the federation of Nigeria. These laws place no restrictions on women with regard to inheritance under a testamentary disposition. They are treated equally with all other beneficiaries. However, these Acts apply only to women married under civil law, not under customary law.

By law of custom, certain real property cannot be affected by testamentary disposition. Instead, it must descend by way of such customary law, and thus cannot be affected by any of the Wills Act(s). This deference to customary law can be very harmful to women: it usually means that they are denied use of any fair portion of the estate.

The Wills Act(s) are almost irrelevant, as wills are rarely – if ever – made in Nigeria, and especially not in favour of a female spouse. Even when a will is made in favour of the spouse, in-laws will generally contest such gifts. Normally, the widow does not know how to access the courts to enforce the will, or is prevented from doing so by threats and even physical force or violence.

2.4.2.6 Administration and Succession (Estate of Deceased Persons) Law
This Law\(^{205}\) is applicable in the Eastern States, and specifically prescribes the distribution of movable and immovable property. If there is a surviving spouse but no children, the estate is held in trust for the spouse. Any interest in the estate belonging to the wife will be hers for the remainder of her life, unless she remarries, at which point such interest terminates and reverts to the siblings of the deceased in equal shares.

If there are children, they receive two-thirds of the estate; the surviving spouse receives one-third. Again, such interest remains absolute for the surviving husband, but for the surviving wife only until she dies or remarries.

2.4.2.7 Administration of Estates Law 1959
This Law\(^{206}\) is applicable in the Western States. It applies only where persons are married in accordance with the Marriage Act, and provides for specific devolution of property. Interestingly, however, it gives deference to customary law for people subject to such law, even if they have entered into a civil law marriage according to the Marriage Act.\(^{207}\)

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**TESTIMONIES OF WIDOWS SEEKING AID FROM WOMEN’S AID COLLECTIVE (WACOL) NIGERIA\(^{208}\)**

“MRS N. N. – WIDOW

*Mrs N. N. was married to late Mr J. O. N. under the Marriage Act. She has seven children (six female and one male) all under sixteen. On the death of her husband, the members of the husband’s family took over the man’s property – both movable and immovable – and chased her out of their house, accusing her of complicity in the death of her husband. She was ostracised by the community. Mrs N. and her children were living in abject poverty and the children could not continue their education, despite the fact that their father owned several houses, two cars and [had] enrolled them in good private schools before his death. WACOL advised her to hand over the estate of her husband to the Administrator General and Public Trustee of the Ministry of Justice. This she did and we have not heard of any further harassment by the husband’s family.*

Continued on p.78

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\(^{205}\) Administration and Succession (Estate of Deceased Persons) Law 1987, Eastern States, Sect. 120.

\(^{206}\) Administration of Estates Law of 1959, Western States, WR 1959, CAP. 1.

\(^{207}\) Ibid., Sects. 1 and 49(5).

\(^{208}\) WACOL, http://www.wacolnig.org/legalaid.htm
2.4.3 Inheritance under customary and religious law

The majority of marriages in Nigeria are entered into under customary law, and it is this code that determines the rights of the spouses and their family members — it is the custom of their ethnic group(s) as interpreted and determined by their male relatives. Customary laws are unwritten and passed orally from one generation to the next.\(^{209}\)

The differences between the more than 250 ethnic groups, all with their own religion, culture, myths and belief systems, create a quagmire of customs and traditions governing inheritance and succession. Customary (and religious) inheritance law varies greatly from area to area, and even from tribe to tribe. As far as succession is concerned, there are also differences between matrilineal and patrilineal ethnic groups.

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\(^{209}\) About 80% of all property disposition takes place pursuant to customary law, according to Chigozie Udemezue (Legal Officer, Women’s Aid Collective), in Inheritance Rights of Women in Nigeria, paper presented at COHRE workshop ‘Inheritance Rights are Human Rights’, 21-23 Jan. 2004, Johannesburg, South Africa (n. 63 above).
It is generally true that widows are denied inheritance to housing and land in particular, and to chattels to a lesser degree. Generally, inheritance is based on the principle of primogeniture: that is, that the eldest surviving son inherits all the deceased’s property.

Under customary law, a married woman is not regarded as a permanent member of her husband’s family. Furthermore, once a woman leaves her natal family to be married, she is no longer regarded as a member of that family either. Thus, if thrown out of her marital home, she has nowhere to go.

Subsections 2.4.3.1 to 2.4.3.4 briefly describe customary or religious-based practices of inheritance in the different areas.

2.4.3.1 Muslim areas in the North
In northern Nigeria, which is predominantly Muslim, women’s inheritance is governed by Islamic law — the Sharia. Under the Sharia, women can acquire and retain their own property, can pass it on to their heirs, and can inherit from their deceased parents, husbands, brothers, sisters, daughters and other relations.

However, under the personal law code of the Sharia, the share of inheritance a female receives is discriminatory. Male heirs generally inherit twice as much as female heirs. This is true for sons and daughters. A wife, though, has the right to only one-quarter of the estate if her deceased husband has no descendants, and a meagre one-eighth if there are heirs. If there is more than one widow (that is, surviving a polygynous marriage), this one-eighth portion is shared between them. These are usually inadequate assets, with no provision for housing or land.

Under the Sharia law, a sole surviving daughter is entitled to half the net estate, whereas a sole surviving son receives the entire estate. This inheritance practice is clearly biased against Muslim women; however, provided that it is adhered to, it can be argued that it at least limitedly secures Muslim women’s land and inheritance right, though not their equality. In the Maliki tradition, a married woman may give out more than one-third of her property without her husband’s consent.

2.4.3.2 Yorubaland
In the Southwest of Nigeria, rules of customary law allow women to inherit similarly to males. As decided in the Lewis v. Bankole customary law case in 1909, the daughter takes second position, after the eldest surviving son. Devolution of property proceeds only along bloodlines; marital relations have no relevance.

2.4.3.3 Abia State
In certain parts of Abia state where the ethnic group is matrilineal, the estate devolves through the widow’s brother and his sons. As they are her own blood-relations, they may treat her more kindly than other family members would.

211 As reported by Udemezue (n. 209 above).
212 Maliki, practiced in North Africa and parts of West Africa, is the second largest of the four schools of Fiqh or religious law within Sunni Islam. Its adherents constitute approximately 25% of Sunni Muslims. In Nigeria, it is largely practised in the northern states.
213 As reported by Udemezue (n. 209 above).
2.4.3.4 Igboiland

In the Igbo culture of Eastern Nigeria, due to discrimination against widows in inheritance, women have a desperate need to produce sons so that through them – providing their relationships with them remain good – they will be able to access land and secure a roof over their heads. A widow, herself considered a part of the property, is only allowed to remain on the property with the permission of the eldest son and heir — she herself has no right to inherit any part of the estate.

Daughters have virtually no rights to inherit their father’s movable and immovable property. The only way a daughter can inherit from her father is – and this only applies if he has no male heirs – to consent to stay in his home and raise her own children there. Her male children are then considered as her father’s children and thus provide continuity of the bloodline.

2.4.4 Codified customary law

Not many customary laws are codified, but a select few have been written down in manual form, for easy reference by the various local courts, as well as to ‘pass down’ the customary legacy in a non-oral form. The Customary Law Manual of the Anambra and Imo States of Nigeria [title paraphrased] (Anambra and Imo states are in Southern Nigeria) is one of the few such ‘manuals’ that has been written. It refers to the devolution of distinct portions of a man’s property: his home, his land, his livestock, the fruits of the trees. Under this law, widows and daughters have no right to inherit anything from their husband or father; only in very specific circumstances (that is, if there are no surviving sons or brothers) may women inherit anything.

According to The Customary Law Manual, a widow is expressly denied the right to inherit the compound (that is, the house(s), with the surrounding plot and enclosure) of her deceased husband, which is to be inherited by his eldest son or elder sons. In certain communities – for example, the Nguzu community – a very specific semi-matrilineral system is practiced, where the land and houses pass to the deceased’s brothers, sisters and maternal relations as a body. In the Ohafia Division, or community, a man’s estate, consisting of his house and land, is inherited by his sons and daughters as a body.

A widow has no rights to keep any movable property, even if she used the same property during her husband’s life. She is given the right to reap fruit from trees on the matrimonial estate, though this is “subject to her good behaviour.”

2.4.4.1 Inheritance by daughters

Under most customary law, daughters, like wives, do not inherit. The only situation in which a daughter can inherit is where she chooses to remain unmarried in her father’s home with a view to raising children there. This is known as nrachi or idegbe custom, and is practiced in various regions and communities in Nigeria.

This situation usually arises when a deceased man leaves an estate, but no surviving male issue to inherit it. The idea underlying this practice is to save the lineage ‘from extinction’. The daughter, now considered an idegbe or nrachi, is entitled to inherit both movable and immovable property from her deceased father’s
estate. The legal interest vests in her until she gives birth to her own children. However, if she bears sons and daughters, the sons rather than the daughters succeed her in accordance with the rule of primogeniture. (See Subsection 2.4.6 'Judicial Decisions' below for information on the constitutionality of the *nrachi* custom)

Under the customary law applicable in the Anambra and Imo states, on the whole, daughters have no rights to inherit their father’s compound or residual land and houses. Some local variations do provide for inheritance by daughters; however, control of the inherited property remains with the oldest son.218

### 2.4.4.2 Widows’ rights to maintenance

Under the customary law of the Anambra and Imo states of Nigeria, the widow has the right to be maintained by the person who inherits the husband’s estate, as she does not inherit the estate herself. This right usually includes the right to live in her deceased husband’s compound. However, this right is subject to her ‘good behaviour’.

Even this rule varies from area to area in each of the regions. For example, in Awgu, a widow without a son has no right to live on the compound. According to Section 226 of *The Customary Law Manual of the Anambra and Imo States of Nigeria*:

> Where a widow without a son has no right to remain a member of the family and is not otherwise allowed by the family to remain a member, her husband’s heir has power to expel her from the husband’s compound and other lands.219

Any widow is thus at the mercy of her in-laws. If she falls into disfavour with them, or if they become greedy, they can throw her out with impunity — there is no recourse for the widow.

### 2.4.5 Widowhood practices

In various parts of Nigeria, degrading and even dangerous ritualistic practices based on tradition are maintained, despite the passing of widowhood laws.220 Sometimes, the Igala people of Kogi State in the Middle Belt of Nigeria will force a widow to drink the water used to wash her dead husband’s corpse in order to ‘prove her innocence’ in the matter of his death.

In Southern Nigeria, widows are ordered to shave or scrape off their hair, right down to the scalp, using a sharp instrument.

In various areas, widows are forced to sit on a bare floor throughout the mourning period, eat from broken plates, wail for days on end and not bathe for weeks on end. If these practices are not done properly, the widow faces, at the very least, a sharp reprimand from her in-laws and, at the worst, expulsion, physical violence and even death.221

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218 Ibid., para. 156(a).
219 Ibid., para. 226.
220 As reported by Udemezue (n. 209 above).
221 Ibid. p. 4.
2.4.6 Judicial decisions

Under law governing the actions of the Higher Courts, the observance and enforcement of every native law and custom which is “not repugnant to natural justice, equity and good conscience” is prescribed.\(^\text{222}\) It makes clear that a High Court does not need to, and should not, apply native law and custom that is found to be repugnant to natural justice, equity and good conscience, and instead should apply statutory law. However, the High Courts do not appear to take this law to heart, for even despite the existence of constitutional provisions and other laws prohibiting sex-based discrimination, women’s rights to equality were, until only a few years ago, completely ignored and even denied outright by Nigerian courts at all levels.

Particularly outrageous from the perspective of human rights and human dignity is the case of *Onwuchekwe v. Onwuchekwe*,\(^\text{223}\) in which the Court of Appeal refused to reject as repugnant a custom whereby a wife is owned, along with her property, by her husband.

The Supreme Court case of *Nzekwu v. Nzekwu*\(^\text{224}\) confirmed that a widow, even after the passage of a significant period of time during which she occupies the home of her deceased husband, cannot claim the property as her own. Any occupancy rights she has depend on her ‘good behaviour’, as determined by the in-laws. Her right to the property is merely usufructuary, claimed the Court; she does not have the right to dispose of it in any way.

2.4.6.1 Changing tide

The inheritance rights picture was fortunately revolutionised by the victory for women, *Augustine Nwofor Mojekwu v. Caroline Mgbafor Okechukwu Mojekwu*,\(^\text{225}\) decided by the Court of Appeal, in Eastern Nigeria, on 10 April 1997. In this case, the appellant sought a declaration, as the only surviving male relative to his deceased uncle, that he was entitled to the uncle’s property. The court ruled that the *oli-ekpe* custom of the Nnewi in Anambra State is discriminatory in nature. This custom prescribes that if there is no direct son to inherit the property (despite the existence of a daughter), the deceased’s nephew, or *oli-ekpe*, is to inherit the entirety of the estate. This completely overlooks any female descendant, and opts instead to give all property to a more distant male blood relative.

Not only did the Court rule that such a custom is discriminatory, it also found that any form of societal discrimination on grounds of sex is unconstitutional. Additionally, the Court held that a court of law cannot invoke a customary law which is repugnant to natural justice, equity and good conscience, which they found this law to be.

Another recent case, *Muojekwu v. Ejikeme*,\(^\text{226}\) in the Supreme Court, affirms a Court of Appeal decision that a female child can inherit from her deceased father’s estate without the *nrachi*\(^\text{227}\) ceremony being performed. The case centred on a dispute as to whom should benefit from the *nrachi*: the direct descendants of the deceased’s daughter (who had performed the *nrachi* ceremony according to custom) or the deceased’s nephews. In accordance with the custom of *oli-kepe*, the nephews were to inherit.

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\(\text{222}\) High Court Law, CAP. 49, Sect. 34(1).
\(\text{223}\) *Onwuchekwe v. Onwuchekwe* [1991] 5 NWLR 197, p. 739.
\(\text{225}\) *Augustine Nwofor Mojekwu v. Caroline Mgbafor Okechukwu Mojekwu* [1997] 7 NWLR 512 at 283. This case is a landmark decision in the advancement of women’s rights in Nigeria. At the time of writing this report, the *Mojekwu* case is being appealed before the Supreme Court. The COHRE WHRP hopes that the Supreme Court will reaffirm the Court of Appeal decision and enable Nigeria to join other nations that have recognised the universal human rights of women.
\(\text{227}\) The *nrachi* custom enabled a man to keep one of his daughters perpetually unmarried under his roof in order to raise children, especially males, to succeed him. Any such daughter took the position of a man in the father’s house and was entitled to inherit her father’s property, and any children born to that woman would automatically be part of the father’s household and accordingly entitled to inherit.
In this case, the Court took liberty to interpret the constitutional nature of freedom from discrimination vis-à-vis the *oli-ekpe* custom, whereby female inheritance is not possible unless the *nrachi* ceremony has been performed by the female. The Court relied on the non-discrimination clause of the Constitution, as well as women’s rights to non-discrimination as enshrined in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Court held that the custom in question was repugnant to natural justice, equity and good conscience.\(^{228}\)

...Virginia has protection under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By the Article, state parties condemn discrimination against women in all its forms and agree to pursue a policy of eliminating discrimination against women. ... In view of the fact that Nigeria is a party to the Convention, courts of law should give or provide teeth to its provisions. That is one major way of ameliorating the unfortunate situation Virginia found herself in, a situation where she was forced to rely on an uncouth custom not only against the laws of Nigeria but also against nature ... \(^{229}\)

This landmark case is considered a major advancement to women’s rights in Nigeria, as it is the first time an international convention on women’s human rights has been judicially recognised in the country.

### 2.4.7 The way forward

Nigeria has signed on to most of the international human rights covenants.\(^{230}\) It seems that, in recent cases, judges have been taking these important rights instruments more seriously than they used to. This is especially true of the cases discussed above, for example *Muojekwu v. Ejikeme*.

In 1998, the Committee on the Elimination of Discrimination Against Women (the body that monitors compliance with CEDAW) expressed concern over religious and customary laws that violate women’s human rights. The Committee found that:

> Certain cultural and traditional practices and beliefs remained obstacles to women’s full enjoyment of rights, including in the context of marriage, inheritance and land ownership.\(^{231}\)

The main difficulty with Nigeria is its enormous variety of ethnic groups and the complicated legal system that has arisen in consequence. The Constitution calls for a unified state; however, it simultaneously allows for distinct courts and laws in each federal state. While such a system may arguably have advantages, the resulting legal and rights-related confusion certainly has very negative consequences for women, as we have seen above.

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228 Ibid. p. 410.

229 Ibid.

230 Nigeria is a State Party to the following human rights treaties: the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (the optional protocol of which it has also signed), the Convention on the Rights of the Child, and the African Charter on Human and Peoples’ Rights.

The fact that some customs are codified in several states but not others merely adds to the chaos. Evidently, customary law is most frequently applied, especially in relation to marriage and inheritance issues, in the more rural and traditional areas of Nigeria. This means that women there are at an even greater disadvantage than their counterparts in the more urban and modern areas.

Unfortunately, certain customs and traditions severely undermine the rights of women. The more egregious widowhood rites demean women and infringe upon their rights to equality and dignity. Certain customary laws continue to deprive women of their rights to own land and housing. Women are only allowed to inherit if, in so doing, they serve a man’s purpose, as we have seen in the context of the *nrachi* custom. Women can only benefit from their own marital estate, albeit in a limited way and/or at the whim of their sons or in-laws. This denies women their rights to self-determination and, of course, to equality and non-discrimination.

The Constitutional provision for equality and non-discrimination is encouraging. Despite the fact that the Constitution defers to traditional cultures, these cultures can only be exercised on the condition that they enhance broader human culture and are consistent with the Constitution. This condition should be made more explicit and should call for the protection of women’s rights in culture and custom.

Whereas the Marriage Act recognises (though does not validate under civil law) all marriages, even those under religious and/or customary rites, the Matrimonial Causes Act excludes maintenance prescriptions for spouses married under customary or religious rites. Thus, while there is a willingness to recognise – under law – customary and religious marriages, such recognition does not go far enough, and those marriages are precluded from specific protections that could be beneficial to the female spouse.

Overall, however, Nigeria’s legal system has failed to address key issues around inheritance rights. Ignoring for the sake of argument the chaos in relation to the applicability of laws, the existing laws fall far short of adequately protecting women and their rights. There is too much deference to the confusing plethora of customs, which are often discriminatory.

There is a clear need to streamline the system and establish a hierarchy of laws to be adhered to uniformly throughout the country. Specifically, there is a need for a federal inheritance and succession law clearly setting forth the requirements for and limitations on inheritance, with consistent federal applicability. The law should ensure that the widow and her children inherit the bulk of the matrimonial estate, with some provisions for competing interests to ensure, as far as is possible, that all potential heirs may be satisfied and the law will not be violated.
SPECIFIC RECOMMENDATIONS

1. There should be a thorough reform of all law affecting inheritance rights: new laws should protect spouses of marriages entered into under customary and religious rites. Ideally, there should be a single law on inheritance for marriages contracted under the existing Marriage Act, as well as for customary law marriages.

2. Nigeria should immediately ratify the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted July 2003), which has provisions on women’s rights to inheritance, housing and land.

3. Nigeria should domesticate CEDAW and ratify the Optional Protocol to CEDAW.

4. Policies and reforms should be created to ensure that more women are placed in management and leadership positions in the country, as this will put women in a better position to influence decisions and policies concerning them.

5. Free legal aid services should be provided for poor women to seek redress in cases of violations of their inheritance rights.
**DOMESTIC LEGAL PROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS**

- Constitution 2003
- Succession Law 1999
- Family Code 1992
- Draft Land Policy 2001
- Civil Code 1960

### 2.5.1 Background

The mere mention of Rwanda brings to mind one of the modern world’s worst appalling tragedies — the horrific genocide of more than one million Tutsis and moderate Hutus at the hands of organised militias, military groups and even ordinary citizens. In the worst period of genocide, some 800,000 persons were slaughtered.

Rwanda’s recent history has been one of continual conflict between Hutus and Tutsis. In 1958, the restless Hutu majority overthrew the controlling Tutsi minority, which caused several thousand Tutsis to seek exile in neighbouring countries. The Hutu majority party subsequently won an overwhelming victory in a UN-supervised referendum. In 1973, however, that victory was overshadowed by a coup following regional infighting between Hutus.

By 1990, Tutsi exiles who had banded together as the Rwandan Patriotic Front (RPF) invaded Rwanda from their base in Uganda. The conflict dragged on for almost two years, until a ceasefire was declared in 1992.

Two years later, the genocide began. After the airplane carrying the Presidents of Rwanda and Burundi was shot down, violence erupted in Rwanda. Extremist Hutus began a wave of killings, targeting the nation’s Tutsi minority and moderate Hutus. The brutality escalated at an astonishing rate, rapidly spreading from the capital, Kigali, to all parts of the country. In the next few months, nearly one million people were killed — many butchered with machetes or beaten to death with clubs. Close to two million people fled the country, and another one million became internally displaced persons. All this happened within a mere 100 days; to say that the country had descended into chaos would be the grossest of understatements.

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Now, a decade after the genocide, the people of Rwanda are to a great extent reunited, and peace and reconciliation are the theme for an overwhelming majority of Rwandans, regardless of whether they are Hutu or Tutsi. The rebuilding of the nation is reflected in the fact that in the years following the massacres, some three-and-a-half million Rwandan refugees were repatriated and resettled.

2.5.1.1 Impact of the genocide on Rwandan women

“Husbands left or were killed, and left us with nothing. Because of that, we never got an opportunity to inherit anything. Our main concern now is to make sure that our children have something left to inherit.”

Inheritance rights issues are nowhere more poignant than in Rwanda. The genocide has had profound demographic repercussions. Today, women constitute approximately seventy percent of Rwanda’s adult population, and fifty percent of these women are widows. Fortunately, the laws have been adapted over time to reflect the needs of women, and of widows in particular. Yet, in conversations the COHRE Women and Housing Rights Programme (WHRP) had with many widows, it was clear that their focus – like that of so much of the population – was on their children and building a better future for them.

During the genocide, women were raped, mutilated, tortured and killed. Aid workers in Rwanda estimate that some seventy percent of Rwandan women were raped in that period. Many women lost husbands, fathers, mothers, brothers, sisters and children in the genocide; many lost their entire families. Women who had been raped during the genocide gave birth to a total of between 2,000 and 5,000 ‘children of hate’. As Rwandan society is largely patrilineal, these children would be considered Hutu by birth. In this way, rape was part of the genocide’s grim plan of ethnic annihilation.

Before the civil war, gender-based violence, including sexual harassment, forced marriage, marital rape and domestic violence, was prevalent but not discussed. Only after the genocide did sexual violence became a topic of national debate and discourse. Some women finally began to talk about it in an attempt to come to terms with the atrocities they had gone through. Others still cannot speak of it today, and carry the pain and trauma deep within their hearts.

Women continue to face the greatest post-genocide challenges. Thirty-four percent of all households in Rwanda today are headed by single women; of these, 28,000 households are headed by girls aged between 12 and 18. HIV/AIDS rates are high among women: of the 5.8 percent of the Rwandan population infected with HIV, over 58 percent are women. Many women were infected during the genocide, and are only now discovering their disease.

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236 Global Fund for Women (n. 3 above).
237 The COHRE WHRP interviewed several women at the Village of Hope and the Polyclinic of Hope, both shelters and meeting places for women victims of the genocide, on 18 Aug. 2003. All the women interviewed expressed concerns not for their own inheritance, but that their children would be able to inherit property, especially housing and land.
238 Global Fund for Women (n. 3 above).
243 COHRE WHRP interview with Auréa Kayiganwa (n. 240 above).
Another result of the genocide is that thousands of suspected murderers are still awaiting trial, which causes many problems for women, especially widows, throughout the country. Relatives and friends of those facing prosecution often take the law into their own hands, and to protect the suspects in jail, target those who may bear witness against them. Widows who are called to testify, being vulnerable, are easy targets for such intimidation by the perpetrators’ associates.

*The community members throw stones at the widows houses, harass their children, and make them feel insecure, as a warning that they should keep quiet.*

Nevertheless, the women of Rwanda now form the vanguard of the reconciliation process, leading the way in educating the public on the need for unity and peace. Women are creating spaces and opportunities for sharing on the atrocities of the genocide, for finding hope of future peace. Women are designing innovative uses of art and popular media for education on the reconciliation process. Various ministries too, in particular the Ministry of Justice and the Police Department, are taking steps to educate the public and promote unity. In the recent elections, women took 48.8 percent of the seats in Parliament, the highest such percentage in the world, and 15 seats more than the 24 allotted to women. Indeed, women have proved to be instrumental in building a government that practices, not only preaches, reconciliation.

### 2.5.1.2 After the genocide

Many women survivors of the genocide have been able to piece together a new life for themselves with the help of women’s NGOs such as Rwandan Women’s Network and AVEGA. Women have also been assisted by Government programmes, including land redistribution policies that have, in some instances, given women back their land or given them new land. However, it is still exceptional for a Rwandan woman to own her own house, and today most women live communally or with their extended family. Many women who returned to the homes they lived in before the conflict found nothing more than burnt-out shells. Even today, some women still live in half-ruined houses, patched up for the time being with corrugated iron or plastic sheeting. Others who tried to move back into their ruined homes faced only retribution from relatives or neighbours, and therefore tried to find alternative housing, not always successfully.

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245 Rwandan NGOs such as AVEGA, Rwandan Women’s Network and HAGURUKA have all focused on strategies for ensuring that women can talk to each other about the atrocities they underwent, for support and reconciliation.
246 For example, on 18 Aug. 2003, the COHRE WHRP viewed a video of a play put on by women of the Polyclinic of Hope, Rwandan Women’s Network, Kigali, which explained the *gacaca* court system (see Subsection 2.5.5, ‘Justice systems’) and the need for reconciliation.
247 The Ministry of Justice is undertaking popular education on the need for inheritance rights laws; the police force is sensitising its officers to the need to give women, particularly widows, special protection against harassment. COHRE WHRP interviews with Policy Commission Mary Kabunde, 18 Aug. 2003, and the Secretary General to the Ministry of Justice and International Affairs, Edna Mukabagwiza, 19 Aug. 2003.
248 COHRE WHRP interview with Auréa Kayiganwa (n. 240 above).
The genocide left thousands of households headed by women or children — the latter category, of course, being particularly vulnerable. It was not uncommon for entire households of up to ten children to be headed by a young girl in her early teens. Often, male cousins or other family members would come to the girl in charge to take over the property, saying she had no right to it, nor to take care of the children. The children would be kicked out and become street children, homeless and destitute.\textsuperscript{249}

Custom and tradition also fell victim to the genocide. With hundreds of thousands massacred, families were torn apart and often completely destroyed. Customs, which are transmitted orally from one generation to the next, suddenly had no one to pass from or to. Furthermore, the majority of the survivors were women — patriarchal customs had largely lost their constituency.

\begin{quote}
\textbf{A TALE OF TERROR: THE STORY OF A RESIDENT AT THE VILLAGE OF HOPE, RWANDAN WOMEN’S NETWORK, KIGALI\textsuperscript{250}}

“I left because there was war, I ran into a church. After the war, there was a time when the soldiers were helping people to find their homes to recuperate their property. When I went back to the house, it was in bad shape, it had been destroyed. Rwanda Women’s Network was able to rehabilitate my house. I had been given the property in 1993, when my husband passed away; however, when I returned to the house, all the papers, all the contents of the house were gone. All the neighbours I knew had been killed. I had no real proof that the house was mine.

“Afterwards the house was rehabilitated and became a good house, and then people started claiming that house. People who knew me started denouncing me, calling me crazy and telling me to get out of the house. All were turning against me because they wanted the house. They began to throw stones at my house, to harass my children. I went to the police for help, but they could not help. They told me I must leave the house or I would be killed. But I would not leave. With the assistance of Penny, a lawyer of the Rwandan Women’s Network, I was able to bring the case to court and to get the papers that belonged to me. I fought the case until I was able to sell that house. I won the case — but my in-laws came back and tried to threaten me even after I had won the case.”
\end{quote}

\textbf{2.5.2 New Constitution}

Rwanda’s new Constitution,\textsuperscript{251} adopted by referendum on 26 May 2003, is much vaunted for its integration of international human rights principles. The Preamble of the Constitution refers to a number of international human rights instruments to which Rwanda is a State Party, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and it affirms Rwanda’s commitment to promoting and protecting human rights.

\begin{flushright}
\textsuperscript{249} Ibid.
\textsuperscript{250} As recorded by the COHRE WHRP in an interview at the Village of Hope, 18 Aug. 2003.
\textsuperscript{251} Legal and Constitutional Commission of Rwanda, http://www.cjcr.gov.rw/eng/constitution_eng.doc
\end{flushright}
Equality between women and men is affirmed in the Constitution, which proclaims in its Preamble that the State is:

*Committed to ensuring equal rights between Rwandans and between women and men without prejudice to the principles of gender equality and complementarity in national development.*\(^{252}\)

The Constitution, in Article 11, further guarantees equal protection of law without discrimination:

*All Rwandans are born and remain free and equal in rights and duties. Discrimination of whatever kind based on, inter alia, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical or mental disability or any other form of discrimination is prohibited and punishable by law.* [Emphasis added.]

The State, in Article 14, also makes a commitment to care for and look after those made destitute by the genocide:

*The State shall, within the limits of its capacity, take special measures for the welfare of the survivors of genocide who were rendered destitute by the genocide committed in Rwanda from October 1st, 1990 to December 31st, 1994, the disabled, the indigent and the elderly as well as other vulnerable groups.*

The Constitution makes specific provisions for family and marital life, and, in Article 26, mandates for monogamous, registered marriages pursuant to civil law. Pursuant to Article 27, the Constitution protects the sanctity of the family, with a clause allowing for special protections of the mother and child in particular, such that the “family may flourish.”\(^{253}\) Whereas this article confers equal rights upon men and women during marriage and after divorce, it does not explicitly mention equal inheritance rights.

Private property rights are guaranteed for “every person”.\(^{254}\) The State grants ownership of land, and administers the “modalities of acquisition, transfer and use of the land.”\(^{255}\) Article 31 of the Constitution defines the nature of State land, and declares such land inviolable.

Notably, Article 51 provides for freedom of customary law and culture, so long as these do not violate human rights.

*The State has the duty to safeguard and to promote positive values based on cultural traditions and practices so long as they do not conflict with human rights, public order and good morals.*

The new Constitution has been celebrated as a victory for women, in that it promotes human rights and equality for all. But how far does this promotion go?

\(^{252}\) Constitution of Rwanda 2003, Preamble, Para. 10.
\(^{253}\) Ibid., Art. 27.
\(^{254}\) Ibid., Art. 29.
\(^{255}\) Ibid., Art. 30.
2.5.2.1 Civil Code
The Civil Code of 1960 sets forth the law of family relations and of persons. Article 83 of the Civil Code stipulates the wife's domicile as being that of her husband.

The family in Rwanda is defined as a unit of ‘conjugal community’ consisting of man, woman and children.\textsuperscript{256} Parents exercise the same rights over the children, but if they disagree, the father’s opinion prevails.\textsuperscript{257} Children born out of wedlock are only legitimised (and thus granted rights) if their natural father and mother subsequently marry, if the father and mother legally recognise such children, or if recognition results from a court order. Legitimised children have the same rights and obligations as children of a regular and legal marriage.\textsuperscript{258}

2.5.2.2 Marriage regimes

\textit{The law does not protect women who are unmarried in a relationship. Couples have to be married to become protected by the law. It is a problem in both rural and urban areas.}\textsuperscript{259}

Rwandans enter into three kinds of marriage: civil, customary and religious rites. However, the civil law system recognises and protects only monogamous, civil law marriages. This marriage regime is a prerequisite to eligibility under the Succession Law. (For further details, see Subsection 2.5.2.3.)

However, a serious problem with this requirement is that, because civil law marriages are prohibitively expensive, most women still enter only into customary marriages, and are therefore left unprotected by the law if the marriage dissolves.

Polygynous marriages are rare in Rwanda, but are still practiced to some extent, especially in the northern, rural parts of the country. As civil law does not recognise polygynous marriages either, women in such unions are also unprotected by the law.

2.5.2.3 Succession Law
In 1999, five years after the genocide, the Parliament of Rwanda passed what is commonly known as the ‘Inheritance and Succession Law’,\textsuperscript{260} which deals with almost all aspects related to inheritance and succession. Among many provisions, it explicitly grants equal inheritance rights to male and female children, establishes a choice of property regimes upon marriage, and allows a wife to inherit her deceased husband’s property. This law has greatly enhanced property rights for married women; unfortunately, however, it only protects monogamous civil marriages.

Title I of the Succession Law defines three different property regimes that are possible in marriage: ‘community of property’, ‘limited community of property’ and ‘separation of property’. Upon marrying, the couple must choose between these three regimes.\textsuperscript{261} If none is explicitly chosen, the spouses are deemed to have chosen ‘community of property’.

\begin{itemize}
\item \textsuperscript{256} Rwandan Civil Code 1960, Art. 206.
\item \textsuperscript{257} Ibid., Art. 345.
\item \textsuperscript{258} Ibid., Arts. 318 and 323.
\item \textsuperscript{259} COHRE WHRP interview on 15 Aug. 2003 with Rose Mukantabana of HAGURUKA (Association pour la Défense des Droits de la Femme et de l'Enfant), an NGO that has been working since 1991 to prevent discrimination against women.
\item \textsuperscript{260} Succession Law of 1999, or Law No. 22/99 of 12/11/1999 to Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions.
\item \textsuperscript{261} Ibid., Title I, Ch. 1, Sect. I, Art. 2
\end{itemize}
‘Community of property’ means that the man and the woman have joint ownership of all the property – moveable and immovable – that they bring into the marriage. ‘Limited community of property’ means that the spouses agree to pool their respective properties gained from the day of marriage onwards, yet maintain as personal their individual property – including debts – gained prior to the marriage. ‘Separation of property’ means that the husband’s property remains separate from the wife’s property after marriage, although each spouse must agree to contribute to the household expenses in proportion to her/his “respective abilities.”

Title II, Chapter I of the Succession Law deals with donations and wills. In almost all instances, a will is to be respected if written in accordance with the prescribed regulations.

Title II, Chapter II of the Succession Law deals with the division of intestate property under the various property regimes. The ‘separation of property’ regime is the most potentially harmful to women, as each spouse retains her/his property. Although this sounds quite equitable in principle, the reality is that, in the vast majority of cases, the female spouse has far fewer assets than the husband, in whose name the home and land are normally registered. Under Article 66, which sets forth the inheritance ranking for the ‘separation of property regime’, the children of the deceased are first in line, followed by her/his parents, then full brothers and sisters, then half brothers and sisters, and finally uncles and aunts. Under this regime, there is no provision at all for devolution of property to a spouse, leaving her with only her own possessions, which are rarely adequate for survival.

Under the ‘community of property’ regime, the surviving spouse (regardless of gender) “shall ensure the administration of the entire estate while assuming the duties of raising the children and assistance to the needy parents of the deceased.” If the duty of raising the children is deemed not to have been fulfilled, the widow or widower is required to give three-quarters of the succession back to the children. If the surviving spouse remarries, but there are no surviving children from the original union, half the estate is to be given to the deceased’s heirs. If a remarriage occurs and there are surviving children, they receive three-quarters of the estate, and one-quarter remains with the surviving spouse.

The estate of a deceased spouse who married under the ‘limited community of property’ regime devolves according to the property’s classification as either separate or communal.

Article 50 of the Law provides that male and female children shall inherit equally, without discrimination.

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262 Ibid., Title I, Ch. I, Sect. III, Art. 11.
263 Ibid., Title II, Ch. II, Sect. III, Art. 70.
264 Only rarely does an inheritance act allow a widow, when she remarries, to retain the property she has inherited, and for this reason the COHRE WHRP welcomes this provision in the Succession Law of Rwanda.
265 Ibid., Title II, Ch. II, Sect. I, Art. 50.
Article 75 of the Succession Law is especially important for women, as it allows the surviving spouse to remain in the marital home, regardless of the property regime, and to maintain usufructuary rights over the home and its contents, if that is the only property in the estate.\textsuperscript{266}

\subsection*{2.5.2.4 Analysis of Succession Law}

Despite its ground-breaking provisions, the Succession Law does have several shortcomings. First and foremost, its protections extend only to those couples married according to civil law, and as such exclude a large portion of the population that marries only according to custom. It has been reported that massive numbers of civil law marriage ceremonies are taking place in a frenzied attempt to ‘legitimise’ existing customary marriages,\textsuperscript{267} but this has its disadvantages. Spouses should not be forced to change their marriage regime in order to gain the benefits of inheritance rights or property rights law. As one women’s rights advocate has noted, however:

\textit{It would be difficult to change the law to allow for non-married couples to be protected, as there is a fear that if the marriages are not regulated, polygamy will take place, which the Constitution prohibits.}\textsuperscript{268}

Another major flaw is the fact that the Law only recognises “legitimate children”.\textsuperscript{269} Thus, while the provision eliminates discrimination based on a person’s sex, it fails to address discrimination based on the birth status of a child.

Research conducted by the Rwanda Initiative for Sustainable Development (RISD) revealed that there is some opposition to the provision that both sons and daughters should inherit in the same proportion. Families expressed concern that their small lots would not be enough to sustain both sons \textit{and} daughters. Many men thought it unfair that women should receive anything from their marital families, because they would then receive two plots of land to use: one from the marital family and one from their new husband when they remarried. Even some women agreed that females should not be entitled to an equal share of land and property – for the same reason, that women are allowed to use their husband’s land.\textsuperscript{270}

Another problem is that the Succession Law does not address the inheritance of \textit{land}; it only refers to housing and personal property. This is because all land in Rwanda is designated as State land. Rwanda is in the process of drafting a Land Policy, which, hopefully, will redress this very critical omission.\textsuperscript{271} (See also Subsection 2.5.3, “Women and land.”)

\begin{flushright}
\begin{footnotesize}
\textsuperscript{267} COHRE WHRP interview with Mary Balikungeri, Director of Rwanda Women’s Network, 15 Aug. 2003: “Massive [numbers of] marriages are taking place, even people who’ve lived together for twenty years now are legally getting married, because they have now understood the importance of being legally married, so we see about 100 couples in a community being married at the same time.”.
\textsuperscript{268} COHRE WHRP interview with Rose Mukanantabana of HAGURUKA, 15 Aug. 2003.
\textsuperscript{269} Art. 50 of the Succession Law states that: “All legitimate children of the deceased, in accordance with civil laws, inherit in equal parts without any discrimination between male and female children.”
\textsuperscript{271} COHRE WHRP interview with Annie Kairaba-Kyambadde, Director of the LandNet Rwanda Chapter of the Rwanda Initiative for Sustainable Development (RISD), 19 Aug. 2003.
\end{footnotesize}
\end{flushright}
The issue of marriage property regimes is also problematical. Even though the Law gives spouses freedom of choice in this respect, it is usually the husband who chooses, the woman having little to no knowledge of law in general. Even if the woman does know about the different regimes and their potential consequences for her, and is concerned about the husband’s preference, she may often keep quiet in order to avoid any confrontation.272 Women in rural areas continue to live under a customary regime in which male family members, most often the husband, control their access to land.

2.5.3 Women and land

“Last week, 80,000 people returned, 80 percent of them women and children. The men, they may still be in the Congo fighting an enemy no one can see... The restitution for the returning refugees includes food for 3 months and plastic sheeting, but this can work for only one season. This is not enough. They should bring back the programmes from 1995, 1996 and 1997. Since 1999, they have not been dealing with the reintegration question... the international community has categorically refused to support reintegration, though we are still in the same spot we were in 1994.”273

With the aim of resolving the issue of access to land by returnee women, a directive on provisional land management was issued in September 1996. This regulated abandoned land (where the owners are absent) and was intended to ensure that widows and children would be entitled to manage the family land, but only until the return of the titleholder. This, however, still left women in a precarious position.274

Under the Government’s land redistribution policy, women-headed households were regarded as equal to male-headed households when it came to consideration for land grants. This policy gave many women access to lands that were previously held by their families. However, women who had entered into a customary marriage would generally lose their access to or control over land.

Land scarcity is a huge problem in Rwanda, especially because the country is almost 90 percent dependant on agriculture. Pressured off the land, thousands are abandoning the countryside and looking for a different source of income in urban centres. However, this migration mainly results in ever-worsening poverty. For women, this ‘urban drift’ may also serve to break down those family ties which once offered them some security. A novel policy is the imidugudu, under which returnees are being grouped into village settings, and this may free up more land for agriculture.275 However, the reaction to this policy has been mixed, with some saying it is imposed upon them against their will.276

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272 COHRE WHRP interview with paralegals, Ms Penina and Ms Nite, of Rwandan Women’s Network, 18 Aug. 2003.
274 The Arusha Peace Accords of 1993, signed by the Government, opposition political parties and the Rwandan Patriotic Front (RPF), were designed to bring peace after the 1990 invasion by the RPF, and to create a power-sharing structure between the various factions. They governed the returning of refugees and other national questions. They had limited affect, and are now defunct.
275 COHRE WHRP interview with Patricia Hajabakiga (n. 273 above).
276 “Since late 1996, the Rwandan government has ordered tens of thousands of persons to leave their homes and take up residence in officially-designated ‘villages’ known as imidugudu. In some cases, homeowners have been obliged to destroy their own homes before moving to the imidugudu; in others landholders have been obliged to cede their fields to serve as building sites. Persons unwilling to move and those critical of the policy have been subject to harassment, imprisonment, and fines by government officials.” Human Rights Watch, written statement to the 57th Session of the UN Commission on Human Rights, under Agenda Item 10, E/CN.4/2001/NGO/30.
As mentioned above, Rwanda is currently in the process of formulating a Draft Land Policy. This Land Policy will attempt to finally settle a long legacy of land disputes. Many feel that the land should not belong to the State as the law now stipulates. Any new law should ensure better land management, while securing the rights of the current occupants. Inevitably, however, there will continue to be serious problems related to returnees and the lack of protection for women. Because the Succession Law of 1999 does not provide for land for women, it is vital that the new Land Policy fully protect women’s independent rights to land.277

2.5.4 Inheritance rights under customary law

“In Rwandese [sic] common law, which prevailed until 1999, the legal capacity of women was unknown. Girls, under the paternal roof, were under the paternal authority. When married, women lived under the marital authority. When widowed, [they] fell under the authority of the head of the family, usually the eldest son. Women were regarded as too weak, and always in need of protection.”278

As we have already seen, many discriminatory customs and traditions have died out in Rwanda as an indirect result of the genocide. However, some customary laws still continue to be observed, especially in rural areas, and these are briefly examined in this subsection.

Rwandan customary law provides for patrilineral succession, whereby land and housing transfers from father to son, or, if there is none, to the male next-of-kin. According to custom, a daughter may occasionally inherit land, but only if the father expressly bequeaths it to her, or if there is no son or other male next-of-kin. Sometimes, a father may reserve some land for eventuations such as a daughter being rejected by her husband or his family. A daughter can only benefit from this kind of land tenure for as long as she is in dire straits. Upon her death, however, the land returns to her surviving brother(s). Women who never marry and have no children – known as uwagumiwe – may also be allocated land by their father. (Before the genocide, it was very unusual for women to be in this position, for they would have to endure heavy social stigma.) Under customary law, any property held by a female has to pass to her son(s) upon her death, whereby the principle of patrilineral succession is preserved.

Under customary law, a married woman has no ownership rights whatsoever; she is not allowed to receive any property from her husband – not even during his lifetime. Particularly in rural areas, the household assets, primarily land and housing, are always considered to be the property of the husband and his lineage. Joint ownership with a wife is seen as impossible and impractical, for in relation to her husband’s family she is customarily regarded as a third party.

According to many Rwandan women’s rights groups, a huge problem with the national culture is that women are told never to talk about what happens within the family. Any problems in the family must remain ‘a family affair’. Women simply do not discuss such private matters, which effectively prevents them from obtaining justice, for in court they would be asked to disclose personal, family-related information.

277 COHRE WHRP interview with Annie Kairaba-Kyambadde (n. 271 above).
278 Umurungi (n. 266 above).
2.5.5 Justice systems

Any discussion of inheritance rights in Rwanda would be incomplete without a brief description of the *gacaca* system of customary arbitration. The *gacaca* system was established to hear the cases of over 100,000 people imprisoned and accused of involvement in the genocide.

However, the *gacaca* courts also decide issues relating to customary law. This form of mediation is overseen by family elders, and community leaders are called to hear disputes, many of them over land. These community leaders hear arguments from both sides and then make their decision, which is not legally binding per se, but which the parties usually abide by. Other land disputes are heard at the local authority level. If, after this process, the dispute is still unresolved, it is referred to the formal courts.

Women are generally reluctant to approach the formal court system: the road to the courts is long and costly. Once in the court system, cases demand an even greater investment, often taking years to be decided and costing considerable sums of money, which most widows, in particular, do not have. Another reason why women hesitate to utilise the courts is that these tend to be partial towards men, due to the patriarchal tendencies of the judges. Legal centres offering family mediation have become more readily available in recent years, but these are usually run by NGOs and are too often constrained by limited financial resources, being solely dependent on external funding. The Department of Justice is attempting to sensitishe judges and judicial personal to women’s inheritance rights, and is running popular sensitisation programmes through the media. The COHRE WHRP hopes that such efforts will continue and be generously supported.

2.5.6 The way forward

The women of Rwanda have emerged severely traumatised from a horrendous era, but amazingly strong. To its credit, Rwanda has reformed its laws to protect women’s inheritance rights, though these laws still do not adequately protect all women. In this respect, the most serious shortcomings are that the Succession Law fails to address land issues and requires all marriages to be civilly registered. This leaves women in customary marriages without protection. The Government of Rwanda should act swiftly to protect the inheritance rights of all women currently beyond the scope of the Succession Law.

Harassment of widows is commonplace in post-conflict Rwanda. In-laws and other community members regularly drive widows from their homes. Often, the police are ill-prepared or unwilling to protect widows in such circumstances, and advise them to leave. In most cases, it is only when a widow can access an advocacy organisation that is willing to assist her that she can make progress with her case. Destitute widows need legal assistance, financial aid and moral support to effectively claim their rights. This work demands a concerted effort both by the Government of Rwanda and by Rwandan women’s organisations. Given the lack of domestic resources, donors should also be encouraged to support this important work. An encouraging example is provided by the Village of Hope, which is assisted by the Rwandan Women’s Network. This is a community of widows, living in housing they themselves have helped build, many of whom have fought successfully for their inheritance rights.

279 Ibid. p. 5.
280 For example, organisations such as the Rwandan Women’s Network, AVEGA and HAGURUKA have established paralegals and legal drop centres for mediation of disputes, and if necessary, accompaniment to court. Even this mediation takes time and costs money, if only on account of the necessary transport.
281 COHRE WHRP interview with the Secretary General to the Ministry of Justice and International Affairs, Edna Mukabagwiza, 19 Aug. 2003 (see also n. 247 above).
As is so often the case, the most discriminatory aspects of culture and society are highly resistant to change. For this reason, a huge number of Rwandan women are still suffering unnecessarily, deprived of their inheritance and other rights, despite progressive laws and policies that protect women and hold them to be equal with men. Given that many women are still living in the temporary housing that was provided immediately after the genocide, or in their own half-ruined houses, there is a great immediate need in some areas for construction materials and assistance. These women, mostly living in remote areas, far from hospitals, schools and sources of employment, must first be given access to adequate housing. In the Jicongo and Butare regions, for example, homeless women sleep in schools after the children have gone home.282 Addressing these problems may well require, among other measures, a massive nationwide housing campaign. This will demand the combined support of governmental, non-governmental and donor organisations.

In Rwanda, as in most of the countries examined in this report, insufficient knowledge of the law is one of the greatest obstacles that must be overcome if the law is to work effectively for women. Many women, especially those in the rural areas, are not aware of the law or how it can help them. Even those that do know about the law do not usually know where to go to claim their rights, and almost never have access to outside resources. Although the Government undertook a limited sensitisation campaign after the Succession Law was passed, much work remains to be done to educate women about their inheritance rights. It is vital that key information on the law be disseminated in a way that reaches the largest possible number of women.

For Rwanda’s women to make progress, co-ordination and co-operation are the key. The efforts of women’s rights organisations, in particular, should be supported and intensified.

**SPECIFIC RECOMMENDATIONS**

1. The Succession Law should be amended to bring within its protection women married under customary and religious rites marriages, illegitimate children, and women’s land rights.
2. The envisaged Draft Land Policy should address women’s access to and ownership of land on an equal basis with men.
3. Nationwide popular education programmes should inform women about the provisions of the Succession Act and how to benefit from them. Such programmes should also sensitis communities to the importance of women’s land, housing and inheritance rights.
4. The court system should be made much more accessible to widows. Paralegal networks should be supported in providing free legal assistance where necessary. The judicial process needs to be streamlined; in particular, inheritance rights cases should be expedited through the courts. The State should run education and training programmes for judges and court officials with the aim of creating a gender-sensitive and women-friendly judiciary.
5. Rwanda is still in a state of emergency. Yet despite the fact that thousands of returning refugees are still entering the country each month, international donors and Government agencies have stopped their aid. It is essential that the provision of aid crucial to the survival and reintegration of these refugees be resumed and sustained until it is no longer necessary. Such aid should focus on women returnees, and especially widows, to ensure that they are adequately provided for and protected.

282 COHRE WHRP interview with Auréa Kayiganwa (n. 240 above).
The Committee is particularly concerned about the lack of progress made by the State party in eradicating the enduring discriminatory practices against women and girls. Such practices include polygamy, restricted access to land, property, housing and credit facilities, and the inability to inherit land.\(^{283}\)

### Domestic Legal Provisions Related to Women’s Inheritance Rights

- Constitution 2001, adopted by referendum
- Family Code 1996
- National Civil Code 1964
- National Land Law reforms 1972

#### 2.6.1 Background

Formerly part of French West Africa, in 1914 Senegal was the first colony to have a representative in the French parliament. In 1959, before gaining independence in its own right, Senegal joined the French Sudan to form the Mali Federation, which became independent in 1960. Only two months later, Senegal seceded and became an independent republic.

Senegal as a nation has been involved in various cross-border disputes, notably with its northern neighbour Mauritania. For the past 15 years, there has also been sporadic fighting between the Senegalese army and separatists in the southern region of Casamance.\(^{284}\) There have been many reports of serious human rights violations against the region’s population, and the conflict has long been the focus of human rights groups.

In May 2000, the long-incumbent president Abdou Diouf was defeated by the popular opposition leader Abdoulaye Wade. There were high hopes that President Wade would bring sweeping positive changes to the system, but in this respect he has not fulfilled his promise.

The three largest ethnic groups in Senegal are the Wolof, the Peul (Fulani) and the Serer. Although Senegal is officially a secular State, more than 90 percent of the population are Muslims. The other religions are Christianity and a wide range of indigenous beliefs, many of them ‘animist’.

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\(^{284}\) Casamance, which lies to the south of The Gambia, is not only geographically isolated from the rest of Senegal, but climatically, ethnically and religiously distinct. Its people have close kinship ties with tribes in neighbouring Guinea-Bissau and The Gambia. Since 1982, an armed separatist movement known as the Mouvement des Forces Démocratiques de Casamance (MFDC) has been fighting against Senegalese Government forces, ostensibly in a bid to obtain independence.
Senegal's population was estimated to be about ten million in 2001 and growing at a rate of roughly 3 percent. Although overwhelmingly agricultural, Senegal has a growing industrial sector. Despite this, eighty percent of the population has to survive on less than US$ 2 a day.\(^{285}\)

2.6.1.1 Land and housing

Agriculture plays a fundamental role in the Senegalese economy. In Senegal, as in Africa as a whole, the land provides its owners with their most essential means of survival. Land issues are therefore complex and have caused conflicts at various levels.

In 1964, all non-registered land became State-owned land. Under the administrative reform of 1972, rural community councils were created to oversee rural land. Though Senegalese land policy and law is written in gender-neutral language, in the key area of access to and control over land, women remain subject to burdensome and marginalising customary constraints.

Women constitute 75 percent of the Senegalese rural population, and carry out 81 percent of all agricultural work. According to the UN Food and Agricultural Organization (FAO), rural women cultivate about 70 percent of the country’s subsistence crops but are also responsible for the whole food-chain from production, through processing, to consumption.

Senegal’s nationalized land policy and rural community administration appears to foster gender-neutral access to land, but in reality acts to reinforce the customary denial of land rights to women. According to custom, women in Senegal are permitted to use but not own land. Under national legislation that authorizes land regulation by rural communities, rural councils determine land use and frequently favor men’s interests over women’s. Low levels of education among council members and the rarity of female representation on the councils exacerbate this problem. While women are responsible for 70% of the agricultural produce of Senegal, they continue to be denied equal property rights.\(^{286}\)

Senegal is a highly urbanised country, especially by African standards, with nearly half the population living in urban centres, the largest of which is the capital, Dakar. Over one-third of accommodation in Dakar is classified as squatter housing. Since 1987, Senegal has been implementing a national policy of urban upgrading and land legalisation in an attempt to address the rapid and uncontrolled growth of its sprawling urban squatter areas.

2.6.1.2 Women

Generally, Senegalese women are confined to traditional roles. They usually marry young – the majority by age 16 in rural areas – and the average number of live births per mother is seven. About half of all Senegalese women live in polygynous unions. Up to 20 percent of girls undergo female genital mutilation (FGM).\(^{287}\)

The Constitution of Senegal provides that “men and women shall be equal in law” and prohibits discrimination based on race, religion, sex, class, or language. However, discrimination against women is pervasive, especially in rural areas. The Government frequently fails to enforce anti-discrimination laws.


Educationally as well, women are clearly disadvantaged. The full-time education rate for girls is low, and decreases sharply in the upper levels: girls constitute 46 percent of primary school pupils, 34 percent of high school students, and only 27 percent of those enrolled in higher education. In 1995, the illiteracy rate among women was estimated at 78 percent, against 53 percent for men.\footnote{288}

Women in Senegal also have very limited access to paid employment. Although they constitute 70 percent of the employable population, only 7.4 percent of the female population are considered wage-earners. The vast majority work in the agriculture and informal sectors.\footnote{289}

Under the Constitution, women are eligible to vote. Furthermore, in 1985 Senegal ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Nonetheless, women hold a mere 10 percent of seats in the current Parliament.

There are credible reports that violence against women, usually wife-beating, is commonplace, particularly in rural areas. The police do not usually intervene in domestic disputes, and most people are reluctant to look beyond the family for redress.\footnote{290} Despite the fact that Senegal has a relatively low percentage of the population living with HIV/AIDS, at the end of 2001 that amounted to approximately 24,000 persons, of which over 58 percent were women.\footnote{291}

In spite of constitutional protections, women face extensive social discrimination, especially in rural areas, where the influence of customary and religious law, including polygynous unions and Islamic rules of inheritance, is strongest. Traditional practices also make it difficult for women to obtain credit from banks.

Compared to their rural counterparts, women in urban areas encounter somewhat less discrimination and are more active in political and professional life, though only to a limited extent. Urban women are more likely to access education, seek employment and take advantage of the Government’s efforts to increase respect for women’s legal rights to divorce, alimony and child support. Urban women are also more successful in exercising their land and housing rights, for they have greater knowledge of the Family Code and other legal protections. Women can rent and buy land and housing in the urban areas with little difficulty,\footnote{292} providing they have enough money, which is often not the case due to women’s lower economic status.

### 2.6.2 Statutory law

The Senegalese legal system is based largely on the French system. Prior to the enactment of the Family Code in 1972, personal or family matters were mainly governed by traditional, religious and customary laws, and to a far lesser extent by civil law. Codification of uniform personal status law began in 1961, with a comprehensive listing of customary laws applicable to personal matters in the country’s various customary regimes.

\begin{itemize}
\item \footnote{288} Ministry of National Education, 1995.
\item \footnote{290} AFROL Gender Profiles: Senegal (n. 287 above).
\item \footnote{291} Joint United Nations Programme on HIV/AIDS, ‘Estimated number of people living with HIV/AIDS, end 2001’ (n. 106 above).
\item \footnote{292} Mariame Coulibaly, RADi-Senegal, Women’s Rights of Heritage in Senegal: Constraints and Strategies, paper presented at COHRE workshop ’Inheritance Rights are Human Rights’, 21-23 Jan. 2004, Johannesburg, South Africa (n. 63 above).
\end{itemize}
Commendably, Senegal has tried to achieve a synthesis of traditional and modern law. For example, both civil and Islamic marriages are legally recognised. On request of the Chief Judge, the courts can hear cases where laws conflict. However, this attempt at synthesis has also created much confusion. Furthermore, the law often serves to institutionalise the generally discriminatory manner in which customs and traditions define and govern woman’s rights to own land.\(^{293}\)

Tribunals of first instance are the lowest rung in the court system, through which cases may be appealed up to the Supreme Court, the highest appellate court in the country.

**2.6.2.1 Constitution of 2001**

A new Constitution\(^{294}\) was adopted by referendum in 2001, granting, for the first time in the nation’s history, full equality to women and men. Article 7 states:

> All human rights are equal before the law. Men and women have equal rights. There is no individual or birth privilege of any person or family.

The Constitution guarantees individual liberties under Article 8. All citizens are additionally guaranteed their economic and social rights, as well as their ‘collective rights’. Enumerated liberties include the right to own property.

This right is reaffirmed under Article 15, which states:

> ... the right to own property is guaranteed ... both men and women have equal right of access to and ownership of land in the terms and conditions established by law.

A woman’s right to administer her wealth personally is guaranteed in Article 19.

> “Constitutional rights afforded women are often not honoured, especially in the countryside, and women have fewer chances than men for education and formal sector employment. Despite government campaigns, spousal abuse and other domestic violence against women are reportedly common. Many elements of Islamic and local customary law, particularly those regarding inheritance and marital relations, are discriminatory toward women.”\(^{295}\)

**2.6.2.2 Family Code**

The Family Code was first written in 1972 to formally establish a statutory system for personal law, which until then had been only in the customary and religious domains. The Code was revised to its current version in 1996. The Family Code regulates marriage, divorce and inheritance, as well as custody and adoption of children, and has a separate section that codifies Muslim succession law.

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\(^{293}\) Ibid.


Article 111 of the Family Code sets the minimum age for marriage at 20 years for males and 16 for females. Both females and males under 21 require parental consent to marry.

The Code stipulates that all marriages must be registered but does not make the validity of marriages dependent on such registration. In order to qualify for registration, customary and religious marriages, both of which are recognised under Senegalese law, must be reported to the officer of civil marriages one month prior to the ceremony. The punishment for non-registration is a fine and loss of rights. Unregistered marriages are valid, but do not enjoy civil law protection. Only registered marriages are protected by civil law in the event of a marital dispute.

Thus, the marriage certificate, which is proof of registration, is a vital document that a woman must preserve in case the marriage fails or her husband dies; for only if she can prove that the marriage is valid and registered can she fall within the protections of the law. In addition, only if the marriage is civilly registered can the spouse receive benefits flowing from her spouse’s employment.

After the death of a spouse, if the beneficiary spouse wishes to ensure that she/he will receive a share of the estate, she/he need not go to court directly. An administrator assists in the division of the estate according to the law. The marriage certificate and the birth certificates of any children are essential to proving the status of the surviving family members and thus benefiting from the inheritance.

Title II of the Family Code deals with intestate inheritance rights. The lineage is divided into “legitimate” heirs, “natural” heirs and “joined” heirs. Articles 520-528 specify the possible legitimate descendants and their ranking: the one with the highest degree of consanguinity is always first in line; thus, first the children and their descendants, if any; thereafter the deceased’s ascendants; then collateral parents and, finally, the surviving spouse.

In order to inherit her/his full share, a child born out of wedlock must be recognised and accepted by the natural father’s wife, and by all his wives in a polygamous marriage. The inheritance of an unrecognised child is only half that of a legitimate child born ‘in the bond of marriage’.297

Inheritance rights for Muslim marriages are governed pursuant to Title III, which codifies the Islamic laws of succession. Article 574 defines the husband as the fourth legitimate male heir, and the female spouse as the seventh female heir — the last in line. In general, female heirs receive half of what their male counterparts receive.298 The widow receives a quarter of the estate, which must be shared by all remaining widows in a polygamous situation.299

2.6.2.2.1 Polygamy
Under the Family Code, three regimes of marriage may be entered into: polygamy, limited polygamy and monogamy. The polygamy regime allows a man to marry a maximum of four wives. There is no reciprocal arrangement whereby a woman can practice polyandry (therefore, it would be more precise to speak of polygyny). The limited polygamy regime restricts the number of wives to two. Monogamy, of course, allows for only one wife.

297 Ibid., Art. 534.
298 Ibid., Art. 602.
299 Ibid., Art. 607(2).
The marriage regime is decided upon by the male when first contracting a marriage – he has the ultimate decision.\textsuperscript{300} Once his declaration is made, it is irrevocable. His spouse(s) have no say in the matter. If he does not declare the marriage regime, it is automatically considered polygamous, thereby allowing the husband to take up to four wives. Of course, he may decide to marry fewer than four.

Under the Family Code, the main requirement imposed on a polygamous marriage – limited or otherwise – is that all the wives are to be treated equally.\textsuperscript{301} This includes equality in terms of maintenance. However, the maintenance to which one spouse is entitled may not be used to benefit another.

\textbf{2.6.2.2.2 Marriage property regimes}

The Family Code further establishes three possible marriage property regimes. For monogamous marriages only, the default property regime is that of ‘in community of property’, whereby the spouses share equally in the marriage estate. Any property and/or debts acquired during the marriage are also considered shared.

In the case of a polygamous marriage, the husband and each wife must jointly choose the type of marriage property regime they will enter into: either the ‘dote’ or the ‘separation of wealth’ property regime.\textsuperscript{302} Different wives can therefore have different regimes.

Under the dote regime, the husband is the sole owner and administrator of the marriage property. The only property at a wife’s personal disposal is her entire dowry, which remains hers for the duration of the marriage. Under the separation of property regime, each spouse maintains her/his own property that was brought into the marriage. On rare occasions, the husband may designate furniture or other personal property acquired by him during the marriage (and thus considered his) as belonging to a particular spouse. The spouse in question is then entitled to keep that property as if it were her own.\textsuperscript{303} This regime does offer some protection to wives.

The husband has the principle responsibility to “take care of the home”. He is identified as the head of the family, and the choice of the family residence lies with him.\textsuperscript{304} The wife is required to live with him, except when a judge has ruled that she may live elsewhere because she or her children are in danger.

Maintenance of children is identified as the dual obligation of both parents for the duration of the marriage. If, however, the husband fails to provide for his wife and/or children, she may seek divorce on those grounds.

\textbf{2.6.3 Customary law}

Tradition and custom govern the rights of most Senegalese women. Of these, the right to own land and housing is considered the least important. Women’s status is strictly defined through tradition and religion, which assign them clear duties and obligations, especially as regards land and cultivation. Depending on whether a woman is married, divorced or a widow, she is assigned the duty to cultivate the land that belongs to her husband or family, though she is denied the right of possession.

\begin{footnotes}
\footnotetext[300]{Ibid., Art. 135.}
\footnotetext[301]{Ibid., Art. 149.}
\footnotetext[302]{Ibid., Art. 370.}
\footnotetext[303]{Ibid., Arts. 380 and 384.}
\footnotetext[304]{Ibid., Arts. 152 and 153.}
\end{footnotes}
Under customary law, women retain lifelong minority status. They are under their father’s authority; when married they become the ward of their husband; and upon the death of their spouse, they are inherited by a male relative, or remain under the care of their son. Many of Senegal’s ethnic groups still practice widow inheritance under customary law.

In some ethnic groups, women are allowed to own land; however, this right is usually only to land that is difficult to cultivate, along swamps or in floodplains. In some rural areas, women have the right to claim allocation of a portion of their father’s or husband’s lot, and the rural council is required to respect such an allocation request. If the rural council refuses to do so, the woman in question may appeal to the civil courts, which will most likely grant her request. However, if rural women under customary law attempt to claim their rights under civil law (as they are entitled to do), they are often met with strong social disapproval, which can have serious consequences such as, in many cases, being ostracised from the family and even from the community.

In the Serer ethnic group, which practices matrilineal succession, a daughter can inherit her mother’s fields and a nephew can inherit his uncle’s property. However, a ‘renaissance’ of the paternal lineage has meant that, on the whole, sons no longer inherit from their uncles but from their fathers.

The Diola also practice matrilineal succession, and fields may be transferred from mothers to girl children without any complaints from the males in the family.

In Senegal as a whole, Islamic rules predominate in issues of divorce, personal status and inheritance. Despite their intimate relationship with agriculture and the land, Muslim women have no rights of ownership over land or any other immoveable property.

2.6.4 The way forward

Whereas Senegal has laws in place that are intended to regulate succession and inheritance, it is evident that they do not adequately address these issues; rather, they codify discriminatory practices against women. The protections enshrined in CEDAW and other international human rights instruments to which Senegal is a State party – in particular those protections relating to the elimination of customs and traditions that are harmful to women – are not fully integrated in the national law.

Apparently, most of the problems are encountered by women in the rural areas, where violence and discriminatory practices against them are to a large extent tolerated. Even though there are rural land councils, these tend to further men’s interests rather than women’s.

On the positive side, Senegalese law does recognise all types of marriage, including customary marriages, as valid and protected by civil law. However, women in customary areas and marriages are often effectively prevented from claiming their rights under civil law, for they face social exclusion if they do so. Furthermore, these rights are often difficult to interpret and not well publicised. Thus, on the face of it, the law does not adequately address violations of women’s rights.
There is an urgent need for Senegal to design and implement a nationwide education programme on women’s rights. Not even good laws can benefit women if they do not know about them and are unable to obtain their protection. Currently, it is only the urban women who have the opportunity to do so. The rural areas have been largely neglected by the Government, and far greater efforts are needed to redress this imbalance. The rural population should be sensitised to women’s human rights and there should be extensive anti-violence campaigns. In addition, discriminatory customs must be exposed for what they are and eradicated. The Government can either conduct such programmes on its own, or – preferably – tap into the existing women’s networks. Although these networks are limited in scope and resources, they have proven to be quite effective and could be far more so if given the support necessary to carrying out such sensitisation and education programmes.

Furthermore, women, and especially those in the rural areas, need to be offered alternative ways of generating income. Poverty is widespread in Senegal and women bear the brunt of it, for they are denied any lasting benefit from land harvest, though they are the ones who do the harvesting.

Senegal should immediately repeal and swiftly replace all discriminatory laws, including the taxation and inheritance laws that deny women their full share of inheritance, as well as laws that name the husband as the head of the family with decision-making power over the entire family. The new laws should fully integrate international human rights laws and standards of equality and non-discrimination, especially between men and women in marriage. Widows should have an automatic right to inherit the bulk of the marital property, while the needs of family members proven to be dependent on the husband should also be taken into consideration.

The rural areas are not the only parts of the country that need urgent attention. Dakar and other urban centres are growing at an alarming rate, with over a third of their residents living in ‘informal settlements’. In such situations, tenure security for women is greatly threatened, although there is some evidence that single women in the urban areas find it easier to access property than their counterparts in the rural areas. The Government must address the issue of urban growth with an effective policy that takes account of the right to adequate housing for all. The Government should note that the right to adequate housing means that people should be allowed and empowered to provide for their own housing if existing housing is insufficient or unavailable, and that such strategies should not be infringed upon. Women’s rights must be respected and women must be allowed to gain and maintain their own land and housing.
SPECIFIC RECOMMENDATIONS

1. The Government should immediately institute public education programmes on civil law and the rights of women vis-à-vis inheritance and equality.
2. General popular sensitisation programmes should also be undertaken to make women and men aware of women’s rights, especially those to equality, non-discrimination and inheritance. The aim should be not only to counter discriminatory land, housing and inheritance practices, but also to combat the widespread violence, and all other discriminatory practices, against women. The practice of polygamy should be discouraged as being potentially discriminatory to women.
3. The Family Code should eliminate all references to the husband’s decision-making power over his wife and family. This only serves to perpetuate the concept that women are subordinate to their husbands. Registration of marriage should not be a condition to gaining validity of marriage under civil law.
4. The rapid urbanisation of Senegal needs to be addressed, with increased protection for women’s tenure security, especially in rural areas.
5. Income-generation programmes should be supported to assist women in overcoming their debilitating poverty, and to reduce their dependency on land — which, as the law now stands, they cannot own.
South Africa belongs to all who live in it
— Preamble of the Bill of Rights, the Constitution of South Africa (1996)

[The Committee] ... notes with concern the continuing recognition of customary and religious laws and their adverse effects on the inheritance and land rights of women.

DOMESTIC LEGAL PROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS

- Constitution of the Republic of South Africa 1996
- Black Administration Act No. 38/1927
- Recognition of Customary Marriages Act 120/1998
- Matrimonial Property Act 88/1984
- Intestate Succession Act 1987
- Administration of Estates Act 1965, as amended by the Administration of Estates Act Amendment 2002
- Maintenance of Surviving Spouses Act 27/1990
- Wills Act 7/1953
- Extension of Security of Tenure Act 1997
- Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 2000
- The Amendment of Customary Law of Succession Bill 1998

2.7.1 Background

South African history has been shaped by decades of dispossession. The pilfering of land and resources from South Africa’s indigenous black population is perhaps most graphically illustrated by the brutal and infamous Apartheid policies of the South African Government. Those policies, implemented from 1948 to 1994, directly affected generations of South Africans, and have cast a long shadow on future generations. While the Apartheid era has officially ended in South Africa, the country's legal system still reflects, and in many ways attempts to redress, the turbulence and injustice of its past.

Post-Apartheid South Africa has emerged, in many ways, as a leading player in the international human rights community. The Government of South Africa has ratified most of the key international human rights treaties, and has established national commissions to ensure that human rights are implemented as a
matter of national priority. Indeed, the 1996 Constitution of South Africa has been heralded as one of the world’s most comprehensive and human-rights-orientated constitutions. It includes many of the key precepts set forth by international human rights law, and many legal activists in South Africa base their arguments on it. In the words of one practitioner: “We don’t rely on international treaties, because most of the time, the rights enshrined therein are already provided for in our Constitution.” The Bill of Rights of the 1996 Constitution is “a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” The Bill of Rights is binding upon all branches and organs of State.

Recognising the country’s diverse cultural heritage, however, and in an effort to uphold the right to cultural self-determination, South Africa has adopted a dual legal system: both customary and civil law are recognised. These two legal systems co-exist in what is sometimes a precarious balance, especially with regard to women and their rights. Women’s human rights activists in South Africa face the formidable challenge of harmonising these incongruent legal systems in order to secure for women the full protections that the Constitution guarantees.

Fortunately, the Constitution is in accordance with the aspirations of women’s rights advocates: even though it requires that the African customary legal heritage be deferred to, it also stipulates that this deference – the right to culture and thus to customary law – is secondary to the right to equal treatment. Thus, pursuant to the Constitution, any rules of customary law that discriminate unfairly on grounds of sex, gender, age or birth must be changed. The Constitution is the supreme law of the land, and all law or conduct inconsistent with it is rendered invalid, while all obligations imposed by it must be fulfilled.

2.7.1.1 Equality and non-discrimination

Equality, protected under Section 9 of the Bill of Rights (Chapter 2 of the Constitution), is defined as including the “full and equal enjoyment of all rights and freedoms”. The abhorrent legacy of Apartheid is finally dispensed with in the recognition that the State may not unfairly discriminate on grounds including “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

The principle of gender equality is also enshrined in Chapter 1 of the Constitution, which declares that the Republic of South Africa is founded on four values, one of which is “non-racialism and non-sexism.”

The equality section of the Constitution, which is applicable to persons and the State, specifically calls for legislative and other measures to promote the achievement of equality, including affirmative action to rectify unfair discrimination.

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308 For example, the South African Constitution has created the Commission for Gender Equality, whose role is to “promote respect for gender equality and the protection, development and attainment of gender equality.”
310 Constitution of the Republic of South Africa 1996, Ch. 2 (Bill of Rights), Subsect. 7(i).
311 Ibid., Ch. 2, Subsect. 9(i).
312 Ibid., Ch. 1 (Founding Provisions), Subsect. 1(b).
313 Ibid., Ch. 2, Subsects. 9(2) and (3) (see text box below for contents).
SECTION 9 OF THE BILL OF RIGHTS OF THE 1996 CONSTITUTION OF SOUTH AFRICA

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

2.7.1.2 Access to land, housing and other property
Under Sections 26 and 27 of the Constitution, everyone has the right to have access to adequate housing, to healthcare services, to sufficient food and water and to social security. The State is obligated “to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.”

HOUSING UNDER SECTION 26 OF THE 1996 CONSTITUTION

(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

314 Ibid., Ch. 2, Sects. 26 and 27.
In addition, Section 25 of the Constitution addresses the property rights of South Africans. Subsections 25(5), (6) and (7) provide that access to land should be on an equitable basis; that people living in tenure insecurity are entitled to secure tenure or comparable redress; and that people dispossessed of property due to racially discriminatory laws or practices in the past can seek judicial redress. This section effectively obliges the State to initiate and implement land reform while recognising existing property rights.\textsuperscript{315} It has been said that the success of such land reform should be “judged by the extent to which it impacts positively and progressively on reducing systematic and structural inequality along race, gender and class lines.”\textsuperscript{316}

2.7.1.3 Effects of land reform on women

The question of land and its allocation relates directly to that of women’s economic marginalisation in South Africa, and to their ability to inherit. At present, traditional authorities are vested with the right to allocate land to South Africans, subject to the approval of the Commissioner of African Affairs. Historically, females were regarded as legal minors and did not even have the right to occupy land.\textsuperscript{317} Males were favoured in all inheritance of movable and immovable property. The present-day situation is somewhat less unfavourable for women, but they are still far too often excluded from the process of land allocation and largely ignored in land reform processes. In addition, customary law still denies women any proprietary capacity in land and condemns them to the guardianship of male relatives. Furthermore, tenure reform in favour of women is also generally opposed by the country’s traditional leaders and farm owners.\textsuperscript{318}

\textsuperscript{317} Sect. 23 of the Black Administration Act (BAA), No. 38 of 1927, held that women were not legal adults.
\textsuperscript{318} Inheritance on South African farms is a huge problem. Men are usually regarded by the farm owner as adding value; women, even if they provide labour to the farm, are less valued. Once her husband passes away, a woman is more often than not ejected from the farm, as the owner no longer regards her as having any value. Women on a farm near Greytown, KwaZulu Natal Province, said they do not see themselves as being able to own property – instead, they said, the men see them as their property, providing labour for the household. In the eyes of the farm owner, they added, they are nothing. Their labour on the farm is never recognised. They know that if their husbands were to die, and the owner were to find this out, they would be ejected from the farm. Interview with farm-worker community, 15 June 2003, Greytown KwaZulu Natal, South Africa.
COMMUNAL LAND RIGHTS BILL 2004

The Communal Land Rights Bill (CLRB) attempts to deal with land issues in the former Bantustans, or communal areas, of South Africa. Fifteen million people live on these lands. The legislation previously applicable to land in communal areas was the Interim Protection of Land Rights Act. That Act permitted people to gain the ‘right to occupy’ a particular piece of land through a Permission to Occupy (PTO) registration, which was always registered under the ‘head of the household’ — under customary law, the male head.

The CLRB stipulates that any PTO that originated from a chief or commission shall be transferred to a formal land tenure right in the form of ownership.

Unfortunately, in February 2004, the Communal Land Rights Bill was passed by the National Assembly. One female observer commented:

“The most controversial aspect of the bill is that it imposes Traditional Councils as the administrators of land rights in communal areas. … Control over land will give traditional leaders a source of entrenched power, which will guarantee them a perpetual place in the political landscape irrespective of what people on the ground want.

“At the public hearings, rural communities … said they did not want their land rights to be subject to their status as tribal subjects: they want the same independent and equal land rights as other South Africans.

“Rural women’s groups said that the bill would entrench patriarchal power relations and bolster the status of customary law, which currently discriminates against women. They gave examples of traditional leaders refusing to allocate land to women, of widows being thrown out of their homes on the death of their husbands, and of divorced women being chased away with nothing. They argued passionately that the bill would reverse hard won victories by rural women against old structures and old ways.

... "In response to the strong women’s lobby against the bill, amendments were made to assert equal land rights for women. However there is a problem enforcing such provisions. Very few rural women are able to take cases to court. Existing equality provisions have had very limited real impact on the lives of rural women.

... "The Communal Land Rights Bill is not just about land rights. It is about whether 15 million people are primarily South African citizens, or tribal subjects. It is also about whether political parties care about rural people and rural poverty, except as fodder for pre-election deals amongst themselves.”"
2.7.2 Customary law

Subsection 211(3) of the Constitution explicitly recognises customary law,\(^\text{321}\) and states that:

\[\text{The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.}\]

However, this application is tempered by Subsections 39(2) and (3), which read:

\begin{itemize}
  \item (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights;
  \item (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.
\end{itemize}

The recognition and application of South African Customary Law has been a divisive issue from the onset. In 1927, South Africa passed the Black Administration Act (BAA),\(^\text{322}\) wherein African customary law was partially recognised throughout the country. However, the law was subject to the overarching precept that it should not be repugnant to public policy.\(^\text{323}\)

2.7.2.1 Succession under customary law

The way religious and customary law marriages have been dealt with creates difficulties for women due to uncertain status and recognition, polygamy, property rights on breakdown of marriage and succession rights after the death of the male partner. Distribution of property after the breakdown of any relationship does not take into account the needs of women and dependent children and this failure leads to poverty.\(^\text{324}\)

Under South Africa’s customary legal system, succession is based on the principle of primogeniture, whereby the estate is devolved essentially through the male line only. If the deceased ‘head of the family’ – always a male – has only one wife (for succession in polygamous families, see two paragraphs below this), he is succeeded by his oldest son; if that son is no longer alive, the oldest surviving grandson succeeds. If there are no such male children of the eldest son, the estate passes to the deceased’s second son and to that son’s male descendants. In the event that there are no male descendants whatsoever, the deceased’s father is heir; if the father is dead, then the deceased’s oldest brother inherits; if he is also dead, then the oldest brother’s eldest son, and so on. In other words, primogeniture essentially entails passing the estate down to male descendants; if there are none, the estate passes up to the next order of male ascendants. Almost all tribes in South Africa practice primogeniture in estate administration.\(^\text{325}\)

\(^{321}\) See also Subsection 15(3)(a) and Section 30 of the Constitution.
\(^{322}\) Black Administration Act (BAA), No. 38 of 1927.
\(^{323}\) Ibid. In KwaZulu Natal at that time, the BAA, when referring to the African Indigenous Law, gave further legal recognition to the code of Zulu Law as codified by Sir Theophilus Shepstone, an administrator of ‘native affairs’. He was responsible for the codification of the Zulu laws in 1891, and the annexation of the Transvaal in 1877. Entry on ‘Shepstone, Sir Theophilus’ in Encyclopædia Britannica, 2003 (Encyclopædia Britannica Premium Service), http://www.britannica.com/eb/article?eu=69043
\(^{325}\) Under certain conditions, estates are exempted from primogeniture, as would be the case when: (a) a citizen of South Africa is issued with a letter of exemption by the President in terms of Sect. 31 of the BAA, the letter meaning that the recipient would be exempt from the application of African Customary Law; (b) a deceased person was a partner in a marriage in community of property or under anti-nuptial contract; or (c) the Minister has decided that the estate must be so administered if in her/his opinion the circumstances are such as to render the application of African Customary Law inequitable or inappropriate.
Under customary law, the male heir’s chief responsibilities include maintaining and caring for the estate and its dependants: namely, the widow and the children. However, these responsibilities have often served as an obstacle to the recognition of women’s rights to full equality. For example, in the 1997 case of *Mthembu v. Letsela*, the court found that primogeniture was non-discriminatory, that female dependants suffer no discrimination because, while they may not be allowed to inherit property, they are entitled to maintenance out of the estate.327 Thus, women’s ownership rights were not even considered.

Polygamous marriages are especially problematical. Customary law allows for polygamous marriages, with no limit on the amount of wives a man may take. In South Africa, polygamous families are divided into separate units or ‘houses,’ with each marriage establishing a new, independent house.328 Under simple polygamy, the male heir is defined as the first-married wife’s oldest son, or if he is no longer alive, his oldest son. If there are no male descendants of the oldest son, the first wife’s second son is heir, and so on. Without a male heir in the first house, the line of succession moves to the males in the second house; that is, the male children of the second marriage.

327 *Mthembu v. Letsela* [1997] (2) SA 936 (T). Mthembu, the petitioner, was a widow who had been forced out of her marital home after the death of her husband. She was suing Letsela, the respondent and male heir, under customary law, to her marital estate. Rather than claim maintenance from the male heir, Methmbu brought her case to court, challenging the customary legal system of succession, and arguing that it was repugnant to the Constitution (at that time, Sect. 3 of the Interim Constitution, which prohibited discrimination on grounds of gender, see *The Interim Constitution Act* 200 of 1993). The Court found, however, that there was no prima facie evidence of discrimination. Customary succession could only be found unconstitutional and against equality if the widow and child were completely excluded from the estate. The Court found this not to be the case, as the widow was protected under the heir’s duty to maintain. Furthermore, while the Court found that Mthembu would be detrimentally affected if the right to support fell away, they pointed to Regulation 2(d) of the Black Administration Act (BAA), (pursuant to Sect. 23(10) of the BAA), which ultimately allowed the Intestate Succession Act to be applied in cases where the widow would be detrimentally affected if the rule of customary succession were to be applied under the BAA.
Thus, the only right that a widow can claim under customary law is one of maintenance against the male heir. In many cases, the male heir is a person who is not only distant in terms of familial relations, but also geographically. Therefore, it is often very difficult for a widow to enforce her claims against the male heir. If he does not pay maintenance to the widow as is required, she can take him to court, often going to great length and expenses to do so. She must identify the male heir, locate him, institute proceedings against him, prove her right to maintenance (often in a gender-biased court) and, finally, ensure that any order against him is enforced. For many widows, the possible rewards are simply not worth the effort. (See also text box ‘The arbitrary role of magistrates’ in Subsection 2.7.2.2 below.)

2.7.2.2 Judicial interpretation of customary law and women’s inheritance rights

As we have seen, the South African Constitution does not allow the application of any law that is in violation of its overarching precepts; nonetheless, many magistrates see their role as being bound by customary law, even when that law is discriminatory. Part of the problem for women is that customary law is largely uncoded and therefore cannot be properly referred to or relied upon. Thus, customary law is wide-open to interpretation and, indeed, different magistrates courts often apply such law in very different ways. That magistrates are so capricious is hardly surprising, for they generally receive little to no training on customary law and its application.

The court hierarchy in South Africa is as follows; uppermost, the Constitutional Court, then the Supreme Court of Appeal, the High Courts and other lower courts. The Constitutional Court has its seat in Johannesburg, the Supreme Court of Appeal in Bloemfontein. There is at least one High Court in each province. Other lower courts include magistrates courts and small claims courts.

COHRE WHRP interview with Sibongile Ndashe (n. 309 above), 5 Aug. 2003. On the same day, this was confirmed in a COHRE WHRP telephone interview with a magistrate of Mitchell’s Plein Magistrates Court. He claimed to be an expert in customary law, on the basis that he had studied such law for two years in order to become a magistrate – though that was 20 years ago. He had not had any formal training on customary law since. This did not matter, he insisted, as “customary law never changes – women can never own property or inherit”. (Name of magistrate undisclosed on request.)
THE ARBITRARY ROLE OF MAGISTRATES

Several magistrates interviewed by the COHRE Women and Housing Rights Programme (WHRP) insisted that in inheritance disputes between black South Africans they have no choice but to apply customary law. Many also believed that, under such law, women have no property rights whatsoever. One magistrate at Simonstown Magistrates Court, who had practised as a judge for over 25 years, declared that although the customary intestate succession law is discriminatory, he is bound by it and cannot change it or its application. He felt that the only solution was the civil registration of marriages. In cases of civil law marriage, he told the WHRP, he can apply the provisions of the statutory Intestate Succession Act. If not, the widow gets nothing, because “customary law simply does not allow her to own or inherit anything”.

A regulation in the Black Administration Act (BAA) allows a magistrate to obtain from the Ministry of Justice a reprieve of customary law application, if it is clear that applying such law would result in an inequitable situation. However, the same Mitchell’s Plein magistrate admitted to the WHRP that he had never, in his 25 years of practice, utilised this regulation.

Another Mitchell’s Plein magistrate with whom the WHRP spoke agreed with his colleague on the strict application of customary law, and stated that only males could inherit. Nevertheless, this magistrate had a creative way of ensuring that widows could benefit from the deceased’s estate. He demanded from the male heir a comprehensive statement for maintenance, with an agreed amount to be paid to the widow. If the male heir refused, the magistrate would obtain the reprieve of customary law application from the Ministry of Justice and apply civil law — thereby enabling the widow to inherit at least part of the estate. In this way, he compelled the heir at least to agree to maintain the widow, which is, in any case, his duty under customary law. One women’s rights activist commented:

“This is the arbitrariness that you get with the application of Black law and custom, and that makes it difficult for people to understand what the system says. Right now, you’ve got all these competing interests, so most of the time when you go to court, you don’t know what you’re going to come up with, because most of the time it’s not clear, it’s not understandable, it’s applied in a very arbitrary way.”

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331 COHRE WHRP telephone interview with magistrates of Simonstown and Mitchell’s Plein Magistrates Courts, 3 Aug. 2003. (Names undisclosed on request.)
332 Regulation 2(d), promulgated by Government Notice No. R. 200 of 6 Feb. 1987, made by the President of the Republic of South Africa under Sect. 23(10) of the Black Administration Act (BAA), 1927 (Act No. 38 of 1927). This regulation calls for customary law to be applied in the devolution of “black” intestate estates, unless it can be shown that the application of such law would be “inequitable or inappropriate”, in which case the estate may devolve as if the deceased were a “European”.
333 COHRE WHRP interview with Sibongile Ndashe (n. 309 above).
2.7.2.3 Debates on the interpretation and application of customary law

In *Du Plessis v. De Klerk*, Justice Mokgoro noted that customary law, lamentably, has been marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community. This sentiment was reiterated on several occasions during the fact-finding mission to South Africa by the COHRE Women and Housing Rights Programme (WHRP).

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**CHALLENGING DISCRIMINATORY INTERPRETATIONS OF TRADITIONS AND CUSTOMS: A CASE STUDY**

The amaHlubi community of KwaZulu Natal Province is an example of how customary law can be applied in a way that recognises women’s equality. Though a very traditional society, the amaHlubi have a very progressive approach to women’s rights and their integration into community life. In the area of property ownership, women and men are seen as equals, and both women and men can request and obtain property. One community member told the COHRE WHRP:

> “Land is allocated to all the people who want to acquire land in their own right, either as men or as women. If a husband dies in this community, the property in terms of land and housing belongs to the wife. They don’t discriminate as they used to on the bases of their marital status.”

Women in amaHlubi said that they are happy to be a part of the community. According to one such woman:

> “If I were to go to another community it would be a disaster for me. For women in the amaHlubi community, there are no limitations. I know that this is not the situation in other communities, so I would not be able to go there, as I would not fit in nicely.”

Another woman told the COHRE WHRP:

> “I have seen in other communities how some members of the male family of the husband come and inherit from their brother. It doesn’t happen here. Here the widow keeps everything, and if she wants to pass it on to another family member, that’s her decision.”

What is different about the amaHlubi? When asked, community members expressed surprise:

> “How are we different? We simply apply customary law like all the others.”

When we pointed out that not all the others apply customary law in the same manner, that many communities do not protect women’s rights, they stated that those communities must be interpreting customary law incorrectly.

Continued on p.117

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335 COHRE WHRP visit and interview with women of the amaHlubi Community, KwaZulu Natal Province, 6 Aug. 2003.
In fact, laws of customary succession are continually being interpreted and re-interpreted, and there is much debate as to what the ‘true’ interpretation and application of such laws ought to be. All too often, unfortunately, the application has a negative outcome for women. Nonetheless, it is important to realise that customary law is always in flux, so the pendulum can swing in their favour. As one women’s rights activist told the COHRE WHRP:

“In some communities, you hear anecdotal data that the communities have decided to let the women inherit. So [inheritance] is not an absolute area as [many magistrates] say it is, or as the courts continue to understand it to be, or as the courts continue to interpret it, as saying that under customary law women cannot inherit — because they do.”

This continuing public debate over the authoritative interpretation of customary law allows for a broader understanding and implementation of the concept of women’s equality than is sometimes assumed. There are cases where customary law is applied in a way that is beneficial for women, and in a way that upholds women’s fundamental equality. For example, some recent surveys indicate that, in practice, parents tend to leave their property to children and other dependants depending on how needy they are, and regardless of gender. Such dependants are often married daughters, daughters who have returned from broken marriages, and sons who cannot establish their own households. Respondents stated that many married couples, contrary to the rule of male primogeniture, would like the surviving spouse to inherit the marital property.

336 Even today, inkhosis hold enormous power and the vast majority of them are men. The inkhosi has say over all matters relating to the distribution of land and housing. An inkhosi may or may not decide to give discretion to the induna (headman) of the isigodi (ward, a particular section of the community). Any decision made by the headman, however, may be overruled by the inkhosi. As in traditional systems generally, it is rare for a woman, especially a widow, to approach an inkhosi directly with any needs or concerns.

337 COHRE WHRP interview with Sibongile Ndashe (n. 309 above).

2.7.3 Statutory law

Whereas customary law is the dominant legal system that usually affects women’s inheritance rights, it is the interplay between such law and statutory law that ultimately shapes, or has the potential to shape, the realisation of women’s inheritance rights in South Africa.

2.7.3.1 Black Administration Act

The constitutional imperative cannot be realised on the face of some provisions contained in the Black Administration Act ... The underlying imperative of the Black Administration Act is that of male preference as against equality of genders and that of African subordination against other races. This is not the occasion, however, where we are called upon to revise the entire Black Administration Act. Suffice it to state that ... [the] Constitutional Court has already expressed its concern with the fact that this Act still remains in our statute book. It is up to Parliament to decide when this Act shall be repealed in toto.339

Section 23 of the Black Administration Act (BAA) No. 38 of 1927 deals generally with succession for estates of ‘black’ persons. Subsections 23(1) and (2) explicitly mandate that all property not devised according to a will must be devolved and administered under black law and custom. As we have seen, black law and custom is generally understood to comprise the system of male primogeniture, under which only males inherit.340 The BAA thus codifies the most discriminatory aspects of this system, including the total exclusion of women from succession.

Regulation 2(d),341 one of the regulations issued pursuant to Section 23(10) of the BAA, provides that if a widow would be detrimentally affected as a result of applying customary law, she can apply to the Minister of Justice for a dispensation that the property shall devolve as if the deceased and the applicant were married ‘out of community of property’. However, this regulation is not often invoked and is difficult to prove.

2.7.3.2 Recognition of Customary Marriages Act

Prior to the Recognition of Customary Marriages Act342 (CM Act) of 1998, customary marriages, for all intents and purposes under the law, were not recognised. The CM Act was heralded as a victory for women’s rights in South Africa.343 It recognises all marriages – whether civil or customary – as valid and subject to civil law, including the Intestate Succession Act. Rules and regulations were instated to allow for the registration of all marriages, even those entered into prior to the CM Act.

341 Regulation 2(d), promulgated by Government Notice No. R. 200 of 6 Feb. 1987, made by the President of the Republic of South Africa under Sect. 23(10) of the Black Administration Act (BAA), 1927 (Act No. 38 of 1927). Regulation 3(1) continues: “(1) All the property in any estate falling within the purview of regulation 2(e) shall be administered in terms of the principles of customary law and the provisions of these regulations, and all other property shall be administered under the jurisdiction of the Master of the High Court in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965) ...”.
342 Recognition of Customary Marriages Act (No. 120 of 1998).
343 The CM Act repealed the infamous Sect. 11(3) of the BAA, which for decades had condemned South African women to a legal state of perpetual minority. The CM Act also repealed a number of laws at the provincial level, including the KwaZulu Act on the Code of Zulu Law of 1985, which had entrenched the notion that a man in a marriage is not only the ‘head of the family’ but also the holder of ‘marital power’.
Any customary marriage entered into *after* the coming into effect of the CM Act (15 November 2000) and valid according to customary law is automatically given the same status as a civil law marriage and, as such, is not bound by black law and custom. It is assigned to the ‘in community of property regime’. The parties can, however, enter into a pre-nuptial agreement changing the marriage property regime.

It is vital that a marriage be registered. If it is entered into after the CM Act came into effect, the couple must register it within three months of the ceremony. However, those married prior to the CM Act had to register their marriages within 12 months of the CM Act coming into effect; that is, before 15 November 2001.

**TYPES OF CIVIL LAW MARRIAGE**

Under South African civil law, there are three basic marriage property regimes:

1. **Community of Property**: The main feature of this regime is that all assets and liabilities are pooled and shared equally by the spouses, irrespective of whether they were acquired before or during the marriage, unless expressly excluded by a donor or testator. Under Community of Property, all profits and losses are borne equally, and the wife has joint control with her husband over the estate. Contracts affecting the joint estate must be entered into by both parties. In the absence of a contract stating otherwise, all marriages are conducted in this manner.

2. **Out of Community of Property**: Under this regime, each spouse retains his or her own assets and liabilities, whether acquired before or during the marriage. There is no sharing of profits and losses, and each spouse has full and independent contractual capacity. Upon death of a spouse or divorce, each spouse retains control of her/his own assets, though a divorce court may order the distribution of the matrimonial property along equal lines. This marriage regime is governed by an ante-nuptial agreement, which must be entered into prior to the ceremony. For marriages entered into after November 1984, if the contract does not specifically exclude the system of accrual (see 3 below), then the rules of accrual automatically apply.

3. **Out of Community of Property with Accrual**: Marriage under this regime is also governed by a pre-nuptial agreement, but this agreement covers the sharing of the spouses’ assets during marriage. If the marriage dissolves by death or divorce, the growth of assets accumulated by the two spouses during the marriage is automatically divided equally. The value of each spouse’s assets is determined at the moment of marriage. On dissolution of the marriage, the assets are again determined and their growth calculated, allowing for inflation.

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344 The CM Act states: “A customary marriage entered into after the date of the commencement of this Act, in which a spouse is not a partner in any other existing customary marriage, is considered a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante-nuptial contract that regulates the matrimonial property system of their marriage.” Pursuant to Sect. 3, these customary marriages in community of property are subject to the Matrimonial Property Act of 1984.
The main purpose of the CM Act is to extend full legal recognition to marriages entered into in accordance with customary law or traditional rites, by bringing women and children into the protective realm of civil law and the Constitution. The CM Act gives recognition to existing customary marriages whether they be monogamous or polygamous. Polygamy is not banned under the CM Act.

All the South Africans interviewed by the COHRE WHRP acknowledged that the CM Act has played an important role in improving women’s lives. Most advocates recognise that it has made a difference, and that as women are now marrying in community of property, are able to register their marriages, and thus have proof of them, they generally feel more secure and empowered.\(^{345}\) Furthermore, now that the CM Act is in place, any husband in a customary marriage who wishes to enter into a further customary marriage must first apply for court approval of a written contract regulating the marriage property regime of his future marriage(s).\(^{346}\)

Even though the CM Act was hailed as a breakthrough and is still seen as such, it has significant limitations. One of these is the one-year time limit originally set for registration of all marriages entered into prior to the Act’s adoption. This allowed too little time to inform the public about the benefits of registering marriages. Since its adoption, however, the CM Act has been amended to allow further time for the registration of existing marriages.

Most importantly, even though the CM Act has provided for registration of all existing customary marriages, the property regimes of such marriages, as well as their proprietary consequences, continue to be governed by customary law. Even the Ministry of Justice has criticised the CM Act, noting that it is unacceptable to apply a system in which women are routinely barred from inheriting property.\(^{347}\) Only rarely do husband and wife agree to apply to a court to have the property regime of their marriage changed and manage to convince the judge that their reasons for the change are sound, upon which all creditors are notified accordingly.\(^{348}\) This is a difficult – if not impossible – course of action for most women. In fact, as far as marriage property is concerned, many women do not benefit from the CM Act.\(^{349}\)

\(^{345}\) COHRE WHRP interview with the Thokozani community, KwaZulu Natal Province, South Africa, 9 Aug. 2003.

\(^{346}\) Recognition of Customary Marriages Act (n. 342 above), Sect. 7(6).


\(^{348}\) Recognition of Customary Marriages Act (n. 342 above), Sect. 7(4).

\(^{349}\) The COHRE WHRP was told that most women married after Nov. 2000 do, in fact, register their marriages.
Furthermore, large groups of women are excluded from the CM Act's protections. As the Act deals with marriages under customary traditional law, but not those under customary religious law, it completely ignores Muslim marriages.\footnote{Furthermore, large groups of women are excluded from the CM Act's protections. As the Act deals with marriages under customary traditional law, but not those under customary religious law, it completely ignores Muslim marriages.}

**2.7.3.3 Intestate Succession Act**

Section 1(1)(a) and (c) of the Intestate Succession Act\footnote{Intestate Succession Act, No. 81 of 1987.} deals with the rights of a surviving spouse. If there is no descendant, the surviving spouse inherits the entire intestate estate. The Intestate Succession Act was amended in 2002 to allow for the equal sharing of the intestate estate among several surviving spouses.

If there are descendants, they inherit a share of the estate determined by the provisions of this Act. The descendants' rights enumerated in the Act apply irrespective of gender. This Act also eliminates illegitimacy as a reason for non-succession by a child; the descendants' rights apply irrespective of whether the descendants were born inside or outside of legally recognised marriages.\footnote{Ibid., Sect. 1: "(2) Notwithstanding the provisions of any law or the common law, but subject to the provisions of this Act and Sect. 5(2) of the Children’s Status Act, 1987; illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.” Adoptive children are also considered blood relations for the purpose of the Intestate Succession Act.}

The Act, however, specifically excludes ‘black’ estates, for under Section 1(4)(b) an intestate estate is defined as including: “any part of any estate ... in respect of which Section 23 of the Black Administration Act, 1927 does not apply.”\footnote{Ibid., Sect. 1(4)(a).}

**2.7.3.4 Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)**

"[PEPUDA] could be another very interesting area in the future where women, for example, could claim that their rights are being violated in the area of inheritance rights, and ... approach the court and seek relief. That’s another brand new piece of legislation which is going to be very interesting."\footnote{COHRE WHRP interview with Judith Cohen, Human Rights Commission, 4 Aug. 2003.}

The Promotion of Equality and Prevention of Unfair Discrimination Act\footnote{Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), No. 4 of 2000.} (PEPUDA) is an important piece of legislation that is intended to advance equality in public and private life. Its primary stated purpose is to "enact legislation required by Section 9 of the Constitution, and to give effect to the letter and spirit of the Constitution."\footnote{Ibid., Objects of the Act, Sect. 2(a)(b).} PEPUDA was created to promote the equal enjoyment of all rights and freedoms by every person, and covers specific areas such as unfair discrimination, hate speech and harassment, particularly on the “grounds of race, gender and disability.”\footnote{Ibid., Sect. 2(c).}
Most importantly, PEPUDA is designed to:

[facilitate further compliance with international law obligations, including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.]

The guiding principles of PEPUDA include access to justice for all, as well as an “expeditious and informal processing of cases, encouraging the participation by the parties to the proceedings”

PEPUDA specifically addresses discrimination in inheritance, stating in Section 8 that:

No person may unfairly discriminate against any person on the ground of gender, including...

(c) [T]he system of preventing women from inheriting family property;
(d) Any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
(e) Any policy or conduct that unfairly limits access of women to land rights, finances and other resources.

Potentially, one of PEPUDA’s most significant contributions to the furthering of gender equality is the creation of “Equality Courts.” For the purposes of PEPUDA, magistrate courts are mandated to act as Equality Courts, having the jurisdiction to hear any matter involving a claim of unfair discrimination, hate speech or harassment. In this capacity, the magistrate courts may order payment of damages, settlement of a dispute, or even an unconditional apology.

Any matter that cannot be settled in the Equality Courts is referred to the Human Rights Commission.

Under PEPUDA, the burden of proof is on the respondent, who must demonstrate that the conduct in question did not constitute discrimination on the grounds prohibited. PEPUDA specifically makes an exception of positive or affirmative discrimination, stating:

It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

The Equality Courts were established on 16 June 2003. At the time of writing this report, no comprehensive analysis of their effectiveness in litigating inheritance claims is available. On the one hand, women’s rights advocates are cautiously optimistic that the Equality Courts may prove to be very effective. On the other hand, these advocates worry that the lack of proper training of the magistrates, on top of the fact that the magistrates system is already overburdened, will compromise the fairness and accessibility of the Equality Courts.

358 Ibid., Sect. 2(h).
359 Ibid., Sect. 4(a)(b).
360 Ibid., Ch. 4, Sect. 16.
361 Ibid., Ch. 4, Sect. 21.
362 Ibid., Ch. 3, Sect. 14(1).
IN BRIEF: FURTHER LAWS RELATED TO INHERITANCE

• Administration of Estates Act 1965, amended 2002: This Act governs administrative details of the devolution of estates not subject to customary law.

• Maintenance of Surviving Spouses Act 27/1990: This maintenance act deals primarily with maintenance of children, but also addresses the maintenance of spouses, after the death of their marriage partner, or divorce.

• Wills Act 7/1953: This Act governs the execution of wills, identifying the various formalities that are required to make a valid will. It ensures that adopted and illegitimate children are entitled to benefits in terms of a will.

• Extension of Security of Tenure Act (ESTA) 1997: ESTA specifically grants occupiers security of tenure and access to services, including education and healthcare services.

2.7.3.5 Amendment of Customary Law of Succession Bill
At the time of writing this report, the Amendment of Customary Law of Succession Bill of 1998 is still under review by the South African Law Commission. It proposes changes to the Intestate Succession Act of 1987 and allows for the devolution of an estate in equal shares to numerous spouses. In November 2003, a series of workshops were held in order to gauge public reaction to the proposed legislation.

2.7.4 Ground-breaking cases upholding women’s and girls’ inheritance rights

2.7.4.1 The Bhe case

The provisions of Regulation 2(e) of the Regulations promulgated in terms of the Black Administration Act dictate that, on the facts of this case, the first two applicants cannot inherit because of their gender and race. They are female and Black … This court is thus bound to declare such law unconstitutional and invalid. … It lacks basic humanity, which is the hallmark of ubuntu. We have been urged to develop African Customary Law.

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365 Ibid., extract from judgment by Justice Ngwenya.
On 26 September 2003, the Bhe judgment was handed down in the Cape High Court by Justice Ngwenya and ordered by Presiding Justice Hlophe. The Bhe case concerned two minor girls who sought to inherit their deceased father’s estate. The case was brought against their grandfather who, under ‘black’ law and custom, was to inherit his deceased son’s estate. The grandfather had previously indicated his intention to sell the girls’ home. The girls sought a Court Order that the rule of primogeniture under black law and custom must be interpreted and developed in line with the Constitution, so as to allow them and other girls in their position to inherit from their deceased father’s estate.

The Court found for the girls, and declared, *inter alia*, that Section 23(10)(a)(c) and (e) of the Black Administration Act are unconstitutional and invalid; that Regulation 2(e) of the Black Administration Act, Regulations for the Administration and Distribution of the Estates of Deceased Blacks, promulgated under Government Notice R200 of 6 February 1987 is invalid; and that Section 1(4)(b) of the Intestate Succession Act 91 of 1987 is unconstitutional and invalid. The Court concluded:

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366 South Africa Law Commission (n. 347 above).
We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents’ intestate estate like any male person. This does not mean that there may not be instances where differentiation on gender lines may not be justified for purposes of certain rituals. As long as this does not amount to disinherison [sic; i.e.: disinheritance] or prejudice to any female descendant. On the facts before us, therefore, the first two applicants are declared to be the sole heirs to the deceased’s estate and they are entitled to inherit equally.

The order I would make here should reflect the constitutional order of the day. Consequently I shall declare those offending provisions of both the Black Administration Act as well as the regulations promulgated thereunder invalid and unconstitutional. Likewise, with the Intestate Succession Act.

To say that the Bhe case is a landmark decision is an understatement. If the Constitutional Court confirms this decision (at the time of writing this report, the affirmation is still pending) it could change the face of inheritance rights for South Africa’s black females forever. Not only does the Court state that primogeniture as under customary law is discriminatory, it also classifies as unconstitutional all legislation that allows such discriminatory laws to be applied. Women and women’s activists throughout South Africa await the Constitutional Court’s confirmation with anticipation.367

2.7.4.2 The Daniels case368

The Constitutional Court of South Africa recently rendered judgment with far-reaching consequences for the protection of spouses married according to Muslim rites in a de facto monogamous union. At issue was the right of surviving spouses in marriages solemnised only in Muslim rites.

Mrs Daniels married Mr Daniels, the deceased, by Muslim rites in 1977. At the time of this marriage, her second (she had previously been divorced), Mrs Daniels was in possession of a council dwelling. In compliance with its policy to register the principal breadwinner as the tenant of the property, the City of Cape Town transferred the property into the name of Mrs Daniels’ husband. At her husband’s death, Mrs Daniels requested that she be named beneficiary of the estate. However, she was told that she did not qualify as a surviving spouse and thus could not inherit. Nor could she ‘inherit’ through the children, as they were not of the union between Mr Daniels and herself. Mr Daniels’ children threatened Mrs Daniels’ continued occupancy of the house. Mrs Daniels appealed the decision of the Master of the estate to deny her any inheritance, and brought the matter to the Local Court, claiming that the protection afforded to spouses under the Intestate Succession Act and the Maintenance of Surviving Spouses Act should extend to her, as a spouse in a monogamous union who was married according to Muslim rites.

367 In early March 2004, the Constitutional Court was hearing the Bhe case (Constitutional Court Case No. 49/03) and the accompanying case, South African Human Rights Commission and Women’s Legal Centre v. Pres. Of the Republic of South Africa and the Ministry for Justice and Constitutional Affairs, Case No. 50/03 of the Constitutional Court of South Africa, seeking confirmation that Section 23 of the BAA, Section 1(4)(b) of the Intestate Succession Act and Regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks promulgated under Government Notice R200 of 6 February 1987 are invalid.

On 1 September 2003, the High Court of South Africa (Cape of Good Hope Provincial Division) held that she was indeed not a spouse for purposes of both the Acts in question: the Intestate Succession Act and the Maintenance of Surviving Spouses Act. However, the Court found that the statutory provisions in these two pieces of legislation do unfairly discriminate against persons in Mrs Daniels’ position on grounds of religious belief and culture. If the Applicant were not recognised as a spouse, the estate of the deceased would be distributed in a manner that was both inconsistent with Muslim Personal Law and would unfairly discriminate against the Applicant by ignoring the reality of her de facto monogamous marriage to her late husband. The Court therefore held that the omission of the words “shall include a husband or wife married in accordance with Muslim rites in a de facto monogamous union” in the relevant provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act was unconstitutional. The Court ordered that these words should be ‘read in’ to the legislation.

Any High Court decisions involving constitutional invalidity of an Act of Parliament must be confirmed by the Constitutional Court, the highest court in South Africa. While confirming that the Acts, as they were interpreted, were indeed unconstitutional, the Constitutional Court of South Africa did not actually confirm the judgment of the High Court. Rather, in a decision handed down on 11 March 2004, the Court concentrated on what it saw as the core issue behind the matter – the meaning of the terms ‘spouse’ and ‘survivor’ for purposes of the Acts in question. It questioned whether it was appropriate to exclude persons in a monogamous Muslim marriage from the meaning of these terms. It held that, indeed, this was not appropriate, for two primary reasons, and that the words ‘spouse’ and ‘survivor’ must be interpreted to include Muslim marriages. Not only was this in line with the common and legally recognised definition of spouse, it also was in line with the values of the Constitution.

Thus, the under-inclusiveness of the Acts was redressed not by simply adding a new category of persons, as the previous High Court judgment had done, but by correcting the Acts’ inaccurate interpretation of the words ‘spouse’ and ‘survivor’, making remedial relief much more readily available to Mrs Daniels and others in a similar position. The Court did not, however, directly deal with the issue of retrospectivity of its decision, stating rather that such retrospective relief must be determined on a case-by-case basis. Thus, in future, relief may be sought for other formerly unrecognised spouses of Muslim marriages.

2.7.5 The way forward

The tide is undoubtedly changing for women in South Africa, and women’s human rights advocates are making significant strides in the advancement of gender equality. Many women feel that their rights are increasingly recognised and respected, that they have more of a voice when it comes to inheritance issues. Nonetheless, it is clear that even more needs to be done in terms of legal reform and raising social awareness if women’s inheritance rights are to be fully secured. With women bearing the brunt of the HIV/AIDS crisis and suffering inordinately from the combined effects of poverty and continuing racial and gender discrimination, now is a critical time to enforce and implement the advances made in law for women’s rights.

369 COHRE WHRP interview with Thokozani community (n. 345 above). Women stated that they felt more empowered due to the change of government and the fact that there were now many more women in Parliament than ever before.

370 According to the Joint United Nations Programme on HIV/AIDS, almost 21% of the population of South Africa was living with HIV/AIDS in late 2001. Of these estimated 4.7 million persons, 2.7 million were women. Joint United Nations Programme on HIV/AIDS, ‘Estimated number of people living with HIV/AIDS, end 2001’ (n. 106 above).
For the time being, the realisation of women’s inheritance rights hangs in the balance. Legal reforms must be aimed at actually helping those who need them most; in particular, women who are subject to patriarchal customary laws, without the benefit of enlightened inkhosi or compassionate in-laws. Legal reforms must also address those groups of women who remain unprotected due to flaws in the legal system, especially women in polygamous and Muslim marriages, and those whose marriages remain unregistered under civil law.

South Africa’s Constitution provides an ideal framework in which to advocate for women’s inheritance rights. Indeed, many elements of South Africa’s legal system are remarkably progressive. The challenge will be to ensure that these ideals are consistently translated into practice when it comes to women and their right to equality.

In order to achieve this, the unstable balance between customary law and civil law must be resolved. The arbitrary and discriminatory application of customary law must be rejected once and for all. This should not be interpreted as an attack on traditional customs per se. After all, such customs can be interpreted in a multitude of ways, and, for far too long, women have been unable to define and delineate traditional culture for themselves. The recent judgments in the Bhe and Daniels cases show that the Courts have woken up to the dangers of discriminatory customs and, even more importantly, to the unconstitutionality of legislation that perpetuates them. South Africa stands at the crossroads: with the assistance of some brilliant women lawyers, the face of customary inheritance may be about to change for the better. It is an exciting time, and one that the whole world, or at least the rest of Africa, should be watching with baited breath. It is not surprising that such a precedent has been set in South Africa. But the question remains: will the words of the Courts be translated into effective action for all black South African women, or will this turn out to be a promise unfilled by the Government?

**SPECIFIC RECOMMENDATIONS**

1. As the Daniels judgment has now been confirmed by the Constitution Court, its judgment and ramification should be immediately implemented in both law and practice. We eagerly await the confirmation of the Bhe matter.

2. The Communal Land Rights Bill should be immediately revised to reduce the power of traditional leaders and to ensure that women are able to own land. The public should be properly informed about issues facing rural women vis-à-vis their being unable to access land, in order to highlight the dire need that women have for land.

3. All customary law of succession should be thoroughly overhauled. The current system is still inconsistent with the fundamental rights guaranteed in the Constitution. It is therefore recommended that, in this respect, the Government of South Africa expedite the legal reform process. It is imperative that all civil law acts and provisions that perpetuate such discrimination, including the Black Administration Act, be abolished.

4. In all areas of civil law where confusion currently reigns with regard to the interrelatedness of a multitude of laws, such laws should be streamlined and greatly clarified. In particular, there should be a single, uniform inheritance and succession law that applies to all South Africans, regardless of their rites of marriage, marital status, proprietary regimes, birth status, gender or race. The Recognition of Customary Marriages Act should be amended to allow for the recognition of all marriages, regardless of the marriage rites or the registration period.

5. Intensive, nationwide gender-sensitisation programmes should be designed and implemented, in an attempt to convince all segments of the population that discriminatory practices against women are unjust, unconstitutional and therefore to be combated, whether these practices are stimulated and condoned by tradition or otherwise. Such programmes should be accessible to the widest cross-section of society and should be propagated through popular media.
The Swazi nation, which is one of the oldest nations in Southern Africa, still has its traditions and customs uniquely intact instead of falling out of favour. With the evolution of time, they are anchoring even deeper in the lives of the Swazi nation.\textsuperscript{371}

D\textsc{omestic Legal Provisions Related to Women’s Inheritance Rights}

- Draft Constitution 2003, redraft of 1969 Constitution
- Marriage Act No. 47/1964
- Administration of Estates Act No. 28/1902
- Intestate Succession Act 3/1953
- Wills Act No. 12/1955
- Deeds Registry Act No. 37/1938
- Age of Majority Act No. 11/1953

\textbf{2.8.1 Background}

Swaziland, the world’s last absolute monarchy, has been ruled by King Mswati III since 1986. Swaziland’s constitutional position has been unclear since 1973, when King Sobhuza II suspended the 1968 independence constitution.\textsuperscript{372} The Swazi nation prides itself on being the most traditional of all southern African states.

Swaziland is ruled rigidly, according to Swazi law and custom, a system of customary law and tradition deeply entrenched in almost all aspects of life. The King is considered the \textit{iNgwenyama}, the customary head of the Swazi nation.

In governing the daily lives of the Swazi people, the Roman-Dutch common law imposed by the colonialists often conflicts with the uncodified laws and customs of Swazi tradition. The two systems overlap and, in some respects, coincide; however, they do not allow a clear definition of their application because of uncertainty as to which of the two is applicable in particular circumstances. As we have seen in previous subsections, similar conflicts between incompatible legal systems occur in several other African states.

As elsewhere, the dual legal system complicates and confuses the issue of women’s rights. Whether and to what extent Swazi women realise their rights depends largely on how and by whom those rights are interpreted. Unfortunately, Swazi customary and civil law generally agree that women’s subordinate status should be maintained and enforced.


\textsuperscript{372} King Sobhuza II, the present king’s father, suspended the Constitution in 1968, declaring a state of emergency and making himself the ultimate ruler over the judicial, legislative and executive branches. Reforms have been made since then, but the King continues to be the absolute monarch and remains above the law: he cannot be brought before a court of law in any circumstances.
In Swaziland, women maintain the status of a minor their entire lives. Under customary law, a woman is considered a perpetual minor: guardianship passes from her father to her husband. In civil law, married women have the legal status of minors and are not allowed to own or access property, except through a male. They cannot enter into contracts or bring civil actions without the consent of their husband.

Swaziland has one of the highest HIV/AIDS rates in the world, with over 33 percent of its population infected. Women suffer the most: over 60 percent of those infected are female.\(^{373}\)

Swaziland is a State Party to several international covenants and treaties under which it is obligated to ensure that women are treated equally, in law as well as in practice. However, the country has utterly failed to fulfil this obligation.\(^{374}\)

2.8.1.1 Judiciary

Swaziland has a dual court system, each with a distinct area of application and its own decision-making power. The Magistrates Courts, the High Court and the Industrial Court are all required to adhere to and apply Roman-Dutch law.\(^{375}\)

The Swazi National Courts handle traditional matters and local petty crimes, applying a combination of Roman-Dutch and Swazi customary law. Judges reach decisions based on their own knowledge of Swazi law and custom, which has never been codified. In addition, the Chiefs' Courts hear cases of petty crimes and local disputes, applying customary law.

Swazi women face major obstacles in realising their rights, particularly the confusing dual legal system and the lack of access to the justice system. The justice system does not provide legal assistance for the poor, nor does it allow lawyers to do so. Furthermore, court cases require a great deal of time and money, which most women cannot afford, as giving either would seriously compromise their ability to provide for their families and children.\(^{376}\)

2.8.1.2 Land

By the end of the 19th century, Swaziland, like most southern African countries, was almost entirely controlled by colonial settlers: nearly two-thirds of the land of the Swazi people had been brought under British control. In subsequent decades, the repossession of lost land became the main aim of the Swazi monarchy. During the greater part of the 20th century, land was progressively restored to the ownership of the Swazi nation, having been repossessed through funds raised by taxes on Swazis and with grants from the UK.\(^{377}\)

This land, now known as Swazi Nation Land, remains in the hands of the King.

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\(^{373}\) Joint United Nations Programme on HIV/AIDS, 'Estimated number of people living with HIV/AIDS, end 2001' (n. 106 above).


\(^{375}\) Swaziland Nation official website, [http://www.sntc.org.sz/tourism/sdpolit.htm](http://www.sntc.org.sz/tourism/sdpolit.htm)

\(^{376}\) Women and Law in Southern Africa (WLSA), an NGO active throughout Southern Africa on issues related to the legal protection of women, has identified several legal obstacles: 1. Duality of the legal system which compromises women’s position; 2. The absence of a state-supported legal aid institution that would be in a position to provide legal representation at a reduced price and/or to provide pro bono legal representation; 3. The inability of lawyers to represent clients because of the laws regulating legal practice in the country, which do not allow lawyers working outside the private and government sectors to appear in court; 4. The lack of understanding of human and women’s rights on the part of responsible officers working in the relevant justice-delivery structure, which also tends to restrict women’s access to their rights. Source: Lomcebo Dlamini (WLSA), *Inheritance Rights in Swaziland: Swaziland’s Unique Culture*, paper prepared for COHRE workshop ‘Inheritance Rights are Human Rights’, 21-23 Jan. 2004, Johannesburg, South Africa (n. 63 above).

A land-policy review process has been underway since 1996, and has resulted in the Draft National Land Policy, which is still under review. Prime objectives of the draft policy are the realisation of human rights, the promotion of gender equity, and the protection of property rights.\footnote{Draft National Land Policy, \url{http://www.ecs.co.sz/land_policy/land_policy_chapter1.htm}} The COHRE Women and Housing Rights Programme (WHRP) welcomes these efforts, and encourages the Government of Swaziland, in finalising and adopting the National Land Policy, to consider its obligations to promote, protect and fulfil women’s rights to housing, land and inheritance.

There are currently two major categories of land ownership: Swazi Nation Land and Title Deed Land. Title Deed Land includes commercial farms, estates and ranches that are freehold or held on concession agreements. Such land is, in principle, purchasable by anyone who can pay the right price. Generally speaking, native Swazis do not own Title Deed Land, which is mainly used for commercial agriculture.\footnote{Swaziland Government Online information portal, Ministry of Agriculture and Cooperatives, \url{http://www.gov.sz/tools/Printbody.asp?pid=55}} Title Deed Land is normally registered under the husband’s name. A woman married ‘in community of property’ cannot register land in her own name because the husband is considered as having ‘marital power’, which reduces her to a legal minor.\footnote{Women and Law in Southern Africa (WLSA), \textit{Family in Transition: the Experience of Swaziland} (Manzini, Swaziland: WLSA Research Trust, 1997), p. 101.}

Two-thirds of Swaziland’s territory is Swazi Nation Land, which is mainly used for subsistence agriculture. Such land is communal and is held in trust for the nation by the King, through chiefs who allocate usufructuary rights to individual Swazi families. As anyone is entitled to use land – by birth or by swearing allegiance – many Swazis do not see a need to purchase land. Under customary law, Swazi Nation Land is allocated to families by the chiefs, who, in accordance with customary law, only allow men to acquire or hold land. Women can only be given usufructuary rights to a man’s land.\footnote{Id., \textit{Inheritance in Swaziland: The Law and Practice} (Manzini, Swaziland: WLSA Research Trust, 1994).}

Issues related to Swazi Nation Land – including succession, dissolution by will, and property regimes – cannot be administered by civil law, which is referred to in Swaziland as ‘general’ law. (This term, used for all non-customary law in the Swazi system, signifies a combination of Roman-Dutch common law and statutes). Thus, even if a widow, in principle, is entitled to half the marriage property (under the ‘community of property’ marriage regime, see Section 2.8.2, ‘Statutory Law’) she cannot actually inherit it. This is because Swazi Nation Land is excluded from the definition of ‘community of property’, which is a term of civil law.
THE IMPACT OF HIV/AIDS ON SWAZILAND’S AGRICULTURE

“A new study has established the link between AIDS and Swaziland’s current food crisis, demonstrating that the epidemic is as damaging to agricultural production as drought and outmoded land policies.

“Although the private sector accounts for 70 percent of Swaziland’s formal labour force, with commercial agriculture employing 19 percent of all workers, 80 percent of the population resides on communal Swazi Nation Land, under the supervision of chiefs, and are not part of the formal sector labour pool. They survive on what they can grow.

“Swaziland has one of the highest incidences of HIV, with 38.6 percent of the adult population HIV positive. ...

“A vicious cycle commences when a household head dies of AIDS, with the final result an overall lessening of national farming output, exacerbating the country’s chronic food shortages. With loss of the breadwinner’s income, ‘deepening poverty and increased orphaning has led to children dropping out of school and worsening food insecurity,’ the report found. ...

“The burden on families increases as diminishing financial resources are used on healthcare. The loss of a household head means less labour in the fields, and other family members are withdrawn from crop-tending to nurse sick relatives. Smaller areas are cultivated.

“The survey, for the first time, quantifies the financial disaster AIDS has brought to Swazi homesteads. Some 38.5 percent of households that suffered AIDS-related deaths reported a lessening of the field area under cultivation, a drop in crop yield, and children leaving school due to lack of money for fees. ...

“Where AIDS strikes a household, cultivation can drop to 50 percent of a farm’s available land, compared to the 84 percent of farmland under cultivation on average by households that have been spared AIDS deaths. ...

“The report urged the government to recognise the impact of AIDS on rural families, and through them the nation’s food security, and target these families with AIDS prevention messages. ...

“Because more rural farms are now headed by women and orphans – ‘the most vulnerable groups in society’ – the report recommended that women be given the right to own property. New laws are needed to protect the inheritance rights of widows and orphans. Assistance is also required for orphans to continue their education, and education programmes to teach women how to run their farms as businesses.”

2.8.2 Statutory law: Draft Constitution

King Mswati III ordered a new Constitution drafted in 1996, and the Constitutional Review Commission and the subsequently established Constitutional Drafting Committee have been at work ever since. After several delays and extensions of deadlines, a draft was presented to the King in May 2003. A final version was to have been ready for adoption by October 2003, but on the request of the people of Swaziland, this too was postponed. There had been overwhelming popular demand for an extension, primarily to allow for translation of the Draft Constitution into the local language, which is still pending.

With regard to the constitution-drafting process, a matter for serious concern has been the inadequate civic education, which has meant that the people themselves have provided little informed input into the Draft Constitution. Only individual submissions have been allowed, which has undermined the drafting process, for individuals rarely have as much expertise as organisations that work on specific issues.

However, the current draft, which is still being debated, does contain some positive provisions for women’s rights. For example, Chapter IV, Section 15 of the Draft Constitution protects the fundamental freedoms of all citizens of Swaziland:

(1) The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely –

(a) respect for life, liberty, security of person and equality before the law and equal protection of the law;
(b) freedom of conscience, of expression and of peaceful assembly and association;
(c) protection of the privacy of the home and other property of the individual; and
(d) protection from deprivation of property without compensation except as otherwise provided by law.

In addition, Section 21 states that all persons are equal before and under the law, “in spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.” This section further establishes the principle of non-discrimination, prohibiting different treatment of different persons as defined “by gender, race, colour, ethnic origin, birth, tribe, creed or religion, social or economic standing, political opinion, age or disability.” Moreover, Section 21 empowers Parliament to implement policies and programmes to redress social, economic or educational imbalances in society.

Section 29 protects women’s rights to equality and equal treatment with men, in political, economic and social activities. Under Section 29(2), the Government is obligated to provide the opportunities that are necessary to enhance women’s welfare.

Most important is Section 29(3), which reads:

A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.

The Draft Constitution also creates a Human Rights Commission, which is charged with investigating alleged human rights violations, complaints of injustice, corruption and power abuse, and promoting strict adherence to the rule of law. Of course, this Commission is not empowered to investigate any claims against the monarchy, which enjoys complete immunity.\(^383\)

\(^{383}\) Draft Constitution of the Nation of Swaziland, Art. 166.
In spite of these laudable provisions, some aspects of the Draft Constitution are highly worrying from a woman’s rights perspective. In particular, Section 116 provides for protection of Swazi law and custom. It states that customary law and ‘general’ (or civil) law shall continue to coexist, as long as they are “not discriminatory, repugnant to humanity or natural justice”. Any changes to custom or tradition must be approved by a newly created Council of Chiefs. Obviously, such representatives cannot democratically represent all the people of Swaziland because they are unelected and exclusively male. This provision seriously jeopardises women and their rights, for custom and tradition, which are unwritten and therefore highly susceptible to manipulation, especially when interpreted by Chiefs, generally serve to entrench patriarchal notions.

2.8.2.1 Inheritance under the Draft Constitution
The Draft Constitution addresses the issue of inheritance under Section 35(1), which stipulates that a surviving spouse is entitled to:

... a reasonable provision out of the estate of the other spouse whether the spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.

Although this is an attempt to protect surviving spouses, especially women, the wording leaves far too much room for interpretation. Who is to decide what constitutes “a reasonable provision”? If this is for the patriarchal courts or chiefs to determine, it is almost inevitable that such provision will be much less than what is really sufficient for the widow’s survival and welfare:

*However, though the intention of the drafters may have been protection, a myriad of negative consequences may result for women.*

In a survey conducted by the Swaziland branch of Women and Law in Southern Africa (WLSA), 41 percent of the widows interviewed said that their in-laws had unlawfully seized their property. Here are a few of the numerous examples of ‘property-grabbing’:

- One woman with a secondary education, living in an urban area, returned from her husband’s funeral to find her house completely stripped of possessions. Her in-laws had taken everything — even her clothes and kitchenware. The in-laws had acted contrary to customary law, which usually requires that the property remain in the home for the benefit of the entire household, and particularly for the good of the children.

- Many women recounted how their in-laws had kicked them out of their homes and off their lands. One such woman was forced to move into a rented room in a suburban area.

- One woman was evicted from her home, built on Title Deed Land, by her father-in-law. He claimed the right to do so, as the title deed was technically in his name and tradition holds that a married couple must build their home on the premises of the husband’s parents.

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385 WLSA (n. 380 above).
2.8.2.2  Marriage Act

“In a significant decision in 1989, the High Court held that a customary union was a valid union under the Marriage Act, and thus the Court had jurisdiction to deal with matters that involved marriages solemnized according to custom. As the circumstances of the case involved inheritance issues, the effect of this judgment was that all estates, regardless of the marital regime concluded, were to be dealt with by the office of the Master of the High Court. However, inasmuch as this is viewed as positive, the problem with this is that the Master’s Office still has difficulty in administering estates of people in terms of custom on one hand and in terms of the relevant status on the other. In the absence of clarity as to how these laws relate to one another, the Master’s Office continues to struggle to harmonise the provisions of the law and administer estates without causing undue hardships to survivors and rightful beneficiaries.” 386

Because the Marriage Act 387 recognises civil and customary marriages as lawful, both types fall under the ambit of the Administration of Estates Act (see Subsection 2.8.2.3) in terms of the administration of estates by the Master of the High Court. This has improved the status of customary marriages, which, prior to the adoption of the Marriage Act in 1964, were not recognised, the marriage property being devolved according to custom and tradition. However, as the above extract testifies, much confusion still surrounds the application of this dual system.

To the great detriment of married women, however, the Marriage Act also specifically confers ‘marital power’ upon the husband. This power of the husband over his wife includes his having administration rights over the joint estate, and his representing his wife in any civil proceedings. Thus, on marrying, a woman reverts to the legal status of a minor and cannot enter into any contract or represent herself in civil matters in her own capacity.

‘MARITAL POWER’: AT THE WHIM OF THE HUSBAND 388

‘Marital power’ makes women extremely vulnerable to the whims of their husband. Women are continually trying to find ways around this power — to which many had no idea they were contracting at the time of their marriage.

- Women often find themselves having to pay back a debt that they were only able to obtain with their husband’s consent. Often, the wife does not even receive the funds because the husband has the freedom to divert them. Yet the wife, as the party who requested the loan, is still liable for repaying it.
- Some women are sued by their husband for having registered land without his consent.
- Many women find themselves homeless after their husband sells their marital home without their knowledge or consent.

386 Dlamini (n. 384 above).
387 Marriage Act No. 47/1964.
388 WLSA (n. 380 above), pp. 167-169.
Under the Marriage Act, all married women are considered to be subject to some form of ‘marital power’. This is governed by the marriage regime they have entered into: civil rites ‘in community of property’, civil rites ‘out of community of property’, or customary rites. When necessary, if they cannot provide documentary proof of the rites by which they were married, it is assumed that they were married according to the default regime of customary rites. Thus, many women are left at the mercy of the vast, unchecked power of the customary legal system.

Under the provision for civil marriages, the ‘marital power’ may technically be nullified by registering an ante-nuptial contract that establishes separate estates for the two spouses. However, as they are therefore married ‘out of community of property’, the wife cannot receive any share in her husband’s estate. The husband nevertheless maintains control over his wife’s estate and their ‘common life’.

Marriage ‘in community of property’ confers on each spouse an indivisible half share in everything owned by the other spouse. If a woman who owns land is married ‘in community of property’, an indivisible half share in that land is transferred to her husband. Unfortunately, the ‘marital power’ then gives the husband absolute power to deal with the entire property, not just his half.\(^{389}\)

Section 24 of the Marriage Act specifies that marriages between Africans are to be considered as customary. Marital power is therefore extensive, exposing the vast majority of married Swazi women to exploitation.

\[\text{The consequences flowing from a marriage in terms of this Act shall be in accordance with common law as varied, from time to time, by any law - unless both parties to the marriage are Africans, in which case ... the marital power of the husband and proprietary rights of the spouses shall be solely governed by Swazi law and custom.}\^{390}\]

Many African couples in Swaziland simultaneously enter into a civil rites and a customary marriage (this is known as ‘dual marriage’). As a result, their marriage is governed by two parallel legal systems. Unfortunately for the wife, what she gains through one system, she may well lose through the other.\(^{391}\)

### 2.8.2.3 Administration of Estates Act

Under the Administration of Estates Act,\(^{392}\) all estates are administered by the office of the Master of the High Court (the Master’s Office). This Act specifies the rather complicated procedures to be followed in the devolution of an estate by the Master’s Office.

Originally, the Act only applied to those couples married under civil law or under both civil and customary law (in a dual marriage). However, as the Marriage Act of 1964 widened the definition of a legally recognised marriage to include customary marriage (see Subsection 2.8.2.2 above), all unions are now subject to the provisions of the Administration of Estates Act.


\(^{390}\) Marriage Act No. 47/1964, Sect. 24.

\(^{391}\) Armstrong (n. 389 above), p. 7.

\(^{392}\) Administration of Estates Act No. 28/1902.
Logistically, this Act poses great problems to women. The administration of all estates must go through the central Master’s Office in the Swazi capital, Mbabane. Many women, being short of time and money, cannot possibly travel to the capital to ensure that their interests are represented in the administration of the estate. They are therefore simply overlooked by the Master’s Office. To solve this problem, the functions of the Master’s Office should be decentralised, so that inheritance matters can be dealt with locally.\textsuperscript{393}

2.8.2.4 Intestate Succession Act
The Intestate Succession Act\textsuperscript{394} governs distribution of an intestate estate. Under this Act, the widow is entitled to inherit as one of the intestate heirs. If there are any surviving children of the marriage, the widow receives a share in the property that equals each child’s share. Again, we see how Swazi law reduces married women to the legal status of a minor.

2.8.2.5 Wills Act
The requirements for a valid will are outlined in the Wills Act,\textsuperscript{395} which assures that those who fulfil the requirements in writing their will shall have their wishes respected. Those married ‘in community of property’ may only bequeath their own indivisible share of the joint estate.

2.8.2.6 Deeds Registry Act
The Deeds Registry Act\textsuperscript{396} governs the registration of immovable property. Section 16 of the Act specifically excludes registration of land titles in the name of women married ‘in community of property’. Special provisions of the Act prevent such women from buying, selling, alienating, donating or otherwise dealing with the estate. Only the husband may do so, for under the ‘in community of property’ regime, he automatically becomes the sole administrator of the estate. He can do anything he wishes with the estate, without his wife’s consent — even without her knowledge. Thus, what is considered ‘in community of property’ in the letter of the law should actually be considered as ‘in full possession of the husband’.

Officials of the Deeds Registry Office claim that land titles may be registered in the name of any woman not married ‘in community of property’. However, there is no account of how many women have had land thus registered.\textsuperscript{397}

As we saw with the administration of estates, the logistics of deeds registry represents a major hurdle for women who wish to register their land. All such registration must go through the central Deeds Registry Office in the capital, Mbabane. For many women, especially those in rural areas, this is practically impossible.

\textsuperscript{393} This issue was among those raised by WLSA Swaziland during the COHRE workshop ‘Inheritance Rights are Human Rights’, 21-23 Jan. 2004, Johannesburg, South Africa (n. 63 above).
\textsuperscript{394} Intestate Succession Act 3/1953.
\textsuperscript{395} Wills Act 10/1955.
\textsuperscript{396} Deeds Registry Act No. 37/1968.
\textsuperscript{397} Armstrong (n. 389 above), p. 14.
2.8.3 Marriages under customary law

Marriage according to Swazi law and custom is not merely a union between a man and a woman; it is a union between their extended families. Lobola is a form of bride price paid by the parents (normally the father) of the bridegroom in head of cattle (or, as recently decreed by the King as being proper, in cash) to the parents (normally the father, or the guardian) of the bride. Payment of lobola seals and consolidates the marriage.

Since lobola is still perceived as an instrument of buying women’s rights and obligations in clans within the communal areas, there is a perception that women do not naturally hold land rights in their husband’s territory.

In terms of housing and land rights, the most women can gain from marriage is usufructuary rights — they can never obtain housing and land of their own. This is extremely difficult for single women. Many women acknowledge that in order for them to survive they have little choice but to marry and farm their husband’s land.

2.8.3.1 Succession under customary law

Customary law holds sway over virtually all aspects of Swazi life. It is the only law known to most Swazis — statutory or civil law is utterly alien to them. Customary law jurisprudence on marriage, maintenance and inheritance issues is well developed. According to Swazi tradition, inheritance issues should be handled by the deceased’s family and heir, and should not be challenged, especially not by a woman. Under customary law, women cannot own property, enter into contracts or represent themselves in court — they are considered to be legal minors.

Some of the traditional rituals performed when a woman is being married mimic those conducted at funerals. They symbolise her ‘death’ to the family into which she was born and a severance of her ties to them. For as long as an unmarried girl or woman lives in her natal home, she is called a ‘foreigner’ or given a name which means a ‘person who will go away’. Similarly, when she enters her husband’s home, she retains the name of ‘foreigner’ and is never regarded as a full member of the family. In particular, she is excluded from family decision-making.

398 WLSA (n. 380 above).
399 Ibid, p. 103.
The ‘general’ (or civil) law related to inheritance is largely gender-neutral and allows for female and male heirs. However, the simultaneous operation of Swazi law and custom, which confers exclusive rights of inheritance upon male heirs, causes a conflict in the law that even the Master’s Office has difficulty resolving, particularly in cases of intestate estate. Given this degree of confusion, it is hardly surprising that many regard ‘property-grabbing’ from widows as justifiable on the grounds that the estate is being wound up according to customary law. The problem with customary law is that in addition to being heavily biased in favour of males, it is unwritten and therefore easily manipulated.\(^{400}\)

The process of becoming a full wife involves a series of ceremonies and rituals spread out over a long period. Therefore, a woman and a man can live together for many years before the customary marriage is considered completely valid. Usually, the final ceremony is the smearing of red ochre over the bride, which signifies that the woman is now truly a ‘wife’.\(^{401}\) However, there are many preliminary stages that must be passed before this ceremony can take place. If the man dies before the red ochre has been smeared, custom decrees that the woman may request to be so smeared by his family, thereby posthumously marrying her husband, in order to be deemed a valid wife and, in turn, a widow. WLSA found that:

Women agreed to posthumous marriages because they wanted to become legal wives, to mourn and protect their children’s right since, according to custom, only children of married woman can inherit.

A month after the husband’s death, the lusendvo or family council, which consists of the wife’s in-laws, meets to decide upon the heir. The heir (always a male) is chosen according to his mother’s seniority-ranking and status. In polygamous marriages, the eldest son of the highest ranking woman ‘wins’ the status of heir to his father’s estate and is known as inkhosana, or head heir. Widows’ (and thus heirs’) seniority in a polygamous marriage is determined according to the following scheme of preference:\(^{402}\)

1. A widow of royal blood;
2. A widow who has the same clan name as that of the deceased’s mother. (Such a wife is considered a gogo or grandmother);
3. A widow who was married by kwendziswa (specially arranged marriage).
4. A widow who is the daughter of a chief (sikhulu) or governor (indvuna).
5. A widow who was an ordinary wife.

The head heir administers his father’s estate and his mother’s house. He takes the father’s title, if any. The eldest son of a subordinate wife becomes a lesser heir or sub-heir to his own mother’s house, though he must always abide by the instructions of the head heir.

If the deceased man leaves only daughters, the eldest of them is forced into a levirate union (marriage to the deceased’s brother), and the first male child from that union will eventually become the heir. The estate remains undistributed until such time as the heir can take proper charge of it. Until then, the husband of the levirate union acts as guardian of the estate and of any daughters of the deceased.

\(^{400}\) Lomcebo Dlamini (WLSA), e-mail to the COHRE WHRP, 26 Jan. 2004.
\(^{401}\) In the case of *R. v. Fakudze and Another* [1970-1976] SLR 422, it was decided that the smearing of red ochre was the final step. (See Subsection 2.8.3.2 below.)
\(^{402}\) WLSA (n. 380 above).
“In my family, women have to consult with somebody before making any decision. Should my mother ever have failed to do so, even concerning her own field of chickens, that would have been the day my father sent her packing.”

The *inkhosana* or head heir has various rights to the estate, including rights of guardianship over the widow(s), the minors and other dependants, rights to the deceased’s offices or titles, land, interests in land, and all the cattle associated with the land, as well as the right to receive bride price or *emalobolo* (bride price) and ultimately all moveable property. He effectively ‘steps into the shoes of the deceased.’

The *inkhosana*, however, is not entitled to the houses located on the land he inherits. Each widow is entitled to remain for the rest of her life in the house she lived in before her husband’s death.

Sub-heirs, the eldest sons of subordinate wives, are entitled to the property in their mother’s house. However, the widow retains a usufructuary right in the property during her lifetime.

‘Property-grabbing’ by in-laws remains a huge problem in Swaziland. The general principle of Swazi law and custom is that property, whether movable or immovable, should be for the family, and not outsiders. Even individual property is governed by custom and cannot be given to a stranger. As a wife is often considered to be an outsider by her in-laws, she is, to all intents and purposes, automatically excluded from inheriting.

### 2.8.3.2 Discriminatory traditions under customary law

Customary marriage, as we have seen, is a process involving a series of ceremonies and rituals that may be conducted over a period of several years. There is no clear definition of when exactly the marriage is considered to be effected. However, in the case of *R. v. Fakudze and Another* it was held that the smearing of red ochre on the ‘wife’ is an essential part of a valid customary marriage, and may be conclusively considered as its final legal recognition.

As mentioned above, the marriage process, ending in the ceremony where red ochre is smeared on the ‘wife’ and the marriage consummated, is often a long one. Some couples live together as ‘husband and wife’ for many years before the red ochre ceremony takes place. Thus, in situations where the ‘husband’ passes away before the red ochre has been smeared, but after the couple has been living together for many years, the ‘wife’ will insist that she be smeared with the red ochre after the death of her spouse, in effect, marrying her husband posthumously.

In addition to the emotional impact of losing a husband, widowhood in Swaziland also brings defamation, social stigma, and shame. Under Swazi custom and tradition, men do not die of their own doing or by natural causes — women cause their deaths. For this reason, widows are made to atone for the death of their husband through discriminatory and often debilitating traditions and rituals.

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403 Ibid.
404 Usually cattle, though it has been decreed by the King that cash may be paid in lieu of cattle.
406 WLSA (n. 380 above).
Head-shaving is just one of the customary practices that are required of women in mourning, or *kuzila*. The widow is confined for a period of one month – often longer – and is expected to wear black mourning gowns for two planting seasons (approximately two-and-a-half years). She is not allowed to work in her fields or move freely in public spaces, which may seriously affect her existing employment and her employment prospects.

Other customary practices that widows throughout Swaziland are forced to undergo include: having to sit still for long periods, not being allowed to sit on chairs or eat in the presence of others, having to eat off dirty plates, wearing the black mourning dress for many months or even years after the death of her husband, and being forced to live in the bush for several weeks.\textsuperscript{408}

Wife inheritance, or *kungenwa*, is commonplace in Swaziland, whereby women are made to marry the brother or even the father of their deceased husband in order to remain in the marital home. A widow who does not agree to be inherited must leave the marital home. Women are considered as transients and can therefore, in effect, be ‘bought and sold’ or dismissed at any time, with no recourse for them.\textsuperscript{409}

### 2.8.4 The way forward

Swaziland is unique in having a male monarchy with absolute power. Strong, rigid traditions and the unswerving desire of the political elite to maintain the status quo, including the most blatantly patriarchal customs and traditions, present huge obstacles to the advancement of women’s rights. The women of this tiny nation, who have little to no legal power in terms of decision-making, property ownership or political participation, have enormous prejudices and disadvantages to overcome.

However, strides have been made in the right direction. With the help of organisations such as WLSA, women have come together to challenge legal obstacles and promote the women’s agenda. Even though they often face great dangers, women are pressing ahead with their cause.

Much work still remains to be done in order that women may gain recognition of their rights and legal majority status. Such a drastic change requires a two-pronged approach: not only law reform, but also – and perhaps more effectively – campaigns to modify the deeply rooted patriarchal notions that are so pervasive in Swazi society.

Any law reform must recognise women’s full legal status and rights, and must protect women from discriminatory traditional practices. Furthermore, it must provide the means of redress for all violations of the rights ensuing from that status. Such reform requires intensive lobbying and advocacy work by women’s groups, and effective action on the part of the Government.

Of critical importance to the success of any law reform programme is the sensitisation and education of traditional and community leaders, as well as members of the justice delivery system — those who currently perpetuate the discrimination against women that is so entrenched in Swazi society. Such sensitisation and education must be based on principles of women’s rights in particular and human rights more generally, on notions of gender equality and non-discrimination. Swaziland should be encouraged to ratify and, more importantly, to domesticate the provisions of CEDAW, and to fulfil obligations thereunder, both in law and in practice.

\textsuperscript{408} Dlamini (n. 384 above).
\textsuperscript{409} Ibid.
Most importantly, it is the women themselves whose empowerment will be the catalyst for change. The call for change must come from the grassroots, with women themselves insisting that the State fulfil its obligations in respect of women’s rights. Only when women know that they have inalienable human rights and can claim them without fear of reprisal, will the system truly change. Even within this unique and often intimidating system of absolute patriarchal monarchy, women do have a voice — and when they raise that voice collectively, things can and will change.

FROM IRINNEWS.ORG

“Women’s groups in Swaziland are taking a more active role in shaping gender policy, ahead of the release of the first draft of the country’s new constitution by King Mswati III.

“Property ownership, currently illegal for Swazi women, is one important area of concern.

“Throughout the operation of our culture and received law, women have been systematically discriminated against in all aspects of social life — for instance, in terms of being property owners,’ said a statement from the women’s empowerment group, Umtapo waBomake.

“The NGO, whose name in SiSwati means ‘the earnings of the women’, has for 10 years quietly financed women’s cooperatives, mostly in small-scale agricultural schemes, sewing and handicraft ventures.

“‘The palace expects to issue its constitution like a royal proclamation, but the nation has to live with it for a long time, and if equality for women is not legalised, we cannot blindly ratify what is put before us,’ said a woman from a cooperative in the central commercial hub of Manzini, which is financed by Umtapo waBomake.

“Her group sews school uniforms sold locally. Nearly all the 15 members of the co-operative are the sole breadwinners for their families. They are either single mothers whose boyfriends abandoned them and their children without financial support, or whose spouses succumbed to AIDS.”

SPECIFIC RECOMMENDATIONS

1. The customary and civil law systems should be brought into harmony. The application of customs and traditions should reflect the equality and non-discrimination provisions of the civil law.

2. Chiefs and tribal leaders should not be allowed to manipulate the application of customary laws; civil law protecting women’s rights should be uniformly applicable in all situations. Positive developments in customary laws should be highlighted and encouraged. This would stimulate a sense of ownership of and responsibility for the dynamism and change in culture, rather than alienate certain groups, such as traditional leaders, who might perceive the proposed changes to customs as being imposed, and thus resist them.

3. Programmes of sensitisation and education on women’s rights and human rights principles of equality and non-discrimination should be designed and implemented for the whole country. It is crucial that such sensitisation programmes be administered throughout the justice delivery system.

4. In order to raise public awareness of the harmfulness of abusive traditional practices such as widowhood rites, the Government should pronounce such practices as adverse, and educational information as to the harmful nature of such practices should be extensively disseminated. Public debate and dialogue between interest groups should be encouraged.

5. The Government should ratify the Optional Protocol to the African Charter on Human and People’s Rights on Women’s Rights in Africa as the basis on which the Government can be held accountable for the protection of women’s rights.

6. The grim realities of HIV/AIDS and crippling poverty cannot be ignored. The National Land Policy should reflect women’s urgent need to own land, and even more importantly, control it. Once women are given control and decision-making responsibility over land, new modes of agriculture should be fostered, to ameliorate the tremendous food shortage in Swaziland.
In my own tradition they say that a woman is property because she’s been bought, so how can property own property? Meaning you don’t deserve property because you are already property yourself.\textsuperscript{411}

If we allow our wives to inherit from us and especially so much, they will get smart and seek to kill us, so that they can have our property!\textsuperscript{412}

\begin{center}
\textbf{DOMESTIC LEGALPROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS}
\end{center}

- Constitution 1996
- Lands Act 1995
- Marriages Act 1989
- Intestate Succession Act 1989
- Wills and Administration of Testate Estates Act 1989

\subsection{2.9.1 Background}

The colonial period in Zambia started in earnest in the late 1800s, when the British imperialist Cecil Rhodes took over the territory that is now Zambia, named it Northern Rhodesia, and began ruling it with an iron, and often brutal, fist. The British proclaimed the territory a ‘protectorate’, citing the needs of the ‘African natives’ as paramount, though, in reality, native Zambians were economically exploited by the colonial elite.

The discovery and opening up of the Copperbelt (a large area in north-western Zambia rich in copper deposits) in the 1920s eventually resulted in the emergence of a largely homogeneous labour force, breaking down tribal differences and effectively unifying the population against colonial rule. In 1964, Zambia became an independent republic and held its first free elections. In 2000, international donors insisted that the Government privatise all the mines, which it had owned and operated since 1970. The privatisation process was a fiasco, and has produced little to nothing in terms of benefits for the people of Zambia. The effects on the mine-workers and their families have been particularly egregious. With job and housing security all but gone, human rights abuses by private actors, with a blind eye turned by the Government, are now prevalent.

The present-day legal system integrates pre-colonial customary law as interpreted by the colonial ‘Native Courts’ (now known as Local Courts) and the statutory law, which has been modified and extended since the pre-independence era.\textsuperscript{413}

\textsuperscript{411} COHRE WHRP interview with Brenda Siajunza of LADA, an NGO active in the Southern Provinces of Zambia, 11 Aug. 2003.
\textsuperscript{412} COHRE WHRP interview with a male member of the Chizwanunji community, outside Mozbuka, 11 Aug. 2003.
\textsuperscript{413} Zambia Virtual Tour: Political Overview, http://www.bized.ac.uk/virtual/dc/back/pol.htm
Zambia ratified CEDAW in 1985, and a legal reform exercise was subsequently launched to remove all legal provisions that were overtly discriminatory.\textsuperscript{414} The Government of Zambia has identified as a priority of great concern:

\textit{[T]he persistent and growing burden of poverty on women and their unequal access to resources and participation in economic structures and policies.}\textsuperscript{415}

Women in Zambia, especially in the rural areas, are still predominantly illiterate and uneducated. It is generally considered to be more important to educate a son rather than a daughter, and thus any money available for school fees is ‘better spent’ first on the son, while the girls are set to work in the fields.\textsuperscript{416}

\begin{quote}
\textit{“Although seventy percent of the food produced in Zambia passes through the hands of female agricultural workers, women never benefit from the profits made from the sale of this food. They are precluded from realizing this income because their fieldwork is seen as falling outside the conventional monetized marketplace. Accordingly, Zambian women and children are known as invisible farmers. They are looked upon as cheap sources of agricultural labor.”}\textsuperscript{417}
\end{quote}

The women of Zambia suffer greatly from the high HIV/AIDS rate. Of the more than one million people infected, close to 600 000 are women.\textsuperscript{418}

\subsection*{2.9.2 Statutory law: Constitutional protections}

Zambia’s current Constitution, of 1996, has been under official review in the period from August 2003 to April 2004. Addressing gender discrimination is on the agenda of the Constitutional Review Commission. Indeed, the Constitutional review process provides a unique opportunity to increase the potential for change in favour of women. It is imperative that the Constitution be changed, for its provisions tend to harm rather than help women. The COHRE Women and Housing Rights Programme (WHRP) strongly encourages the Constitutional Review Commission to integrate human rights principles of equality and non-discrimination, as well as women’s human rights to land, housing and inheritance.

Article 11, of the current Constitution, on fundamental rights and freedoms, protects various civil and political rights for all Zambians, regardless of, \textit{inter alia}, sex. This provision also prohibits the taking of property without appropriate compensation.

\begin{itemize}
\item \textsuperscript{414} Zambia is a State Party to the following human rights treaties: The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its First Optional Protocol, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the African Charter on Human and Peoples’ Rights.
\item \textsuperscript{415} From Zambia’s response to the UN Secretary-General’s ‘Questionnaire to Governments on the Implementation of the Beijing Platform for Action’, \url{http://www.un.org/womenwatch/dow/followup/question.htm}
\item \textsuperscript{417} Ibid. p. 2.
\item \textsuperscript{418} 2002 Joint United Nations Programme on HIV/AIDS, ‘Estimated number of people living with HIV/AIDS, end 2001.’ (n. 106 above)
\end{itemize}
The current Constitution of 1996 attempts to guarantee non-discrimination in law and application. Article 23(3), defines ‘discriminatory’ as:

... affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed.

Furthermore, the Constitution prohibits not only restrictions on, but also advantages to, certain persons over others.

Disappointingly, however, and with devastating consequences for women, Article 23(4) of the Constitution specifically excludes from the application of the non-discrimination clause all law:

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
(d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;

Additionally, the current Constitution explicitly allows for discriminatory treatment of persons, provided that such treatment is “reasonable and justifiable in a democratic society,” in Article 32(3)(d).

The UN Committee on the Elimination of Discrimination Against Women, which monitors State Parties’ compliance with CEDAW, has expressed concern at the:

... contradictory provisions contained in the Constitution whereby article 11 guarantees the equal status of women and article 23(4) permits discriminatory laws to exist in the area of personal law, namely: revenue allocation, adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law and customary law with respect to any matter.

It is clear that, on the whole, the 1996 Constitution falls far short of providing the full protection that is necessary to ensure women’s equal rights. Furthermore, personal law matters, including inheritance, are governed by customary law, which often enshrines patriarchy and discrimination against women. The COHRE WHRP is hopeful that the new Constitution presently being developed will enshrine women’s equality and human rights for all, with strong protections against discrimination.

419 Constitution of Zambia, 1996, Art. 23(3).
420 Ibid., Art. 23(4)(c) and (d).
2.9.2.1 Lands Act
The Lands Act of 1995 streamlined the various land categories that had existed prior to its adoption, specifying two main categories: State and Customary land. Six percent of Zambian land is State land, consisting of freehold and leasehold titles and administered according to English law. The remaining 94 percent is considered to be Customary land, and its ownership is governed by customs and traditions. Customary tenure is usually undocumented and the rules of tenure vary from area to area.

The Lands Act provides for leaseholds (not exceeding 99 years) and leasehold tenure, and statutorily recognises customary tenure. The Act confirms that all land vests absolutely in the President of Zambia. He may alienate State land to any Zambian and, to a limited extent, to non-Zambians. However, the President is not allowed to alienate Customary land without first considering local customary law, consulting and obtaining the permission of the appropriate chief and the local authority, and consulting those whose interests would be affected.

In October 2003, the Government of Zambia directed that land allocation by local authorities to women should be intensified. The results of this directive have yet to be felt.

2.9.2.2 Marriages Act
In Zambia, there are several types of marriages that men and women can enter into. Statutory and customary marriages are the most common. Statutory marriages are those entered into under the Marriages Act of the Laws of Zambia. The High Court has jurisdiction over matrimonial causes arising out of such marriages (including succession). Statutory marriages must be registered, and must be monogamous. If a person was married under customary law prior to entering into a marriage under the Marriages Act, she/he is liable to prosecution for bigamy. The provisions of the Marriages Act do not apply to customary law marriages.

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423 However, Sect. 6(3) of the Lands Act of 1995 does leave room for ‘other’ categories of land.
425 Marriages Act 1989, Ch. 50, Laws of Zambia.
The Marriages Act sets the legal minimum marrying age at sixteen. Anyone under twenty-one who is not a widow or widower needs written consent to marry from their father. If refused consent, the minor can apply to a High Court judge to obtain official consent. Under customary law, the minimum marrying age is considered to be when the person in question reaches ‘maturity’, a status which is not accurately defined.

2.9.2.3 Intestate Succession Act
One notable reform of the past few decades was the Intestate Succession Act of 1989, which was introduced to end ‘property-grabbing’ in cases where a deceased spouse has not left a written will. This Act establishes a standard scheme for distribution of the property in an intestate estate, both in civil and customary marriages. The Act as reformed in 1996 provides for inheritance rights of multiple wives. However, it applies neither to land held under customary law nor ‘family property’. The latter is defined as movable and immovable property that belongs collectively to the family.

The property distribution scheme is as follows:
- Twenty percent of the estate passes to the surviving spouse. If there is more than one widow, the 20 percent is shared among them, in proportion to the duration of their respective marriages to the deceased. When dividing the property among multiple widows, a number of other factors may be taken into account, including each widow’s contribution to the estate.
- Fifty percent passes to the deceased’s children in such “proportions as are commensurate with a child’s age or educational needs or both;”
- Twenty percent goes to the parents of the deceased;
- Ten percent goes to the dependents, in equal shares.

THE CONFLICT BETWEEN A WOMAN’S ROLE AS A MOTHER AND AS A WIFE

“If my daughter in-law gets 20 percent and her children 50 percent, what does that leave us — not enough to live on! If there is a lot of money, fine. But my son supports us, he works in the city. If he dies and his wife and children take almost all (70 percent), we get nothing. She will not take care of us — and we will die too.”

426 Intestate Succession Act, No. 5 of 1989.
427 Ibid., Part II, Sect. 5(a).
428 Ibid., Part II, Sect. 5(b).
429 Ibid., Part II, Sect. 5(c).
430 Ibid., Part I, Sect. 3, which defines a dependant as “a person maintained by the deceased, living with the deceased and/or a minor whose education was being provided for by the deceased.”
431 Ibid., Part II, Sect. 5(d).
432 COHRE WHRP interview with a member of the Minambe community of the Copperbelt Region, Zambia, 12 Aug 2003.
Section 9 of the Intestate Succession Act provides that any house in an estate shall devolve to the deceased’s spouse and their children. When there is more than one widow or child, all are to hold the house as tenants in common. The spouse is to hold a life interest in the house which “shall terminate upon that spouse’s remarriage.”433 In a polygamous marriage, the widows and their children are absolutely entitled to the personal chattels she and the deceased used, and to share equally the common chattels; that is, those previously shared between the deceased and the various wives.434 Of course, these provisions on sharing cause problems when the surviving spouses cannot or do not wish to reside together, or cannot agree on how the house and chattels should be shared.

When a minor is the sole beneficiary of the estate, she/he requires a guardian to ensure that her/his interests are protected. The guardian may not benefit from this position, and if she/he deprives the minor of the property in any way, she/he is liable to a fine or imprisonment.435

The Intestate Succession Act provides that the higher the value of the estate, the higher the court that has jurisdiction over its devolution.

2.9.2.3.1 Shortcomings of the Intestate Succession Act
The Intestate Succession Act was initially regarded as a victory for most Zambian women. Now, almost 15 years later, the Act has proven to be seriously flawed. As the Zambia branch of Women and Law In Southern Africa (WLSA) has pointed out:

On paper, the new law of inheritance has been a wonderful breakthrough for women’s rights. In practice, though, the five years since the enactment of the Act have witnessed a very different picture. The earlier resentment at the passing of the law, which usurps customary rights, had blossomed into blatant disregard of statutory law and a perpetuation of the distorted and evil practice of property grabbing. This is particularly so in situations where people are aware of the provisions of the statute and do not fear the sanctions provided for. The law is weakened first and foremost by the lack of conviction among women themselves that they have a legal right to their deceased husband’s property, and secondly by their fear of reprisals should they invoke the law ... Even the laws and the law enforcement agencies like the police and the Local Courts have failed to give the new law the respect it deserves and encourage its use.436

Many women, especially those whose sons are married, do not believe that widows should be allowed to inherit such a large share of property. As they themselves grow older, they rely increasingly on their sons to provide for their care and well-being. These mothers argue that they are the ones who raised their sons, put them through school, and invested in them. Therefore, in the event of a son’s death, his estate should repay and provide for his mother, not his widow.

433 Intestate Succession Act, No. 5 of 1989, Part II, Sect. 9(1).
434 Ibid., Part II, Sect. 10.
435 Ibid., Part IV, Sect. 35.
On the one hand, many women feel that the Intestate Succession Act does not adequately protect them: 20 percent of an estate for and on which they worked hard cannot satisfy their needs; in reality, they are often left with little to nothing. On the other hand, many family members complain that this widow’s share is too large. A wife, they claim, does not contribute to the husband’s development or growth; that task is performed by his parents and siblings, and they should therefore be paid back substantially for their efforts. Many Zambians see the education of their children, and especially of their sons, as an investment, the eventual return being that they themselves are looked after when they are old.

Many men also expressed concern about the Act, worrying that if their wives knew they could inherit such a large share, particularly the 70 percent they stood to gain if their children were still minors, they would “get smart and kill us!” However ridiculous or paranoid this may sound, men in several communities did raise this as a serious concern.

Another criticism of the Act is that it places no age limit on the definition of children. Thus, even if the children of a marriage are grown up and have started their own families, they can take their 50 percent share and leave the widow, who may be old and in need of extra assistance, with only 20 percent.

PROPERTY-GRABBING IN THE CHONA COMMUNITY

One woman from Chona village, in a rural area of southern Zambia, spoke of her daughter who had been married to an older man. After he passed away, his relatives so harassed her that she eventually “died from depression”. Apparently, her husband had been very wealthy, and the relatives accused her of having “stolen” his money, even though she knew neither that he had had so much money in the bank, nor the account details. The relatives even accused the wife of using witchcraft to bring about her husband’s death in order to obtain his money. A relative of the husband became the administrator of the estate and misappropriated it, so that the children could not even go to school. Instead, the administrator used the money to support and educate his own children.

Another problem is that the Act applies neither to ‘family property’ (that is, property held jointly by the family), nor to land held in customary tenure. It therefore does not apply to the majority of Zambians, who still live on rural land under customary tenure.

Finally, many Zambians regard any civil law as imposed by a ‘western’ or foreign system and therefore an infringement of their own rights as Africans. Zambians are well versed in customary law, but have little knowledge of civil or statutory law. There have been complaints that even the courts themselves, especially the Local Courts, are ignorant of this Act and the civil law as a whole.

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437 Women For Change has received several complaints of this kind from widows. COHRE WHRP interview with Women For Change, Lusaka, 9 Aug. 2003.
439 COHRE WHRP interviews with various communities, including Chona, Twashuka and Chizwanunji, revealed such fears.
441 Shezongo-Macmillan (n. 436 above).
2.9.2.4 **Wills and Administration of Testate Estates Act**
The Wills and Administration of Testate Estates Act of 1989 established a special provision allowing a court to intervene if the will in question makes no “reasonable provisions” for the maintenance of a dependant. A dependant is defined as the “wife, husband, child or parent” of the deceased. Here, ‘child’ is defined as a child born in or out of wedlock, as well as an adopted, or an unborn child. ‘Marriage’ includes polygamous unions. Like the Intestate Succession Act, this Act does not apply to land held under customary law.

The provision for child maintenance is imposable by court order. Any need for maintenance payments expires when the surviving spouse remarries or the child reaches the age of 18.

Interestingly, the Act specifically prohibits the “intermeddling” of property with those entitled to the property pursuant to the Act (that is, those determined by the court or by the will to be beneficiaries). An unauthorised person who deprives a person entitled to the property or any part of it has committed an offence and is liable to a fine or imprisonment. This clause ought to be used to combat the all too common practice of ‘property-grabbing’ by in-laws.

2.9.2.5 **Judicial system**
The Zambian court system has several levels: from Local Courts, through Magistrates’ Courts and the High Court, to the Supreme Court. Disputes or prosecutions under statutory law are heard in the Magistrates’ Courts (if less important) or the High Court, with appeal to the Supreme Court. Disputes under customary law are usually heard in Local Courts, though they can be appealed through the higher levels of the court system.

The Local Courts hear cases related, among other matters, to the rights of people married in customary law in respect of property, inheritance, marriage and divorce. Problems arise when customary and statutory laws conflict. Although statutory law is supposed to take precedence, in practice, judgments rarely reflect this and often discriminate against women, especially in inheritance rights cases. Local Courts often ignore the percentages mandated by the Intestate Succession Act in distributing estates, and women are left with nothing from the estate.

The Local Courts prevent lawyers from participating in proceedings. Typically, a Local Court appoints a male relative of the deceased spouse to act as an administrator, even when it has no jurisdiction to do so.

Most widows interviewed by the COHRE WHRP expressed dissatisfaction at how Local Court justices had handled their cases. These justices are exclusively male and often show bias towards the deceased husband’s male relatives. Not only poor women, but women of all classes encounter such discrimination.

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443 Wills and Administration of Testate Estates Act (WATE Act), No. 6 of 1989.
444 Ibid., Part I, Sect. 3.
445 Ibid., Part III, Sect. 2(b).
446 Ibid., Part VII, Sect. 65(1) and (2).
448 The Local Courts tend to appoint the administrator they prefer, normally a male, even if the widow herself should clearly be made the administrator, or the widow’s approval of the administrator has not been attained, or it is evident that the administrator discriminates against the widow.
449 Several women with whom the COHRE WHRP spoke gave accounts of economically well-off women who were denied death benefits, houses and land by Local Courts, which insisted on appointing male administrators.
In addition, the Government of Zambia has been criticised for its neglect of the Local Courts, which are understaffed, under-funded and under-regulated. Many of these courts are short of or entirely lack proper materials, including copies of important laws. Their officials admit that they have little to no formal legal training in principles of customary law. If a decision handed down by a Local Court is not acceptable to a party, she/he may bring an appeal before the Administrator General’s Office. However, many women are very reluctant to take this course of action, as it takes too much time and costs too much money.

Men and women in the rural areas stress the fact that there is significant corruption within the police service and the judicial system, particularly within the lower courts. If a woman and a man have a dispute, it is always the woman who loses. Women are also scolded, insulted and suppressed in these courts.

As the customary laws are not generally codified it is hardly surprising that the customary legal system is seriously flawed: the laws are not clearly defined for the Local Courts and are therefore wide open to arbitrary application.

Local Courts, especially rural ones, usually interpret customary law in a way that is discriminatory against women. For example, cases of ‘widow-cleansing’ (see Subsection 2.9.3.3, ‘Widowhood rituals’) normally revolve around payment for or obligations associated with cleansing rituals — the legality or moral desirability of the practice itself is almost never questioned.

In contrast, Local Courts in urban areas appear to have stopped applying strict interpretations of customary law. They have become institutions for solving community disputes, applying concepts of logic and fairness in the process. For example, the Local Court in the capital, Lusaka, heard a case of two widows of the same deceased husband. The first wife, the plaintiff, had been denied a share in the deceased’s home because she was ‘barren’. (Under customary law, a widow cannot inherit property, though her children can.) The Court ruled that as the second wife (who had a son) had received two rooms in the house, so too should the first wife. The Court found that the first wife was entitled to the same share as the second wife because she had been with the deceased the longest and had added to the value of the home. Thus, contrary to strict customary law, the Court effectively decided that a widow can benefit directly from an estate.

2.9.3 Customary law

As we have already seen in several instances, Zambia’s legal system integrates two parallel systems: customary law, which stems from pre-colonial customs and traditions and is interpreted by the Local Courts; and statutory law, which was imposed by British colonialists and has since been modified and extended. Most personal matters in Zambia are subject to customary law.

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450 Siajunza (n. 416 above).
452 Siajunza (n. 416 above).
453 Ibid.
Zambians, both men and women, generally treat the customary legal system with great deference. To them, the traditional customs and laws are their ancestral heritage, and are therefore sacred. Women who are convinced that they are adhering to their ancestors’ wishes tend to be resigned to their fate, even if the practice in question is clearly discriminatory.456

2.9.3.1 Marriage under customary law
Whereas some urban Zambian couples are married in civil ceremonies governed by the Marriage Act, which sets out non-discriminatory rules for property division and inheritance, most rural (and even some urban) Zambians are married under customary law and therefore do not fall within the protections of the civil law. Customary marriages are conducted according to the tribal customs of the two parties. Polygamy (strictly speaking, polygyny, the taking of multiple wives) is allowed under customary law.

The practice of paying bride price, or lobola, which is still widespread, is detrimental to women. Once lobola has been paid, the wife has no right to return to her parents’ home after the death of her husband. She is therefore highly vulnerable to mistreatment by her in-laws, who consider her as ‘property.’457 The payment of lobola is often used as a pretext for ‘property-grabbing’ and even for the taking away of children after their father’s death. Some see lobola as ‘the price paid’ for the wife — and, thus, she can be cast away as easily as she was ‘bought’.

Under customary law, women may be married off as soon as they have reached ‘maturity’. This status is undefined: no official minimum age is set. In some areas, it is considered to be the onset of menses, which can occur as earlier as age twelve or thirteen. In many rural areas, it is not uncommon for girls under sixteen to be forced to marry or to have sexual relations, more often than not with much older men, often in polygamous relationships.

The UN, in its Common Country Assessment (year 2000), recognised the effects this practice may be having on the spread of HIV/AIDS:

In Zambia, some of the factors contributing to [the spread of AIDS] are imbedded in customary laws and practices, especially in relation to divorce, adultery, child marriages and defilement.458

This practice, in turn, has serious consequences in the area of inheritance, for girls as young as sixteen can become widows.

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2.9.3.2 ‘Property-grabbing’

The inheritance-related problem that is most prevalent in Zambia is ‘property-grabbing’: the unlawful appropriation of the deceased’s property by in-laws or other family members. ‘Property-grabbers’ deprive widows of their house, personal chattels, and land — often with impunity from the law. Most widows do not resist for a variety of reasons ranging from ignorance of the law, through a feeling that they do not deserve the property, to a belief that if they fight their relatives, they will be ‘bewitched’ (see Subsection 2.9.3.4 below). Often, the in-laws even take the children of the marriage, claiming that anything arising out of the marriage is theirs, and using as justification the fact that lobola (bride price) has been paid. The in-laws often insist that they wish to take care of the children, but there is also a material interest in taking them: under the Intestate Succession Act, the children are entitled to 50 percent of the estate (see Subsection 2.9.2.3 above).

‘Property-grabbing’ has direct and often dire effects on women and children. They may be left destitute, with no real options for survival. Many widows and young girls who are the victims of this practice engage in prostitution to earn money, which places them at heightened risk of contracting HIV/AIDS.\(^{459}\)

THE VICTIM SUPPORT UNIT (VSU)

The establishment of the VSU within the Zambian police service has been one of the most positive steps taken by the Government to protect women from ‘property-grabbing’.\(^{460}\) Such cases are reported to the VSU, which attempts to follow them up through intervention and mediation. The VSU brings the parties to the table, and in some cases even drives to the home of the ‘grabber’ to collect the stolen property. If the ‘grabber’ is not willing to relinquish it or return it to the ‘grabbee’, the VSU may fine and/or imprison her/him. Unfortunately, the VSU is severely under-resourced, lacking both financial and staffing support from the Government. In addition, as many people, especially those in rural areas, do not know that the VSU exists to help widows, they do not call on it for help.\(^{461}\)

2.9.3.3 Widowhood rituals

Many Zambian communities practice widowhood rites, though these rituals are reported to be on the decline due to the spread of HIV/AIDS. One community told the COHRE WHRP:

There are a lot of problems but many of them [the harmful traditional practices] have been eradicated … but there is still the problem of torture and oppression of the widow. If the husband dies, the widow is taken to the river and dipped in the water, and when she comes out they smear her with a lot of clay and mud, then she is dipped again, and then wrapped with fibre; she is tied up completely. They do these things while the widow is naked. While old women are appointed to do this, the men are allow to watch from a distance. … After sensitization, sexual cleansing practices have stopped a bit, and the community does not force the women to do this anymore, but some still do it.\(^{462}\)

\(^{459}\) Human Right Watch (n. 447 above), p. 58.
\(^{460}\) Himiyane (n. 457 above), p. 5.
\(^{461}\) COHRE WHRP interview with two officials of Kitwe Police VSU unit, Mufilira, Copperbelt Region, Zambia, 12 Aug. 2003.
Surprisingly, both men and women must undergo this cleansing ritual. Men cannot be cleansed until they have paid the full bride price, and if there is still money owing, then the husband cannot be cleansed. Not being cleansed has huge ramifications: widows or widowers may not engage with the rest of the community, they cannot sit on the ground, on a stool or in anyone else’s seat. They are considered to carry with them the spirit of the deceased and are thus treated with extreme wariness and even a certain distaste until they are considered ‘cleansed.’ It is only after cleansing that they are allowed to remarry. Although the form of cleansing may be changing, the concept behind it does not seem to be.

2.9.3.4 Bewitchment
Women throughout Zambia fear that if they claim their inheritance rights they may be bewitched by angry in-laws. Members of several communities told the COHRE WHRP of women who had died shortly after their husband’s death, allegedly because they had opposed the in-laws’ ‘grabbing’ of their property and home. They even claimed that the bewitchment ‘techniques’ were now so good that they had emulated the symptoms of AIDS. When asked if it was not possible that the widows had, in fact, died of AIDS, the respondents vehemently disagreed: there was no doubt that bewitchment had caused these deaths – the AIDS-like symptoms were a mere guise of the bewitchment. They could not accept that AIDS was the actual cause.

“I stayed with my husband nine years. When he died, the house was grabbed, the property was grabbed, I was left with literally nothing. I am trying to fight for the house so my children can live somewhere. While I am scared to claim my rights, scared that my in-laws will bewitch me, when I look at the suffering of my children, I know I must — I feel brave to claim my rights.”

A widow often fears that if she claims her property rights, her in-laws may accuse her of being a witch, of having used witchcraft to kill her husband in order to get his property. Such accusations are common, and generally lead to the widow being ostracised from both family and community. Sensitisation and education campaigns are needed to stop this heinous practice.

Claims of bewitchment related to inheritance are sometimes brought before the Local Courts. These courts usually order the parties to consult with ‘witch-finders’, who will try to determine whether or not witchcraft has occurred.

2.9.3.5 Divorce
Under customary law, the wife is not entitled to an equal share of the property acquired during the marriage. Even if she helped purchase the property, it is still considered as entirely the husband’s. The wife’s contribution is seen as nothing more than the fulfilment of her wifely duties and obligations. Thus, any benefit the husband may have derived from her work is seen as his inalienable right — she cannot gain from it. Neither spouse is entitled to maintenance after divorce. The spouse who retains custody of the children must maintain them; the spouse without custody has no obligation to provide maintenance for the children.

463 The Chona community expressed some concerns about sexual cleansing rituals. Their community has adapted the traditionally practised sexual cleansing ritual to reflect the reality of AIDS. Instead of being sexually cleansed in the traditional way, widows and widowers are completely immersed several times in the nearby lake and blessed by the community’s spiritual leader. COHRE WHRP interview with Chona community, 11 Aug. 2003.
464 This belief was expressed particularly strongly in the Kankoyo community, near Mufilira, as well as in the Mulenga Compound outside Kitwe, Zambia.
2.9.4 Poverty

Zambia is a country ravaged by poverty. Since the collapse of the mining industry in the late 1970s and 1980s and the unsuccessful attempt to privatise it, the people of Zambia have been struggling to survive economically. Eighty percent of the population now lives in chronic poverty. The per capita external debt amounts to US$605.468

This deepening poverty has led to an increase in the denial of women’s rights, especially inheritance rights. Customary systems used to ensure that the heir of the estate would protect and provide for the widow until she remarried or died. Nowadays, this responsibility is rarely, if ever, fulfilled. Rather, the majority of heirs simply take what they can and run. Many Zambians interviewed by the COHRE WHRP blamed this on incessant poverty, saying that people are so desperate to gain any material goods, they will go to any extreme.469

There are so many orphans here, child-headed households. There is no orphanage. When parents die, their relatives take everything. They are left with nothing. If they can, the children go to school and work after school until late in the evening in town to earn a small amount of money, selling ice blocks or other things.470

Zambia’s poverty is tragically manifest in the large number of street children in urban areas. Families in dire straits often send their children to the urban centres to scrounge for food and beg for money. Many other street children are orphans, often due to AIDS, who have been stripped of their parent’s property by greedy in-laws or others. Vulnerable and desperate, they head to the urban centres to survive by whatever means possible. In Lusaka alone, thousands of street children sleep in doorways, on sidewalks or in small encampments for protection.

ONE CHILD’S STORY

“I am 10 years old. Mum and dad died in a bus crash coming from their village in Lundazi. A relative of my dad took all the property and money that my parents had kept. They kept us for a while and later chased my sister and I away. We are both on the street. My sister is sometimes taken by rich men who pay her for sex. I wanted to be a policeman. I wish my parents were alive. It is rough out here. Sometimes big boys beat us up.”471

469 The COHRE WHRP fact-finding mission heard this repeatedly, and particularly in Zambia. Poverty has greatly affected almost every segment of the population.
2.9.5 The way forward

Zambia is stricken by severe poverty, endemic HIV/AIDS, the breakdown of the rural economy, and rapid urbanisation. Meanwhile, patriarchal customs, entrenched traditions and misplaced beliefs are further devastating the lives of women and children. The statutory law, despite some encouraging aspects, tends to ignore women’s real needs.

The Intestate Succession Act positively addresses several issues of inheritance, especially as regards home ownership by widows and children. However, the provision for women in polygamous marriages is inadequate, especially given their prevalence. Sharing a home once the husband of a polygamous marriage has died is very difficult, and often the house must be sold so that the proceeds can be split, which rarely provides enough for each widow to survive.

This illustrates the shortcomings of a system which devolves estates according to fixed percentages. Such percentages are difficult to apply in practice, especially when the estate is small. The deceased’s parents are particularly disadvantaged, an issue that needs to be addressed.

Communal traditions and beliefs are slowly changing in Zambia but still pose a major obstacle to the realisation of women’s rights. This is not only evident in the rural areas; in the urban areas too, deeply-rooted traditional beliefs serve to discriminate against women. Although traditions and beliefs are held sacred in community life and culture, it is important that their negative aspects be brought to light, challenged and eventually dispelled.

Zambia should immediately repeal Article 23 of the Constitution, which provides that customary law can determine women’s personal issues such as inheritance. This provision is a serious flaw in the legal protection of women, and it fosters patriarchy and discrimination.

Women need to be properly educated about their rights and supported in claiming them. The VSU is a step in the right direction, but requires much greater assistance, both financial and institutional. NGOs promoting popular education and gender sensitisation are making a difference on the ground. These efforts are vital and worthy of support.
SPECIFIC RECOMMENDATIONS

1. All deference to customary law allowing discrimination should be removed from the revised Constitution, which should fully protect women’s rights to equality and non-discrimination, as well as to adequate housing, land and inheritance.

2. The Intestate Succession Act should be amended to provide for customary land transfer to widows, including those in polygamous marriages. The Act should be reformed in consultation with representatives of all those affected, including parents and spouses, and may need to include a revision of the estate distribution scheme.

3. The VSU and other systems for enforcement of the laws protecting women should be properly supported with adequate resources and training programmes.

4. Extensive education and sensitisation programmes should be targeted at communities, especially in the rural areas, focusing on the negative consequences that traditional customs, practices and beliefs can have on women’s rights, and exposing the discrimination and violence against women that such customs, practices and beliefs tend to perpetuate.

5. Women should be supported in claiming their rights, through the provision of free legal aid and sensitisation programmes on those rights.

6. Zambia should address poverty issues head on. Income-generation programmes are vital to ensure that the populace can support itself. Before any further privatisation schemes are implemented, these should be evaluated for their impact on the poor.

7. The abuses resulting from misguided privatisation should be urgently addressed. The COHRE Women and Housing Rights Programme (WHRP) visited many former mining communities that are now facing eviction by new mine-owners. For the most part, the privatised mines have been given free reign to pollute the communities in which they operate. Blatant environmental degradation and human rights abuses result from people living in polluted conditions. The Government needs to take responsibility for its people, instead of turning a blind eye to the human rights violations that privatisation has caused.
2.10 ZIMBABWE

There is a duality in Zimbabwe’s legal system. Zimbabwe’s constitutional and international obligations eschew gender discrimination, while customary Africa law continues to promote discriminatory treatment of women.\(^{472}\)

I would have my head cut off if I gave women land.\(^{473}\)

DOMESTIC LEGAL PROVISIONS RELATED TO WOMEN’S INHERITANCE RIGHTS

- Constitution 1999
- Marriage Act 1983
- Customary Marriages Act 1951
- Legal Age of Majority Act 1982
- Deeds Registry Act 1996
- Married Persons Property Act 1929
- Matrimonial Causes Act 1986
- Maintenance Act 1971
- Deceased Persons Family Maintenance Act 1979
- Administration of Estates Amendment Act 1997

2.10.1 Background

In recent years, Zimbabwe has regularly been the focus of international attention in connection with land issues. In the period from June 2000 to July 2001, invasions of farms owned by white Zimbabweans formed the spearhead of an aggressive so-called ‘land reform’ campaign led by Prime Minister Robert Mugabe. The ostensible aim of this ‘fast-track’ campaign was to restore control of this land to indigenous Zimbabweans. The ill-conceived campaign had devastating consequences, not only for the white farm-owners, but also for the black farm-workers who had spent years working the land and depended on the farms for their livelihoods.\(^{474}\)

At around the same time, a less widely publicised battle was taking place in Zimbabwe’s law courts. Venia Magaya fought all the way to the Supreme Court in a bid to gain her rightful inheritance: access to her family home, to which she had made a lifelong contribution. A lower court had granted her title to the house, but her half brother had challenged that decision. Unfortunately, the Supreme Court found in his favour, and threw Venia out on the streets. She died shortly afterwards, homeless and destitute. (See Subsection 2.10.2.1 below.)

Even though Zimbabwe has ratified numerous instruments of international law\textsuperscript{475} that protect the rights to housing, land and property of both men and women, and despite the fact that the country's policies have been tagged by some as ‘well intentioned’, the reality of the land struggle is that it has failed miserably to protect any of these rights for the majority of Zimbabweans.

2.10.1.1 Brief history
After a long guerrilla war against white minority rule, Zimbabwe gained independence in 1980. A key demand during the war was control over all land seized from indigenous Zimbabweans by the white minority.

The territory first came to the world’s attention when the infamous Cecil John Rhodes acquired mineral rights there from the British Crown. By 1893, his British South African Company occupied most of the region. In 1895, the territory was renamed Rhodesia after him.

Land inequity was formalised at the turn of the century: 8.4 million hectares were allocated to 700 000 indigenous farmers; 32 million hectares went to 12 600 white settlers. In 1923, this racist imbalance was consolidated with the apportioning of ‘Native Reserves’ and ‘European Areas’.

In subsequent decades, there were feeble attempts at land reform, but the huge inequalities remained. In 1972, fighting broke out between ‘liberalisation’ forces and the Government of Rhodesia. The Rural Land Act of 1979 formed the basis for resettlement and opened the door to independence, which finally came in 1980, the new prime minister being Robert Mugabe.\textsuperscript{476}

2.10.1.2 Government/legal system
The President is Head of State, and has extensive powers. Parliament consists of the House of Assembly, with a Speaker, a Leader of the House, 120 popularly elected members, eight provincial governors appointed by the President, and ten traditional leaders appointed by the Chiefs’ Council.

The Customary Law and Local Courts Act of 1990 created a unitary court system comprising Headmen’s Courts, Chiefs’ Court, Magistrates’ Courts, the High Court and the Supreme Court.

Most cases are heard by magistrates, who are not actually part of the judicial system; rather, they are civil servants, and many of them are susceptible to corruption and political pressure. The lower courts are the most accessible, but are generally discriminatory against women.

In the early 1980s, the Zanu Government’s election manifesto included “13 Fundamental Rights and Freedoms”. Number 8 was women’s right to equality with men in all spheres of political, economic, cultural and family life. By 1987, the Government had delivered substantive gender equality in statutory law, though this was not confirmed in the Constitution. The now ruling Zanu-PF did not draw up its Gender Policy until 2001.

\textsuperscript{475} Zimbabwe is a State Party to the following human rights treaties: The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the African Charter on Human and Peoples’ Rights. It is also a signatory to the International Covenant on Economic, Social and Cultural Rights.

\textsuperscript{476} Robert Mugabe became Executive President of Zimbabwe after the office of Prime Minister was eliminated through constitutional reform in 1987. He was re-elected President in 1990.
2.10.1.3 Women
Despite recent legislative amendments and statutory changes, the women of Zimbabwe remain severely disadvantaged. Illiteracy, economic dependency and the prevailing social norms serve to entrench social discrimination against women, especially in rural areas.

The 1998 Human Development Report by the UN Development Programme (UNDP) noted that, in most regions of the country, girls are underrepresented in secondary schools. The literacy rate for females over the age of 15 was estimated to be 80 percent, compared to 90 percent for males. Despite legal prohibitions, women are still subjected to humiliating customary practices that clearly violate their human rights, including: wife inheritance, whereby a widow is forced to marry her late husband's brother; the pledging of a young woman to marriage; and the offering of a young girl as compensation in inter-family disputes.\(^\text{477}\)

Certain tribes in Zimbabwe still practice female genital mutilation (FGM), and some even practice infibulation, the severest form. Polygyny is still accepted in culture and religion, and the marriage of young girls is still condoned, even though this is against the law. More than 60 percent of all murder cases tried in the High Court of Harare are related to domestic violence. Reports of rape and violence against women are increasing, partly due to media focus on these issues with the aim of bringing their severity to light.\(^\text{478}\) In the Communal areas, women constitute 61 percent of the farmers and at least 70 percent of the labour force.\(^\text{479}\)

Of the two million Zimbabweans, or 34 percent of the population, who are infected with HIV/AIDS, a full 60 percent are women.\(^\text{480}\)

2.10.2 Statutory law: the Constitution
Since independence, Zimbabwe has amended its Constitution several times, primarily in order to grant the Government powers of land reform. Women’s rights have been largely overlooked. The quite intensive constitutional reform of late 1999 left the discriminatory policies of the previously version unchanged.\(^\text{481}\)

Section 16 guarantees the right to property, with every citizen having equal rights to ownership. Equality and non-discrimination is protected under Section 23, which states:

\[\text{No law shall make any provision that is discriminatory either of itself or in its effect; and:} \]
\[\text{...(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.}\]

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\(^\text{478}\) Ibid.


\(^\text{481}\) The Constitution was last reformed in the year 2000.
However, reading further reveals that the Constitution allows blatant discrimination in areas including adoption, marriage, divorce and inheritance. Section 23(3) states that:

> Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters:
> a) adoption, marriage, divorce and inheritance ...
> b) the application of African customary law...

This deference to customs and traditions in matters of adoption, marriage, divorce and inheritance essentially has the effect of negating any real protection of women’s inheritance that the Constitution may otherwise offer.

### 2.10.2.1 Infamous injustice: *Magaya v. Magaya*[^482^]

No account of Zimbabwean inheritance rights law would be complete without a reference to *Magaya v. Magaya*, the case that set the country’s African women back years, if not decades.

Venia Magaya, a 58-year-old seamstress, had contributed to the family home in Mabvuku, Zimbabwe, all her life and had taken care of her parents whenever they needed her. After her father passed away in early April 1990, Venia petitioned the court in her community to be named as heir to his estate. She did not expect any problems, for this had always been her father’s wish. She won the case and was appointed heir.

However, her half brother Nakayi sought to have the decision overturned, and filed an appeal to the next highest court, the district magistrates’ court. He claimed that he should be heir, as he was the eldest surviving son. The magistrate agreed and found in his favour, ruling that Venia could not inherit because she was a “lady.”[^483^] Venia appealed to the Supreme Court, which, tragically, found against her, upholding the magistrate’s earlier decision.

> ... because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family (through marriage).[^484^]

The Supreme Court supported its decision by referring to Section 23 of the Zimbabwean Constitution. In issues related to devolution of property on death and other matters of personal law, Section 23(3) provides for exceptions to the prohibition of discrimination, deferring instead to the application of African customary law. The Court disputed arguments to the effect that the Legal Age of Majority Act (LAMA)[^485^] assisted women, asserting that women’s disadvantages under customary law were not, in fact, removed by the LAMA. The judge who made the decision claimed at a later date that he was trying to protect women, so that they would “not sit on their laurels and take comfort in a falsehood that the LAMA had done a great deal in protecting women’s right in Zimbabwe.”[^486^]

[^483^]: Magistrate ruling on 13 November 1992, heard in the District Court of Rotten Row, Mabvuku, Zimbabwe.
[^484^]: *Magaya v. Magaya* [1999] (1) ZLR 100 (S).
[^485^]: Legal Age of Majority Act, 1982.
Essentially, the Supreme Court had elevated customary law above constitutional checks and balances. However, some argue that the Court failed to apply what it had declared to be the true customary law of inheritance to the fact of the *Magaya* dispute:

> The court correctly observed that the main purpose of customary inheritance laws was to ensure that the property of the deceased remained within the family and that it was used for the care and support of those who were dependant on the deceased. These in many cases consisted of minor children and the widow. Logically, therefore, it can be said that this principle should always be the starting point in any inheritance dispute. It should be, with this in mind, that the issue of the person most suited to ensure that the principle is upheld is then determined. In a traditional customary setting, time and environment, the eldest son was considered the most appropriately placed to inherit the property of the deceased and use it for the benefit of his remnant family. ... It seems what was really at play was a desire to assert cultural identity, at the expense of Venia’s claim.  

Shortly after the decision, which was internationally condemned, Venia Magaya died homeless and destitute. Hers is one of the world’s most egregious cases of court-condoned discrimination.

### 2.10.2.2 The land question

In August 1998, the Government denied a petition by women’s groups that one-third of land redistributed under the land reform program be distributed to households headed by women, which reportedly make up one-third of all rural households. At a press conference, Joseph Mafika, Minister of the White Portfolio in charge of resettlement, reportedly stated, “I would have my head cut off if I gave women land.”

One cannot speak of housing and land issues in Zimbabwe without at least touching upon Robert Mugabe’s ‘land reform’ process. Although a full analysis is beyond the scope of this report, the essential aspects are briefly given here.

Since independence, Robert Mugabe’s Government has focused on the undeniably enormous discrepancies in land distribution that are part of the colonial legacy. At independence in 1980, a massive 39 percent of the land was controlled by only a few thousand white farmers, compared to the 41 percent controlled by black Zimbabweans. (These statistics did not change significantly until almost 20 years later.)

The British agreed to support a slow process of land reform, providing funding that the Zimbabweans, however, regarded as grossly insufficient. In 2000, the Zimbabwean Liberation War Veterans Association, claiming that it was impatient with the slowness of the process, forcibly and often violently ‘reclaimed’ over more than 1000 white-owned farms.

In 2000, Parliament passed the Land Acquisition Act, which essentially supported such actions by removing any legal barriers to the rapid acquisition of land. The subsequent Land Reform and Resettlement Programme calls for quick resettlement in favour of the poor and disadvantaged. However, the reality is that

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487 Ibid, p. 61, 63.
488 AFROL (n. 477 above).
such resettlement and redistribution actions provide far greater benefit to the Government and its cronies than to the poor masses. Furthermore, even though over half of the resettled population is female, few women actually hold residence permits.

Communal land is State land and is allocated only to the head of household. Neither married nor single women are seen as heads of household. A recent survey of couples showed that 98 percent of resettlement area permits to farming and grazing lands are held by husbands, against a mere two percent held by wives. Clearly, women do not benefit from such land reform.

2.10.3 Marriage

Marriages, governed by both statutory and customary law, currently fall into three categories: civil marriage; registered customary marriage; and unregistered customary marriage. Civil marriages are contracted in terms of the Marriage Act and can only be monogamous. All Zimbabweans are competent to contract this type of marriage.

Before independence, most Africans married under the Customary Law Marriages Act. Marriage under this Act may be polygamous, can only be contracted by indigenous Africans, and is governed by African customary law. The third category of marriage, unregistered customary marriage, is when customary law requirements on marriage have been met but the union is not officially registered. The law does not recognise this kind of marriage as valid, except for certain specific purposes such as the status and rights of children of such a marriage.

2.10.3.1 Marriage Act

The Marriage Act governs the solemnisation of marriage by religious ceremony. In order for the marriage to be valid, notice of intent to marry must be posted prior to the ceremony. Boys under 18 and girls under 16 are prohibited from contracting such a marriage.

2.10.3.2 Customary Marriages Act

The Customary Marriages Act governs solemnisation and other aspects of customary marriages. A customary marriage must be solemnised in order to be considered valid. The solemnisation process must take place in the presence of the wife’s guardian and the head or chief of the guardian’s village. Interestingly, the marriage must be witnessed by relatives of the woman, not the man. This illustrates the patronising nature of customary law: the woman is not capable of acting as her own witness — she requires others to do so for her.

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491 COHRE WHRP interview with Abby Taka Mgugu, Director, Women and Land Lobby Group.
494 Ibid.
Certain conditions must be met if a customary marriage is to be considered valid under the Customary Marriages Act. Even when these conditions are not met, Section 3(5) states that invalidity does not affect “customary laws and custom relating to status, guardianship, custody and rights of succession of the children of such a marriage”. Thus, even in cases of invalid marriage, customary personal laws are deferred to in respect of the children.

2.10.3.3 Legal Age of Majority Act
The Legal Age of Majority Act\textsuperscript{495} gave women and men full legal capacity at age 18. Women gained the right to own property and to control their own sexuality.

\begin{quote}
\textbf{THE CLASH BETWEEN CUSTOMARY AND CIVIL LAW}\textsuperscript{496}

“12. The Committee is concerned about the duality of the ... statutory law and customary law, which potentially leads to unequal treatment between individuals, particularly in the area of marriage and inheritance laws. The Committee expresses concern that where customary law contravenes the Covenant or the statutory law, the customary law continues to be upheld and applied ...”
\end{quote}

Despite the Legal Age of Majority Act and various other civil laws which purport to protect women from discriminatory customary practices, in the \textit{Magaya} case (see Subsection 2.10.2.1 above), the LAMA was held to be inapplicable to customary marriages and thus the courts allowed customary law to prevail over the provisions of the Act. The Supreme Court in \textit{Magaya} firmly stated: “Under customary law, only men can inherit and all family members are subordinate to the male head of the family”, and ruled that the Administration of Estates Amendment Act of 1997 did not apply. The Court held that a male child takes precedence over his sister in inheritance and that the LAMA did not help women. Women, the Court said, should not be lulled into a false sense of security that the LAMA provides them with protection.

Unmarried women may own property in their own names, but women married under customary law are not allowed to own property jointly with their husbands. Although the Legal Age of Majority Act was a bid to amend customary law in this area, the custom is still that the husband holds land in his name and, when he dies, the property passes to his son, not his spouse.\textsuperscript{497}

2.10.3.4 Deeds Registry Act
Despite the Legal Age of Majority Act, later laws again refer to women’s ‘lower’ legal status. For example, the Deeds Registry Act\textsuperscript{498} confirms a married women’s minority status by dictating that she shall be assisted by her husband when “executing any deed or document required to be so registered”, for “by virtue of her marriage” she has no legal capacity to do so herself.\textsuperscript{499}

\textsuperscript{495} Legal Age of Majority Act 15/1982 (LAMA) now Sect. 15 of the General Laws Amendment Act, Ch. 8:07.
\textsuperscript{496} Concluding Observations of the Human Rights Committee: Zimbabwe (CCPR/C/79/Add. 89) on 6 Apr. 1998.
\textsuperscript{497} http://www.usis.usemb.se/human/human1998/zimbabwe.htm
\textsuperscript{498} Deeds Registry Act 1996.
\textsuperscript{499} Ibid., Art. 15(1).
Even if widows are able to access their late husband’s land or housing, the deeds registry process often hampers their actual use and full ownership of the property. In a recent study of women’s access to land and land use, by the Land Tenure Center of the University of Wisconsin-Madison, researchers found that many of the obstacles faced by widows were related to the inadequacy and slowness of the deeds system. In many cases, it took several years to transfer the title; one interviewee stated that she had waited 13 years. During the waiting period, it is very difficult for the widow to benefit from her property: without legal title she has no collateral with which to obtain bank loans for investment in her land or improvements to her housing. As a result, many women are forced to give up the land they have rightfully acquired, especially when male relatives or in-laws, seeing the dilemma such a woman is in, lay claim on her land and house under customary law, and basically pressure her to hand over the land to them.

2.10.3.5 Married Persons Property Act
The Married Persons Property Act\textsuperscript{501} precludes the ‘in community of property’ (or in community of profit and loss) marriage regime from applying to unions entered into after 1 January 1929, the date the act came into force. The Act also serves to exclude the ‘marital power’ (the power of the husband over the wife) and “any liabilities or privileges resulting therefrom”\textsuperscript{502} from marriages entered into after 1 January 1929. However, if the parties agree prior to marrying that the property should be held in community, they must enter into a written agreement to this effect and register it with the local Deeds Registry office.

2.10.3.6 Matrimonial Causes Act
The Matrimonial Causes Act\textsuperscript{503} first recognised a married women’s right to matrimonial property after divorce or her husband’s death. It primarily gives married women, upon dissolution of the marriage, the right to maintenance for themselves and their children. It also includes provisions for polygamous marriages. The Act instructs the Court, when issuing a maintenance order, to take account of the “direct and indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family, and any other domestic duties.”\textsuperscript{504} Such recognition is rare in laws of this kind.

2.10.3.7 Maintenance Act
The Maintenance Act\textsuperscript{505} establishes Magistrates Courts as ‘maintenance courts.’\textsuperscript{506} Complaints of failure to pay maintenance to a dependant may be made to the ‘maintenance officer’. If there is a legal obligation and an ability to pay maintenance, the Court issues a ‘maintenance order’.

The husband and wife are seen as primarily responsible for maintaining each other. They are also primarily and jointly responsible for maintaining their child, until she/he reaches the age of majority or becomes self-supporting.\textsuperscript{507} Under customary law, the heir to the estate takes over all responsibilities of the household head. It is therefore assumed that the duty to maintain will pass to him, though this duty is rarely fulfilled nowadays.

\textsuperscript{500} As reported in Petire, Roth and Mazvimavi, ‘Seeking Women Land Owners and Ownership in Zimbabwe’ (Ch. 8), in Michael Roth and Francis Gonese (eds.), \textit{Delivering Land and Securing Rural Livelihoods: Post-Independence Land Reform and Resettlement in Zimbabwe} (Madison, WI: Land Tenure Centre, University of Wisconsin-Madison, 2003), p 180.


\textsuperscript{502} Ibid., Art. 2(1).


\textsuperscript{504} Matrimonial Causes Act, Art. 7(4)(e).


\textsuperscript{506} Maintenance Act, Art. 3.

\textsuperscript{507} Ibid., Art. 3(6) and (b).
2.10.3.8 Deceased Persons Family Maintenance Act
The Deceased Persons Family Maintenance Act provides that the dependant of an estate can apply for an award from that estate. This must be done within “three months of the date of the grant of the letters of administration to the executor of the deceased estate concerned.”

If the deceased has left a will, but the applicant is not mentioned in it, the potential reasons for this omission are to be reviewed by the Master of the Court.

The Act provides that if the applicant is the deceased’s spouse, she/he should receive the “Provision the applicant might reasonably have expected to receive if, on the day on which the deceased died, the marriage instead of being terminated by death, had been terminated by a decree of divorce.” The Court takes into consideration the age of the applicant and the contribution made by her/him to the welfare of the deceased’s family, including contributions made in “looking after the home or caring for the family.” This recognition of the widow’s labour is rare and laudable.

Article 10 of the Act protects the deceased person’s family and property. It protects the rights of the surviving spouse (whether married under customary or civil law) and child(ren) to occupy housing that the deceased had the right to occupy and in which the spouse and the child(ren) were living. It also protects usufructuary rights of household goods and animals, and benefit from the harvest of the land. It is important to note that these are not ownership rights.

Article 10 goes on to prohibit any interfering in or depriving of these rights of the spouse/child, establishing that such offences are punishable through a fine and/or imprisonment. This is an important tool in protecting against “property-grabbing” by in-laws and others.

Any person who steals inherited property from the spouse and/or child must return the property and even pay compensation. This sanction is important as it again applies irrespective of any law, including customary law. Thus, in-laws may no longer use the pretext of customary law when laying claim to or actually stealing property from the widow and/or child.

Article 12 further protects the spouse and/or child by allowing the Court to reject the disposition of property made by the deceased up to two years before her/his death, if it can be shown that the intention of such disposition was to deprive the dependant(s) of maintenance.

2.10.3.9 Administration of Estates Amendment
In 1997, the face of Zimbabwean inheritance rights law was drastically changed when the vitally important Administration of Estates Amendment repealed provisions of the prior Administration of Estates Act, which had delegated the distribution of intestate property in accordance with customs and usage of the tribe or people to which the deceased belonged.

509 Ibid., Sect. 3(2)(b)(i).
510 Ibid., Sect. 7(2)(f).
511 Ibid., Sect. 7(3)(c).
512 Ibid., Sect. 7(3)(b).
513 Ibid., Sect. 10(2)(3).
514 Administration of Estates Amendment of Act 6 of 1997.
The 1997 Amendment sought to ensure that the immediate family of a person who dies intestate be better provided for than under the old law. The main aim was to give women in customary law marriages, whether registered or not, the right to inherit from their deceased husband.

The amended Act states that the heir, as stipulated by customary law (normally the firstborn male under patrilineal customary law), should receive the name and/or traditional articles that he would normally receive. However, unless he is a direct beneficiary of the estate (as determined by law), the heir is not automatically entitled to the rest of the property. Rather, the amended Act, addressing civil and customary marriages, sets out a system of devolution unique to Zimbabwe.516

If the deceased was married under civil law,517 the estate is distributed as follows:

- If the deceased died after November 1997, then the surviving spouse is automatically entitled to ownership of the matrimonial home.518 If the deceased died before November 1997 (the date the Act came into force), this automatic entitlement does not apply.
- In addition to the home, the value of the estate is divided by the number of children plus surviving spouse. If the deceased left two children, the estate would be added, the liabilities paid, and the remainder divided by three; the surviving spouse taking a third or 200 000 Zimbabwean dollars, whichever is greater, and the remaining two-thirds going to the children. If the estate is worth 200 000 Zimbabwean dollars or less, the surviving spouse receives the full amount.

WHY SUCH A LAW?

This question was answered in Zimbabwe’s 1998 Report to the CEDAW Committee:519

“After extensive consultation with the general public and interested parties, including NGOs and traditional leaders, it is the view of the Government that the root of the problem which we alluded to in our initial report lies not in the marriage laws but in the inheritance/succession laws when a person who dies intestate was married according to African customary law. In order to remedy this situation the Government has amended the Administration of Estates Act, which governs the administration of deceased persons’ estates. This amendment seeks to provide a method for fair distribution of property when a person who has been married under customary law to one or more wives dies intestate.”

If no children survive the deceased, the surviving spouse takes 500 000 Zimbabwean dollars or half the entire estate, whichever is larger, and the remainder is split between the parents of the deceased and their children.

516 The following explanations of devolution of intestate estates is, in part, adapted from the handbook: Women and Law in Southern Africa (WLSA), A Guide to Inheritance Laws in Zimbabwe (WLSA Research Trust, 2000), created for popular dissemination to educate women and the public at large on the various laws affecting inheritance.
517 Defined as a registered church marriage or what is often called a ‘Chapter 37 Marriage’.
518 The home occupied by the couple.
519 Zimbabwe’s 2nd and 3rd periodic reports to the CEDAW Committee were due on 12 June 1996 and 12 June 2000 respectively; the 4th periodic report is due on 12 June 2004.
If the deceased was married under customary law:

- The Amendment allows for often complicated family arrangements by providing for the making of a ‘Master Plan’ of how the estate is to be administered. This Plan is overseen by the Master of the High Court or the magistrate, who determines whether or not the needs of the family will be met, according to a series of guidelines for the administration of an estate under customary law. For example, in polygamous marriages, the law states that, if possible, each wife should become the owner of the home in which she is living.
- If a number of wives are sharing a home, that arrangement should continue after their spouse’s death, if possible. The first wife receives two-thirds of the first third of the estate’s liquid assets, for she is presumed to have made the biggest contribution to the estate. The remaining wives share equally the remainder of the first third of the estate, and the children of the various marriages share the remaining two-thirds.
- The above applies if the deceased died after 1 November 1997 (the date the Amendment came into force). If the deceased died before 1 November 1997 and was married under customary law, her/his estate is still distributed according to customary law and tradition.
- The amended Act makes it illegal to take the bequeathed land and property from the deceased’s immediate family and/or to stop them occupying and using that land and property. This provision is crucial in combating ‘property-grabbing’ by in-laws.

2.10.3.10 Reality of the law

The difficulties that Zimbabwean women encounter in acquiring land and housing are not confined to the area of inheritance. Issues of property acquisition and ownership plague women throughout their lives. Despite laws to the contrary, women – especially married women – rarely gain access to property of their own.

WLSA Zimbabwe has found several reasons why women do not or cannot claim their rights:

- Lack of resources — women lack time and/or money to bring their cases either to the formal court system or even to the informal dispute-resolution mechanism; heavy workloads keep women too busy to claim their rights;
- Often, fear is also involved: not only do women fear the systems themselves, they also fear ‘venturing out into the unknown’ and the potentially negative consequences that may result from interference by other family members;
- Widows are often accused of having caused their husband’s death — a superstition that does nothing to assuage the fear that ‘avenging spirits’ of the deceased will punish them if they try to ‘gain’ from their husband’s death;
- Access to justice is limited; the patriarchal courts discriminate against women;
- There is a strong culture of silence, mystification and stigmatisation of sexuality and gender-roles (women are coerced into and kept in traditional caring roles);
- There is a huge disparity between the law in books and the law in practice, mainly due to persistent negative attitudes towards women. These are manifest in practices such as polygyny, son preference in education, and payment of lobola (bride price). Such practices keep women in subordinate social positions.

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The Zimbabwean legal system, following the outrageous decision in the Magaya case, is in an identity crisis. On the one hand, the country’s laws do, to some extent, on paper at least, protect women’s rights to housing and land; on the other hand, the patriarchal nature of customary law, often disguised as ‘protection’ of the female, presents a very different face. The Magaya case should be seen as a warning to all women — that all the laws in the world will amount to nothing if they continue to be interpreted by discriminatory men. As one researcher has concluded, the Magaya judgment should “awaken women to realize that our problems are more serious than we realized and the solution goes beyond the legalistic ... it was easy to destroy all those gains through a mere stroke of a pen.” She goes on to point out an interesting aspect of the court’s objection to the Legal Age of Majority Act (reflecting male society as a whole). She notes that very little, if any, objection was made to women obtaining contractual capacity in the spheres of business and commercial matters — the real objections relate to women’s right to marry without parental intervention, and the potential loss of control over the payment of lobola.

2.10.4 The way forward

The Zimbabwean legal system, following the outrageous decision in the Magaya case, is in an identity crisis. On the one hand, the country’s laws do, to some extent, on paper at least, protect women’s rights to housing and land; on the other hand, the patriarchal nature of customary law, often disguised as ‘protection’ of the female, presents a very different face. The Magaya case should be seen as a warning to all women — that all the laws in the world will amount to nothing if they continue to be interpreted by discriminatory men.

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### RIGHTS DENIED: Jenah v. Nyemba

“For African law and custom, property acquired during a marriage becomes the husband’s; property whether acquired by him or his wife. To this rule there are few exceptions.”

The Supreme Court found that the LAMA did not affect women’s right to property, housing or land — it merely allowed women to stand before the Court. It upheld that divorced women in Zimbabwe’s communal areas are not granted rights to their husband’s land or housing. They have limited rights to maintenance from the male heir, and only have informal, but no legal, rights to produce of the trees on the land, trees they themselves cultivated.

### RIGHTS UPHELD: Chinhowa v. Mangwende

“Some of the traditional anchors and obligations of African society have broken down and are being intentionally abused by those who want to derive benefit from the old situation.”

In positive contrast, the Supreme Court upheld a community court decision that daughters are entitled to inheritable property in the absence of sons. A brother of the deceased argued that customary law provides that property can devolve to male heirs only. The Court denied this misinterpretation of customary law, applying the Legal Age of Majority Act (LAMA) to substantive customary law, holding that LAMA changed customary law, giving the daughter standing to inherit. (This case was heard pre-Magaya and should have acted as guidance to that misguided decision.)

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522 Ibid., extract from the final judgment.
524 Ibid., extract from the final judgment.
525 Dr Amy Tsanga, as quoted by Agatha Tsiti Dodo (WLSA Zimbabwe) in her presentation ‘The Experience of Zimbabwe’ given at COHRE workshop ‘Inheritance Rights are Human Rights’, 21-23 Jan. 2004, Johannesburg, South Africa (n. 63 above).
526 As noted in WLSA (n. 486 above), p. 34, n. 19.
Is this the underlying reason — a fear on the part of some key males that male control over women will be lost if they are allowed autonomy in family-related matters? Is it this fear that perpetuates the rift between customary and civil law?

The CEDAW Committee noted that:

... although the national laws guaranteed the equal status of women, the continued existence of and adherence to customary laws perpetuated discrimination against women, particularly in the context of the family. The Committee notes with dissatisfaction that prevailing traditional and socio-cultural attitudes towards women contribute to the perpetuation of negative images of women, which impedes their emancipation.  

There can be no doubt that this fear has as much to do with the continuing discrimination in the legal system as any other reason. Venia Magaya became the unfortunate target of this fear. Judge Muchechetere stated that he sympathised with women’s rights and was only trying to help women by warning them how ineffective the Legal Age of Majority Act is in protecting them. This purported ‘desire to help women’ is very hard to swallow, especially when we consider that his judgment served only to further entrench discrimination against women and the denial of their most basic rights and humanity.

This judge also agreed that international human rights should guide a decision that cannot be made under domestic law. Clearly, he was not heeding his own advice, for his decision was diametrically opposed to the provisions of CEDAW and other international covenants.

In Zimbabwe, housing and land issues re-occur incessantly. Discrimination, gender-based and otherwise, is at the very heart of the land issue, and when this is compounded with the distortion of customary law, it seems inevitable that women will continue to lose out.

The inheritance rights issue pales in comparison to the overall discrimination that Zimbabwe’s women – and, indeed, the majority of the population – encounter in the land and housing sphere. Land continues to be an extremely divisive issue in the country, and there seems to be no viable resolution in sight.

528 Presiding judge in Mogaya v. Mogaya (n. 484 above).
**THE PROBLEMS OF LAND CONTINUE: ZIMBABWE CHANGES LAND LAW**

“Harare – The parliament of Zimbabwe on Wednesday passed a controversial land law that will allow the government to take land more easily from white farmers, the state news agency Ziana reported. Parliament, which is dominated by lawmakers from President Robert Mugabe’s ruling Zanu PF, passed an amendment to the Land Acquisition Act after intense debate. The new law allows the government to acquire white-owned farms after publishing a notice of intention in the Government Gazette, scrapping the old requirement that a preliminary notice of acquisition by the government should be served on the farm owner. The Government Gazette is a weekly publication sold by the government printers. The bill was adopted despite an adverse report from a special parliamentary legal committee. The committee had argued that some sections of the new law violated the constitution.

“The government argues that the law is aimed at helping it to speedily implement land reforms by taking land from whites and giving it to landless blacks. The opposition had argued that acquiring land without taking the trouble to personally locate the landowners would prejudice absentee landlords. But Zanu PF MP and Justice Minister Patrick Chinamasa Tuesday was emphatic that the new law was targeting landlords who had long migrated overseas and whom the government had failed to locate. “No white farmer in Zimbabwe was not aware of the land reform programme and that it was targeting their farms,” Chinamasa was quoted as saying by the news agency. About 4 500 whites used to own a third of the country’s land – 70% of prime farmland – before the government launched a fast-track land reform programme in 2000. Fewer than 400 white farmers now remain in farming in Zimbabwe and own just three percent of the country’s land, according to a government audit of the land reform programme ...”

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**SPECIFIC RECOMMENDATIONS**

1. Section 23(3) of the Constitution, allowing deference to customary law in cases of personal law and family life, should be abolished and the non-discrimination clause enforced in all cases.

2. There is an urgent need for a specialised court to be established to deal expertly with family complexities in the context of intestate succession. Such a Court should replace the current system whereby an overburdened High Court determines the families’ needs and the appropriateness of devolutions in cases of intestate estates.

3. Popular legal education and human rights sensitisation programmes are essential to help the people of Zimbabwe, in particular the rural communities, dispel the myth of women’s inferior status and to stamp out practices that discriminate against them. Women must be encouraged to claim their rights to land, housing and inheritance.

4. Human rights training and gender sensitisation is necessary for Zimbabwe’s judicial, administrative and legislative actors. They should be made aware of how imperative it is that Zimbabwe, in its policy decisions and law-making, should fulfil its international obligations by applying the human rights principles enshrined in the various international conventions that the country has ratified.

5. The Deceased Persons Family Maintenance Act should be amended, entitling the surviving spouse and children to claim full ownership rights over the deceased’s property.

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INHERITANCE AND PROPERTY

OWNERSHIP: IDENTIFYING OBSTACLES AND CHALLENGES
As we have seen in Section 2, different countries and cultural contexts provide women with varying degrees of legal and social protection as regards their inheritance rights. Clearly the question as to why women’s inheritance rights are, in reality, so routinely violated in sub-Saharan Africa is more complicated and difficult to answer than at first may appear.

Obviously, the answer does not lie simply with the law, though the law is undoubtedly an essential element that women must have on their side if they are ever to achieve equality. As in other areas where women are denied substantive equality with men, the obstacles to women’s full enjoyment of their inheritance rights are both legal and non-legal.

This section summarises and addresses the more common obstacles – and challenges still to be met – which, as the COHRE Women and Housing Rights Programme (WHRP) has found, significantly inhibit the realisation of women’s inheritance rights. The challenges presented in this section do not stand alone; they overlap and intersect, complicating and compounding the difficulties in which many women find themselves when seeking to enforce their inheritance rights.

For this reason, strategies to combat the denial of women’s inheritance rights must be integrated, balanced and holistic. The following subsections set forth some of the many ways in which the obstacles and challenges identified here can be overcome.

3.1 LACK OF ADEQUATE LEGAL PROTECTION

Inadequate legal protection ranges from cases where the most blatant gender-based discrimination is sanctioned by law, to cases where the legal obstacles are more difficult to detect at first glance. Women are denied inheritance rights within the context of national law, in flagrant violation of international human rights standards. Women’s inequality before the law is assumed to be justifiable on a number of grounds. Certainly, cultural norms that maintain women’s unequal position vis-à-vis inheritance are frequently put forward as justifications — a rationale we discuss in more detail below.

The ten constitutions surveyed in Section 2 protect the rights of women to equality and non-discrimination — at least on paper. Ghana’s Constitution goes further in specifically protecting the right to equal inheritance, and South Africa’s specifically protects the right to housing and rules out arbitrary evictions. Indeed, almost all constitutions provide for some protection of the right to property and the freedom from arbitrary interferences with that property, irrespective of a person’s sex. Unfortunately, however, it cannot be said of any of these sub-Saharan countries that women are able to fully realise their rights to adequate housing and land, let alone inheritance.

Even though almost all the constitutions surveyed contain guarantees for equality and non-discrimination based on sex and/or gender, discrimination against women continues to be widespread, standard practice in the legal systems of these countries. In many cases, parallel customary and civil legal systems lead to gaping holes in protection, and may leave certain groups of women especially vulnerable to having their inheritance rights violated.

In such dual-track systems, where customary and civil laws co-exist in precarious balance, there is a tendency to regard women’s right to equality as conflicting with the need to uphold the right to cultural autonomy. Often, such systems are anything but parallel — they actually run perpendicular to each other. In Swaziland and Nigeria, for example, a tangle of civil law (in Nigeria, on various State and federal levels) creates confusion and chaos, even in the courts.\(^{531}\)

The deference to cultural norms, which prevails wherever customary and civil law are integrated, often results in women being denied their fundamental rights. The codification of customary law and the leeway given to civil courts in applying – and even interpreting – such law create hybrids of custom and civil law, which usually prove detrimental to women.

In post-apartheid South Africa, for example, ensuring the right to culture is a paramount goal enshrined in the Constitution. However, despite a provision that this right may not result in discrimination, the unintended consequence can sometimes be an implicit acquiescence to gender inequalities and discrimination. In the case of Zimbabwe, civil law takes the back seat, as the courts are free to apply often discriminatory interpretations of customary law. There is similar deference to culture in the Zambian and the Ethiopian constitutions, which allow for the application of customary law in family-related matters. While it is vitally important that the practice of culture and custom be protected, such protection must not allow for, or be used as, an excuse to discriminate in any way against women, nor serve to violate their human rights.

### 3.1.1 Marriage status laws

As we have repeatedly seen in this report, marriage laws severely impact on the ability of women to inherit property from their spouse and achieve their right to adequate housing and land. Often, as in Rwanda, Nigeria and South Africa, the marriage laws fail to recognise certain forms of religious or customary marriage. In Rwanda, the law is explicit in only recognising civil law marriages. While some people advocated for this, stating that women simply must ensure that they are married civilly, they failed to recognise the hurdles that many women must surmount to gain their husband’s or family’s consent to such a marriage.

\(^{531}\) See Subsections 2.4 on Nigeria and 2.8 on Swaziland.
Frequently, those opposed to civil law marriage argue that it is a foreign institution: customary marriages have been taking place for centuries, so all marriages should be according to this tradition. Whereas in countries such as Rwanda one may marry under both customary and civil systems, only civil marriages are actually recognised in law. Having to undergo both ceremonies adds expense, time and trouble, which many couples cannot afford, or for which they simply do not see or understand the need. Registry offices tend to be far away and inaccessible, making registration practically impossible. In Swaziland, for example, the registry office is in the capital city, out of reach of many rural dwellers.

In Zambia, both customary and civil law are recognised; however, one may only enter into one or the other. In very few countries, Swaziland and Senegal among them, are both civil and customary law marriages valid and legally recognised.

Religious rites marriages are not often accepted as being civilly valid either. Even in countries that have attempted to amend their laws to allow the recognition of customary marriages, such as South Africa, the law still fails to recognise marriages under Islamic law.\(^{532}\)

Women in polygamous marriages also suffer the ill effects of non-recognition. In Africa generally, the issue of polygamous marriages is contentious and difficult to address. In most situations, second and third wives are completely excluded from any marriage law: they are considered as being unrecognised according to the requirements of civil law marriage.\(^{533}\) Some marriage law – that in Ghana, for example – does give limited recognition to polygamy. In such cases, however, the laws regulating inheritance fail to address devolution to multiple wives, so the question as to whether the later wives (that is, the second, the third, etc.) may inherit is usually left open and unresolved, which is particularly detrimental to those wives.

Another major problem is that of cohabiting couples — and their numbers will continue to increase with the devastation of HIV/AIDS and growing poverty. There are various reasons why couples often do not get married: they are in a second union, they cannot afford to marry, or they simply do not want to. Even though, for themselves and for the people around them, they may act as if they were married – that is, by living together and sharing the household — the female partner is usually ignored after the death of the male, both by the family and by the law. It is vital that governments begin to address cohabitation and confer protections on each of the partners. Single women too, without spouse or partner, are often discriminated against, in that they are rarely provided for in any inheritance system. This is most probably due to the notion that they will eventually marry, or re-marry, and gain from their future husband. Of course, women who do not marry as expected find themselves in an even more complex situation.

It is thus important that marriage laws should recognise all customary or religious rites marriages as valid and make them subject to civil law. Some argue that this is difficult to achieve, as customary marriages vary widely in the rituals that must be undergone in order for them to be considered valid, even under the customary system itself. Nevertheless, such validity can be conferred in the eyes of civil law by the presence of a witness, or simply by the parties themselves in going to register their marriage. Such a system can and does work, though not perfectly, in Botswana, Ghana and other sub-Saharan countries. Better still is the Senegalese system, which, while encouraging registration, does not require it for the validity of the marriage to be recognised.

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\(^{532}\) COHRE Women & Housing Rights Programme (WHRP) interview with Suraya Williams, Parliamentary Officer with the South African Commission on Gender Equality, Cape Town, South Africa, 4 Aug. 2003. This has changed with the recent judgment of the Constitutional Court, though the same still needs to be properly implemented before the change will be truly realised.

\(^{533}\) The reason why most polygamous marriages are not acceptable under civil law is that they are usually performed under customary law.
In addition, most law in the region inadequately addresses discrimination in law against girl children. Even when inheritance laws allow for the property to pass to children in shares, girls are still effectively discriminated against. In Zambia, the law provides that children should receive shares of their father’s property that are based on their age or educational needs. However, the latter criterion can lead to discriminatory treatment of girls, for the education of girl children is generally regarded as being less important than that of boys.

### 3.1.2 Marital powers

Women’s rights to equality are violated in the granting by law of official marital power or head-of-household status to the male, and thus, power over his spouse and the marital property. Notable in this respect is Botswana, which codifies such power, effectively robbing women who marry of any legal status. There, an 18-year-old single woman has a greater legal status than a 40-year-old married woman. Swaziland has also codified marital power in its marriage act, granting the husband all rights over the joint estate, and power over his wife in civil proceedings. In Senegal and Ethiopia, men are considered the ‘head of household’, with vast powers over property.

The granting of marital power, which in effect strips married women of their inalienable right to self-determination, is a blatant denial of women’s human rights. It is not surprising, then, that there is abundant evidence to show that marital power “goes a long way in perpetuating the disadvantaged position of married women both in their families and society at large.”

It is essential that explicit (and implicit) marital power be abolished, and that laws be examined to ensure that they do not confer ultimate power over marital property on the ‘head of household’, as usually, this has a proportional negative effect on marital power for women.

### 3.1.3 Marital property regimes

An issue closely related to marital powers is that of the choice between marital property regimes. In Botswana, Rwanda, Zimbabwe and Swaziland, for example, laws often allow a choice of different regimes: ‘in community of property’ or ‘out of community of property’; and separate or joint ownership of marital property. Frequently, the choice itself, or at least the consequences thereof, are not made clear to the couple to be married, especially not to the woman, thereby leaving her with little or no actual decision-making power over the kind of regime to be entered into. In South Africa, Ethiopia and other countries, the property regime is assigned according to the kind of marriage one enters into. In Ethiopia, pursuant to the Civil Code, all marriages shall be under a ‘community of property’ regime. WLSA Swaziland points out that in Swaziland, most women “at the time of contracting the marriage, were not aware of the consequences of the very marriage they were entering into, let alone that there were other options available to them.”

While a choice between marital property regimes may seem to be the best solution, education on their details and consequences is badly needed to make the choice and the regimes effective. Also, administrative systems for registration of the marriage regime must ensure that women and men engage equally in the decision-making process, with their full knowledge of the regimes and their consequences.

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535 Ibid.
3.1.4 Land rights

Women in sub-Saharan Africa are rarely, if ever, granted the right to own land in their own name. Land reform in countries such as South Africa and Zimbabwe purports to protect women, though it hardly ever does in practice. South Africa’s Communal Land Rights Bill, which is designed to provide secure tenure to the millions living in the former ‘homelands’, has been passed with provisions which will almost certainly discriminate against women. Land policies in Zambia, Ethiopia, Botswana, Nigeria and Zimbabwe, which purport to protect the land rights of all citizens, especially to rural land, fail to do so for women. In Ethiopia, women are explicitly given the right to realise their land rights; however, the law puts land ownership in the name of the ‘head of household’ — inevitably considered to be the male. Under Zimbabwe’s rural resettlement programmes, ostensibly gender-neutral, 98 percent of all land permits are held by men. Clearly, gender inequity in land runs rampant throughout the entire region.

Land reform and land-titling systems must ensure that women too are granted land titles in their own names. Land reform, traditionally focused on addressing racial discrimination, must also address and remedy gender discrimination: it must redistribute land to women. As one expert has stated, land reform “should be judged by the extent to which it impacts positively and progressively on reducing systematic and structural inequalities along race, gender and class lines.”\textsuperscript{536} [Emphasis added.] Only then will it truly be successful. The Twashuka Village community in Zambia is a tribute to this need; according to one male member of the community:

\textit{The women are the ones who work the land, they should be the ones to own it.\textsuperscript{537}}


\textsuperscript{537} COHRE WHRP interview with Twashuka Village community, Copperbelt, Zambia, 12 Aug. 2003.
3.2 LACK OF RIGHTS AWARENESS

“"It is not enough to put legislation in place: women must be trained and sensitized about their rights and the laws protecting these, in order to allow them to claim and champion their rights."”
— UN High Commission for Refugees, Kigali Office, Rwanda

A devastating factor for women is the widespread lack of awareness and knowledge of their rights. In communities where women have access to information on their legal rights, and the resources to secure these rights, the women are much more empowered to seek a better future for themselves and their families. Laws are extremely complicated, and simplified legal information in plain language is very rarely disseminated. Yet without basic, essential information it is difficult – if not impossible – for women to confront and improve their situation. Key information includes, for example, the benefits of civil unions, of writing a will, and of claiming joint ownership of marital property. Women also need to know how to access available resources and support.

Even where laws addressing inheritance issues are in place, they cannot serve the women they seek to protect if those women are unaware of them. This is particularly evident in Ghana, where the laws governing inheritance are actually quite good, but an overwhelming number of women do not know about them. Of course, this lack of legal knowledge is not unique to Ghana; the COHRE Women and Housing Rights Programme (WHRP) encountered the same problem in all ten countries it surveyed.

Such lack of knowledge is usually most prevalent in rural areas. In Rwanda, for example, whereas many women in the capital, Kigali, have heard of the Succession Law, this knowledge is not widespread in the rural areas. The same is true of Senegal, where in the capital, Dakar, women find it easier to realise their land and housing rights because they know that they have such rights. The situation in rural areas is totally different, and quite appalling.

To be truly effective, however, education on the available laws needs to go much further than imparting knowledge of their mere existence. The ten countries examined run few or no education programmes that actually attempt to inform women on the contents of laws; too often, education is focused merely on informing the general public that a particular law exists. While this is important, it is vital that the next step forward be taken and public education programmes also inform women – and men – on the contents of laws, the rights conferred and the correct process for claiming those rights. So far, this vital work has largely been left to dedicated NGOs and groups working directly in the communities. Governments should start taking their responsibilities in this area far more seriously.

3.3 ACCESS TO JUSTICE

Inheritance rights issues extend far beyond the mere letter of the law. The inaccessibility of courts is a key obstacle to the realisation of women’s inheritance rights. As the organisation Women and Law in Southern Africa (WLSA) has pointed out, while law is an important tool, it is not in and of itself the equivalent of social change.\(^\text{539}\) Rather, women must be encouraged to use the law on their own behalf and to their own benefit, and need support – both legal and moral – in doing so. The phrase ‘lack of adequate legal protection’ refers not only to shortcomings in the law on the books, but also to the inaccessibility of legal remedies and/or the unacceptably low quality of those remedies.

Court procedures are complicated; they take a lot of time and require considerable financial resources — two precious commodities that African women in particular often lack. They are generally too busy taking care of children and sick family members, maintaining the household, seeking and preparing food, doing agricultural work, and trying to earn enough income.

Women’s lack of legal empowerment is a massive obstacle to securing their inheritance rights in sub-Saharan Africa. The COHRE WHRP heard several accounts from women who felt that they were unable to press their claims because they lacked access to the judicial system and did not understand the legal process. Meetings with communities in Zambia’s Copperbelt region revealed that women fear the formal legal system, thinking it too big and complicated to be of use to them. It is hard to trust something that one does not know or understand. Even accessing the Victims’ Support Unit (VSU), established by the Government of Zambia to address issues of family disputes and violence against women,\(^\text{540}\) was not always seen as a real option. Even those who were aware of the VSU did not know how to access it, for it was far away and seemed unresponsive.

This touches upon another huge obstacle highlighted by the COHRE WHRP fact-finding mission: the cost involved in bringing cases to courts. Courts and other authorities are usually located in urban areas, too far away and too expensive to reach. As mentioned above, women are often too busy with their essential day-to-day activities to devote time to pursuing their rights. In addition, spending time on activities that do not generate income means losing income, and many women simply cannot afford to do this. Finally, there is the question of the judgement: once it is given, how will it be enforced? This factor was also cited by many of the women with whom the WHRP spoke. Even if the court rules that the woman is the rightful owner of the property, it may be very difficult to enforce this in practice. While systems such as the VSU in Zambia are designed to follow through in such cases, they are overburdened and often slow to act. One woman at the Polyclinic of Hope in Rwanda told the WHRP about a pending legal case regarding her claim to her home. She had won the claim and was awaiting payment in respect of the house, which had been sold by the defendant, who was dying of AIDS. It seemed as if she would never receive payment.\(^\text{541}\)

Access to legal aid and legal assistance through paralegals or pro bono lawyers is critical for such women. Legal aid is crucial because, very often, women literally lose everything upon the death of their spouse. Not only do they lose their life partner, but often their home and their property too. In economic terms, the stark reality is that such women are in an extremely precarious position by the time they present a claim within the court system.


\(^{540}\) See Subsection 2.9.3.2, ‘Property grabbing’.

If a woman does not even know that the law is on her side, she may feel that there is no hope of changing her situation. Even in cases where a woman is aware of the law, she may not be able to afford to hire legal representation without financial support. If she does not know how to apply the law properly and has no one to guide or assist her in court, the law will most likely not work in her favour. Thus, paralegals or pro bono lawyers are necessary components of the fight for justice.

Accessibility issues, however, extend even further than knowledge of the laws and access to legal and/or financial aid: if women are ever to press their legal claims with a reasonable chance of success, courts must be receptive to women and lend their ears to their concerns. Lawyers and judges must be adequately trained in the application of the law in order to ensure that women’s rights are upheld by the judicial system. As we have seen, in for example South Africa and Zimbabwe, judges and lawyers exercise discretion when it comes to the application of the law, especially in cases where the law is vague or open to interpretation.

If and when women are able to access courts, they often encounter entrenched discrimination. Gender-sensitivity training and awareness raising is often lacking within legal systems, and court personnel may be openly discriminatory towards women. As the Cape Town magistrates interviewed by the COHRE WHRP clearly demonstrated, courts still often regard women as second-class citizens without rights of their own. In countries where marital power is granted to men, married women are not allowed to represent themselves in court. In Swaziland, women are deprived of legal capacity and are never allowed to appear in court without a male representative.

In some cases, courts will insist on dealing only with male heads of households. Clearly, if women are not even allowed to access the court system without a male friend or family member accompanying them, they are placed at an enormous disadvantage. Training judges and lawyers to be more gender-sensitive can be an initiative of either the government or an NGO, or, as in Rwanda, a joint effort between the two.

Administrative procedures, such as those related to deeds registries or estate administrators, are also fraught with discrimination. As we saw in the case of Botswana, even when deeds registries are mandated by law to register land and housing in the name of women, in practice they often fail to do so, opting instead to maintain the status quo, the ‘way it’s always been’. If a woman needs her husband’s consent to be able to register land or housing in her own name, then the law has proved to be utterly ineffective in her case.

Fear, isolation and intimidation are other challenges which must be overcome if women are to effectively fight for their own rights within the legal system. Women who have been widowed and later become victims of property-grabbing have an enormous need for moral support. Women who choose to present their claims of inheritance rights before the courts are often brave pioneers in their communities, and are frequently subjected to gender-based violence as a result. Such women may face social stigma and be ostracised for claiming their inheritance rights. For example, the Rwandan widows who tried to claim their homes became victims of stone-throwing and harassment.

For women seeking justice in the court system, having someone close by to walk with them through the process, both literally and figuratively, can make all the difference as far as the just application of the law is concerned. Women who challenge the denial of their rights, and do so successfully, must be celebrated and shown to the world as an example that infringements of women’s right can and should be opposed.

542 See Subsection 2.7.2.2 (text box “The Arbitrary Role of Magistrates”) on COHRE WHRP interview with magistrates of Cape Town, South Africa.
543 See Subsection 2.1.2.3, ‘Deeds Registry Act, before and after the 1996 Amendment’. For further examples of the administrative obstacles women face in obtaining deeds to land which is rightfully theirs, see Subsection 2.10.3.4 ‘Deeds Registry Act’ [of Zimbabwe], in particular the text box ‘Administrative nightmares’.
544 See Subsection 2.5.1.2, ‘After the genocide’.
Political will is an important element of social change, and an indication of responsible leadership that takes women’s human rights seriously. Unfortunately, in too many cases, political will is altogether lacking, as authorities in power shy away from potential controversies related to upholding women’s human rights. Men, in particular, be they community members, tribal leadership or legislative representatives, may be hesitant to challenge and change a socio-legal structure which effectively benefits their gender status. Why rock the boat, when they themselves risk falling out?

It is also true that many women in positions of leadership are not effective advocates for the rights of women in their country. While it is true that more women in decision-making positions are desperately needed to bring real change to the system, it is a sad reality that, for whatever reason, the number of women parliamentarians is not a measure of how well women’s rights are being respected in a particular country or cultural context. Even in Rwanda, where a majority of the parliamentarians are women, entrenched systems of patriarchy make for slow change.

The apathy and inertia of political leaders in many countries, be it due to corruption, ineptitude, or simply because ‘women’s issues’ are inevitably given low priority in public policy, is a major reason why so many women continue to face an uphill struggle with regard to their inheritance rights. Political authorities excuse their own lack of leadership on a multitude of grounds. Politicians blame the predominant ‘culture’, traditional norms, the lack of resources; in some cases, they even blame women themselves for not fighting hard enough for their rights. Legislative and judicial authorities point the finger at each other, passing the buck for the slow pace of change. It is always someone else who is not doing their job properly; no one will take responsibility, let alone the blame. As a result, women’s concerns all too often fall on deaf ears. In many cases, the COHRE Women and Housing Rights Programme (WHRP) found that national governments in sub-Saharan Africa looked to local structures to promote women’s rights, while local governments looked to the national level. In countries such as Nigeria, with several layers of legislation, this failure to accept responsibility is especially apparent. Progress will only be achieved when every layer takes its own obligations seriously and takes positive action.

The effects of a lack of political will are severe to say the least, especially for women. Policies may be formulated, programmes planned and legislation drafted, but an unwillingness to implement policies, allocate resources to programmes and take a stand on legislation makes such measures meaningless.

Lack of political will is an extremely difficult issue to address, as it often pervades the entire system. It is frustrating, for a few sympathetic advocates in positions of power can make a huge difference on behalf of women’s rights. Ideally, though, we should have more to depend on than just the occasional progressive politician to uphold women’s human rights. Political will must extend beyond the individual and become institutionalised; for example, with the creation of special offices, agencies or ministries which have as their
mission the improvement of women’s lives and the realisation of their rights. However, such specialised agencies cannot be the only solution: ultimately, all political bodies must integrate a gender-focused and gender-sensitive framework – they themselves must become part of the fight for women’s human rights. A department or agency, standing alone, will not suffice to move the often stagnant, and deeply patriarchal, political machinery that runs most of the world’s governments, especially in Africa.

When political will exists, governments and state agencies can play an enormous positive role in protecting and promoting women’s rights, in overturning discriminatory laws, and in challenging gender stereotypes. In any case, civil society and women’s rights organisations have an important role to play in holding governments accountable, and in creating the critical mass necessary to make political change a reality.

3.5 **SOCIAL STIGMA**

Social stigma is another enormous obstacle to the realisation of women’s inheritance rights, and even in cases where the law provides protections, women may be reluctant to claim their rights in a court of law because of the severe social stigma that can result from doing so. Formal adjudication is alien to most traditional African cultures, which generally have their own customary means of resolving disputes. A lone woman going outside the traditional system and presenting her claim within the court system tends to be viewed in a very negative light. She may be regarded as being greedy, disrespectful, or smug. In particular, a woman laying claim to her housing and land rights after the death of her spouse may be accused of being after his money. Often, the widow is even accused of having caused his death in order to seize the property for herself, and may be harassed, physically assaulted and/or left entirely destitute. Many widows have good reason to fear that they and their children will be targeted and harmed if they attempt to claim their inheritance rights, for sadly, as we saw in the case of Rwanda, this often happens. In several sub-Saharan African countries, degrading and even dangerous mourning rites reflect the misconception that widows are generally to blame for the deaths of their husband and must atone for this crime against the community. One community representative told the COHRE WHRP that if widows would only behave themselves “appropriately” after the death of their husbands – that is, by observing an appropriate grieving period – they would not face such difficulties.\(^{545}\)

Traditional beliefs are sometimes used to reinforce this social stigma. Several women testified to the WHRP that they feared that if they challenged their in-laws on questions of inheritance or ‘property-grabbing’ they would be ‘bewitched’. By the intensity of their fear it was clear that bewitchment equals death in the minds of many rural African women. Even a relatively educated woman working as a schoolteacher, herself a widow who supports women’s inheritance rights, acknowledged “yes, it happens” when asked about the practice of bewitchment.\(^{546}\)

Obviously, this fear prevents many women from presenting legal claims, though the WHRP did talk with some brave women who were pressing their claims nonetheless. When asked why they were doing so, these women emphasised that they were willing to confront this fear because they needed to secure their inheritance for their children’s sake.\(^{547}\)

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545 COHRE WHRP meeting with the Mulenga Compound, outside Kitwe, Zambia, 13 Aug. 2003 (in association with Oxfam).
546 Ibid.
547 COHRE WHRP meeting with the Kankoyo community, outside Mufilira, Zambia, 12 Aug. 2003 (in association with Oxfam).
Some community members recognise that women need to be educated about their rights in order to claim them. However, such education must approach women’s empowerment holistically, taking account of the belief systems that the women themselves embrace. For example, in the Mulenga compound, outside Kitwe in Zambia’s Copperbelt region, women told the COHRE WHRP that widows often die a few months after the husband. The women saw this as proof that the widows had been bewitched.\textsuperscript{548} Of course, in many of these rural communities, HIV/AIDS is rapidly spreading. However, when asked whether these widows’ deaths might be connected with the AIDS pandemic, some women confessed that they had never received any education about the disease.

Other women agreed that the symptoms of the ‘bewitchment’ were ‘AIDS-like’. However, these symptoms, rather than being acknowledged as actual AIDS, were regarded as proof that the bewitchers were getting smarter and smarter: for now they could even emulate AIDS symptoms!

Traditional notions of bewitchment may be difficult to understand if one is not from within the culture. However, an appreciation – though not necessarily an acceptance – of this traditional framework is critical to understanding the practical challenges of realising women’s inheritance rights. Spiritual beliefs and practices are fundamental to most African tribal cultures, but it would be quite wrong to assume that these belief systems are static. Traditional beliefs and practices can and do change. In any education around practices and beliefs, it must be realised that the beliefs themselves should not and cannot in any way be condemned; rather the negative effects should be highlighted, in order to stimulate the development of a potentially different expression or interpretation of the beliefs — hopefully, with positive effects.

### 3.6 HARMFUL TRADITIONAL PRACTICES

The Commission on Human Rights ... encourages Governments to support the transformation of customs and traditions that discriminate against women and deny women security of tenure and equal ownership of, access to and control over land and equal rights to own property and to adequate housing, to ensure the right of women to equal treatment in land and agrarian reform, as well as in land resettlement schemes and in ownership of property and in adequate housing, and to take other measures to increase access to land and housing for women living in poverty, particularly female heads of household.\textsuperscript{549}

When women’s human rights are violated in sub-Saharan Africa, customs and traditions are often indicated as being the underlying factors. However, traditional norms are complex and require far more than just simplistic reasoning if they are to be understood.

In some situations, customs and traditions undeniably place women at a disadvantage to men and serve to justify entrenched gender roles and hierarchies. With regard to inheritance, for example, the view has often been expressed that women should not be allowed to inherit property because they themselves are property. This notion is perhaps at its starkest in cases of ‘wife inheritance’, where, after the death of her hus-

\textsuperscript{548} See n. 545 above

band, a widow automatically becomes the wife of her brother-in-law.\textsuperscript{550} It seems that women are viewed as appendages to their male relatives, be it as wives or daughters, but not as individuals deserving of a dignified life in their own right.

A milder interpretation of this practice is that widowed women need to be ‘taken care of’ by their male relatives, and that they should not trouble themselves with the drudgery of administering property. Either way, these ideas ultimately serve to reinforce women’s dependence on men. Nonetheless, we must not forget that such ideas are held not only by men: many women also adhere to traditional gender roles and defend the status quo of gender inequality, for varying reasons. It is often argued that such women have fallen victim to the socialisation of their own subordination.

Matrilineal societies are much vaunted as a progressive arena for women’s rights. As we saw in Ghana, where nearly half of the communities are matrilineal, this is far from the truth. For even in traditional matrilineal societies, women still lack access to and control over property. In practice, land and housing is still transferred to the male relatives — the only difference being that it passes to the children of the deceased husband’s sister; that is, through a female line. However, because these relatives are more distant from the widow than the husband’s own children (the heirs in patrilineal societies), the widow often finds herself at an even greater disadvantage. If her male children were to inherit, she could at least appeal to them to take care of her.\textsuperscript{551}

Just as judges and lawyers may lack gender sensitivity, so may tribal leaders and other traditional authorities act in ways that maintain women’s unequal position within the community, seeking to justify their actions on the basis of tradition. Community leaders interviewed by the COHRE Women and Housing Rights Programme (WHRP) expressed concern that land would be ‘wasted’ on women, and that men are somehow better suited to be caretakers of property. At the same time, these leaders acknowledged that it is most often the women who work the land. They also pointed out that as land is scarce, it would be difficult to divide it between male and female heirs.

Fear is often the common undercurrent. Some men the WHRP spoke with expressed concern that if women were allowed to inherit, their wives might kill them.\textsuperscript{552} Others were worried that they would loose their status as the ‘ruler of the household’, that the women would be in control, and perhaps that they would start to mistreat their husbands and forget their family responsibilities.\textsuperscript{553}

The fact remains that culture and tradition do impose restrictions upon women that severely undermine and violate their rights. Prime examples of this are the widowhood practices, which, as the WHRP learned, are still practised widely throughout sub-Saharan Africa.\textsuperscript{554} Not all widowhood or mourning rituals are physically harmful to women, though many are clearly dehumanising and expose women to considerable health risks. Only rarely are men expected to undergo similar rituals after their wife dies. Two particularly egregious practices that are still fairly common in the region are wife-inheritance (that is, the widow being forced to marry her deceased husband’s brother or father\textsuperscript{555}) and, worse still, widow-cleansing (that is, the widow being

\textsuperscript{550} Although this practice is becoming less common, it still occurs in parts of Swaziland, Zambia, Nigeria and Ethiopia.

\textsuperscript{551} In patrilineal societies, widows may benefit indirectly from their children’s inheritance. In matrilineal societies, the deceased’s nephews and nieces who inherit rarely seek to benefit either the widow or her children.

\textsuperscript{552} See, for example, extract of COHRE WHRP interview with man in Chizwanunji, outside Mozabuka, Zambia, 11 Aug. 2003 (n. 412 above).

\textsuperscript{553} See n. 547 above.

\textsuperscript{554} Women often express a wish to mourn their husbands, and thus often voluntarily subject themselves to harmful mourning rituals. In some communities, however, alternative mourning rituals that are not degrading or harmful to the widow have been incorporated into cultural practice.

\textsuperscript{555} Note that some women do marry their brothers in-law willingly, often thinking (which in some circumstances may be true) that this is the only way they will be able to avoid homelessness.
forced to have sex, often with a paid ‘cleanser’, sometimes a male outcast in the community, who is seen as being somehow able to ‘absorb’ the potentially malevolent spirit of the deceased, for he himself is unclean). However, these practices, particularly widow-cleansing, have been declining recently with the onslaught of HIV/AIDS and increased awareness of how the virus is transmitted.556

SEXUAL CLEANSING

Sexual cleansing is supposed to ‘rid’ the widow of her late husband’s spirit, and once she is ‘sexually cleansed’ (a euphemism for being forced to have sex, often with a male in-law such as the father or a brother of her late spouse), she will be able to remarry. In many cases, this practice proliferates HIV/AIDS, for the husband may well have died of AIDS after infecting his wife with HIV, or the ‘cleanser’ himself may be carrying the virus.

The COHRE WHRP learned that, in many cases, the practice of sexual cleansing of widows is on the decline, mainly due to the spread of HIV/AIDS. Fortunately, in many of the communities visited, particularly those that had received HIV/AIDS awareness education, residents recognised that the practice of sexual cleansing was very oppressive to widows, and many, though not all, claimed that it is no longer practised.

In some communities, widows are merely blessed by a selected person from within the community, and this symbolic ritual is considered sufficient to ‘cleanse’ the widow.557

Despite the apparent decline of sexual cleansing, other cleansing rituals, less life-threatening though similarly offensive, are still commonly forced on widows. These include prolonged isolation, lack of hygiene, and scalp-scraping (still widespread in Swaziland and Nigeria). Widowers, of course, are most often not subjected to such humiliation.

Women are often regarded as having caused the death of the husband. They must therefore atone for his death and be cleansed.558 Thus, the widow is told, she is not entitled to any property the husband left behind, again a pretext for denying a woman her inheritance rights.

556 For example, women of the Chona community in Zambia told the COHRE WHRP that the ritual has changed, and that ‘widow-cleansing’ now merely entails being rubbed with powder and wrapped with cord. While this ritual is still unpleasant, at least it is not life-threatening. (See Subsection 2.9.3.3 on widowhood rituals in Zambia.)

557 This was observed in many communities, including the Chona and Minambe communities in Zambia, and the Thokozani community in South Africa. While this is a positive trend, it does not mean that the practice of enforced sexual cleansing has been eradicated. There is still a long way to go, especially in the more rural and poorly educated communities.

558 During the COHRE workshop on inheritance rights (n. 63 above) many activists testified that this is a problem in their particular cultural contexts. Widows are generally treated with great disdain because they are regarded as having been responsible for their husband’s death. This is sometimes used as a convenient pretext for excluding widows from their rightful inheritance.
The denial of inheritance rights to women results in the descent of millions of women and their families into extreme poverty and is a major cause and consequence of violence against women in Africa.\textsuperscript{559}

Many widows are threatened with or actually undergo violence when they try to claim their inheritance rights. Such violence ranges from harassment, through physical intimidation, to beating and rape, even murder. Widows face some of the most extreme forms of violence, and many of the women interviewed by the COHRE Women and Housing Rights Programme testified that widows are frequently mistreated in the context of inheritance disputes and traditional ‘widow-cleansing’ practices.

Women’s fear of reprisal is not based on fantasy. Women do run concrete risks if they try to assert their rights, and this threat of violence keeps many women from making inheritance claims after the death of a spouse. We were told that in some cases of women seeking to remain in their marital home, clumps of dirt and stones were thrown at the house if they tried to reclaim their property.\textsuperscript{560} In other cases, women were insulted and physically forced off the land.

In many countries, including Nigeria, Senegal, Ethiopia and Zimbabwe, violence against women is almost commonplace and can have a chilling effect on the expression of women’s autonomy. Violence against women ensures that they are kept ‘in their place’, that they do not assert their rights, and that they do not disrupt the system which discriminates against them to the benefit of men. The internalisation of sexist ideologies or the threat of social stigma is often enough to keep women in line.

‘Soft’ methods of socialisation and conformity to gender-roles do work to ensure that women remain subjugated to men for their whole lives. However, in cases where these methods are not enough, when women begin to openly challenge the status quo, they are all too aware of the harsh reality that most probably awaits them. Violence is often the default response that is used to keep women from claiming their rights.

In Zambia, the Victim Support Unit told COHRE that women often seek their assistance after being subjected to physical violence for raising the issue of their rights with in-laws who have ‘grabbed’ their property.\textsuperscript{561}

Violence is a grim reality faced by women throughout the world, and inheritance rights advocates should be acutely aware of this. The psychological dimensions of being threatened with and/or being a victim of violence can have an enormous impact on a woman’s decision as to whether she will press for her rights. The woman’s dilemma is often impossible: on the one hand, she can run the risk of violence by pressing for the recognition of her inheritance rights and the hope of a better future for herself and her children; on the other hand, she can resign herself to the way things are, and face an uncertain future of impoverishment, housing insecurity, and potentially, more violence.\textsuperscript{562}

\textsuperscript{560} COHRE WHRP interview with Kigali Police Commissioner, Rwanda, 17 Aug. 2003.
\textsuperscript{561} COHRE WHRP interview with VSU office, Copperbelt, Zambia, 12 Aug. 2003.
\textsuperscript{562} All this brings us to another aspect of violence against widowed women. Landless and homeless, many widowed women have no alternative but to turn to prostitution as a way to survive and to provide for their children. Of course, women working as prostitutes are at high risk of contracting HIV/AIDS, and are often abused by their ‘clients’.
In order to ensure that women are able to claim their rights without fear of reprisal, they need access to legal and physical protection, and where necessary, to psychological counselling and related health services. Widowed women in particular need access to social services that can protect them from violence and ensure their general well-being. State-supported programmes combating violence against women are vital, as is the provision of legal aid and alternative accommodation for victims.

3.8 POVERTY AND ONGOING VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The grinding poverty in which so many sub-Saharan Africans live undoubtedly aggravates the problem of ‘property-grabbing’. While the social subordination of women is clearly a common factor in the denial of their inheritance rights, it is also true that women in financial poverty are far more susceptible to property-grabbing and maltreatment. For example, YWCA representatives in Kitwe, Zambia, told the COHRE Women and Housing Rights Programme that the current wave of property-grabbing is exacerbated by poverty and the economic depression that has overtaken the Copperbelt in the midst of recent privatisation efforts.563

Even women themselves are divided on key inheritance rights issues, as illustrated by the COHRE WHRP’s discussions with the Minambe community in Zambia’s Copperbelt region, which highlighted a series of ongoing debates within communities. Some women there claimed that their situation with regard to inheritance is now much better than it used to be; others emphasised the current problems, especially that of in-laws ‘grabbing’ property after the death of the husband. There was also major disagreement on how property should be divided between the surviving wife and the husband’s parents. This tension illustrates women’s conflicting interests in inheritance, on the one hand as widows, and on the other hand as parents. As we learned, parents often view male children as economic investments and feel that they have a right to share in the wealth accumulated by their son if he dies.

The traditional key role of sons in the economic well-being of the family is essential to understanding why such conflicts between a widow and her in-laws arise. As we have seen, the husband’s parents often believe that they are entitled to the son’s property if he dies, for they took care of him when he was a child, saw that he was educated, and prepared him for a successful life. A daughter is not viewed as an investment, but is seen as joining another family when she marries, whereas sons are always linked to their parents. As the economic malaise makes it more and more difficult for families to make ends meet, they rely increasingly on sons.

The denial of economic, social and cultural rights is also related to the erosion of traditional norms that used to provide for the well-being of widows. Mass migration to urban centres in search of employment, which occurs in all the countries surveyed, has further eroded traditional communal relationships. Leaders of many communities explained to the COHRE WHRP that in the past, widows were provided for by the community. However, where land is scarce, where families cannot even provide for their own children, and where HIV/AIDS has crippled local economies, communities can no longer take care of their widows.

In many traditional communities, women marry into their husband’s family and community. After the death of the husband, however, the widow may face the prospect of having to return to her original community, even if she has not lived there for decades. Unfortunately, in many communities in countries including Botswana and Nigeria, once a woman has left the natal home to marry, she is no longer considered part of the family, and is rejected if she returns. Many widows end up utterly destitute, vulnerable to violence, and facing a future of terminal hardship.

### 3.9 HIV/AIDS

“Poverty tends to affect women the most, with girls the first to be withdrawn from school and women increasingly marginalised from formal employment. Women’s economic dependence on men in marriage or in less formal commercial sexual relations is thereby increased. Educating and empowering women is strongly linked with effective family planning, improved primary health care and consequently lower rates of HIV transmission.

“Poverty makes HIV/AIDS education difficult because of high levels of illiteracy and poor access to mass media and to health and education services. Poorly educated women are unlikely to be able to protect themselves from infected husbands. They tend to have little health information and little power to control any aspect of sexual relations. Even if they know they are at risk from their husbands, economic necessity may force them to acquiesce in an unsafe sexual relationship.”

Underlying many of the above obstacles but requiring separate investigation is the issue of HIV/AIDS. The pandemic has greatly exacerbated the difficulties that women face with regard to property and inheritance rights; conversely, when women suffer violations of their land, housing and inheritance rights, they become far more exposed to the dangers of HIV/AIDS.

One of the most fundamental effects of HIV/AIDS on women is an exponential growth of the number who are widowed at an early age. The pandemic is especially acute in sub-Saharan Africa: in some countries of the region, close to 40 percent of the population is infected. Every day in Africa, over 6 000 people die of AIDS — far more than from war, famine or disaster. In the ten countries examined for the purpose of this report, a total of over 1.1 million people died of AIDS in 2001 alone. Women are now said to be becoming infected at twice the rate of men, largely due to uneven power relations. An obvious outcome of this devastation is that inheritance is becoming an increasingly important issue.

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Women and girls are particularly susceptible to HIV/AIDS. Economically marginalised, subordinated and discriminated against, they are not only the predominant category of HIV/AIDS victims in Africa, but also the most vulnerable to its consequences. One such consequence is the social stigma attached to HIV/AIDS, which is debilitating for women and particularly so for widows.

As we have seen in several instances in this report, traditional beliefs often play an important role in determining whether women can inherit from their marital or parental estate. Many women do not claim their rightful inheritance because they fear the dangers of being ‘bewitched’ by their in-laws or others claiming the estate. Despite community education programmes on the realities of HIV/AIDS, many African women still refuse to recognise the symptoms as such, choosing instead to regard them as the effects of ‘bewitchment’.  

This denial cannot be blamed solely on a lack of education, for the women in question had been taught about HIV/AIDS. They may lack a proper understanding of how HIV/AIDS is transmitted. Most likely, their traditional beliefs are so deeply ingrained that it is difficult for them to look beyond them, and to realise that HIV/AIDS is often transmitted from husband to wife. Whatever the reason for the denial, HIV/AIDS plays a key role in women hesitating to claim their rightful inheritance.

Furthermore, lack of education on or a misunderstanding of HIV/AIDS fuels distrust of widows whose husbands have died of AIDS-related disease. Often, widows are blamed for the HIV infection and death of their husband, and are subsequently driven from the home by in-laws, who, in their fear and misunderstanding of the disease, feel justified in doing so. If the husband has died of AIDS and the widow is also showing signs of it, her own family may refuse to take her in, both out of fear and due to the attitude that she no longer belongs to the household, having married into and been taken in by her husband’s family. Many HIV-positive women who have been expelled from their marital or parental home have no alternative but to engage in ‘survival sex’ — that is, sex for money, food or other commodities.

As a direct result of HIV/AIDS, widows are often charged with the care of children who are not their own, including children orphaned by AIDS and family members suffering from AIDS-related disease. This additional burden makes it even more essential that there be adequate protection of widows’ inheritance rights. After all, the denial of inheritance rights to women widowed by AIDS, many of whom are suffering from the disease themselves and caring for other victims, may lead not only to the destitution of the widows themselves, but to that of their charges as well.  

567 This was particularly evident when the COHRE WHRP interviewed women of Kankoyo community, near Mufili, Zambia, on 12 Aug. 2003. (See Subsection 2.9.3.4, ‘Bewitchment’.)

3.10 CUSTOMARY LAW, CIVIL LAW AND HUMAN RIGHTS

Human rights are the birthright of every person. If a State dismisses universal human rights on the basis of cultural relativism, then rights would be denied to the persons living under that State’s authority. The denial or abuse of human rights is wrong, regardless of the violator’s culture.569

3.10.1 The tension between customary and civil law: cultural relativism

Inheritance issues are closely associated with concerns about cultural relativism, which are frequently encountered by women’s rights advocates seeking to promote women’s full equality. Advocates who challenge discrimination against women in Africa are liable to be criticised for imposing a ‘Western’ set of values on African traditional cultures. In reality, however, the lines are not that clearly drawn: the actual confrontation is not between Western and African cultural values.

Of course, the West itself has never been a paragon of gender equality and should never pretend to be that. The real schism is between the ideology (which exists in every part of the world) that seeks to justify the subjugation of women, and the opposing ideology (which also exists in every part of the world) that seeks to uphold the fundamental equality and human rights of all people, women and men. The fact that African women and African women’s rights organisations are working to achieve gender equality throughout the continent undercuts the legitimacy of those who use cultural relativistic arguments as a false pretext for justifying discrimination on the basis of a person’s gender.

Indeed, traditional culture may well inform human rights, especially when it comes to the importance of upholding collective rights. Tessa Cousins of the Legal Entity Assessment Project (LEAP), in discussions with the COHRE Women and Housing Rights Programme (WHRP), highlighted the larger conflict between, on the one hand, traditional communities and their communal relationship to land, and, on the other hand, the Western-style legal framework, which tends to individualise property ownership rights.570

This point was reiterated by Likhapa Mbatha of the Centre for Applied Legal Studies (CALS). According to Likhapa, internationally accepted human rights are highly relevant to the overall goal of ensuring that women do not continue to face gender-based discrimination, but the answer does not lie in imposing a Western legal paradigm that only recognises individual property rights. Rather, human rights discourse must engage with the debate in a way that both promotes women’s equality and preserves communal rights to land and property.571

570 COHRE WHRP interview with Tessa Cousins, Legal Entity Assessment Project (LEAP), Pietermaritzburg, South Africa, 8 Aug. 2003.
Significantly, this conflict between customary law advocates and women’s rights advocates is currently being played out in South Africa’s courts. Against the historical backdrop of the Apartheid system, the recognition of tribal leadership and traditional customary law has played an important role in reconciliation. However, women’s rights advocates are quick to point out that the Western colonial law that was imposed in South Africa codified not only the supposed racial superiority of the ‘whites’, but also the gender superiority of men. Whereas South Africa’s legacy of institutionalised racism and racial oppression is infamous throughout the world, its legacy of gender-based subjugation is seriously underexposed. Women’s rights advocates argue that the legacy of Apartheid will only really be erased when not only racial but also gender discrimination are properly addressed and eradicated from the law.\(^{572}\)

The conflict should not necessarily be regarded as one between civil and customary law. Indeed, many African women’s rights advocates support some of the more communal ideals of customary law, pointing out that not all aspects of such law are detrimental to women. Rather, they argue, customary law should be selectively challenged, with the focus on those applications that deny women the realisation of their human rights on the basis of their gender.

### 3.10.2 Customary law and human rights

Throughout the period in which the COHRE WHRP was working on this report, we repeatedly heard that human rights principles should be integrated into customary law without discarding the cultural values that underlie such law. A balance should be struck between achieving human rights for women and maintaining the positive aspects of customary law.

Objective analysis of the two systems suggests that such a balance is feasible and has already been achieved to some extent. Customary law is said to be a reflection of the culture that institutes it. However, the problem with customary law and its present-day applications is that it seems not to reflect the true nature of cultural values.

Some deal with this disparity by distinguishing between an ‘official’, or formal, and an ‘unofficial’, or informal version of customary law. Some maintain that the ‘official’ version, which in many cases has been written down, actually stems from the colonial period. In formulating this customary law, it is said, certain institutions were manipulated, both by tribal leaders and by the colonial powers, in order to gain advantages over the masses. In contrast, the ‘unofficial’ or ‘living’ customary law is a flexible version that is applied daily and lived out in villages and communities throughout Africa.\(^{573}\)

\(^{572}\) COHRE WHRP interview with Sizani Ngubane, Women’s Rural Movement (AFRA), 7 Aug. 2003.

Indeed, evidence of a distinction between ‘official’ and ‘unofficial’ customary law is found in many instances in this report. Take, for example, the magistrates we interviewed in Cape Town, who applied customary law in a way that was rigidly discriminatory to women. The magistrates stated that the application as such could never change, for customary law was ancient and thus unwavering. Their decisions, evidently, were based on the writings of famous scholars of customary law. Interestingly, though, member of the communities where such law was allegedly practiced did not concur with the magistrates, stating instead that customary laws are constantly changing with the times.

As WLSA Swaziland has observed:

*Customary law as declared by the general law courts must, however, be viewed with suspicion. If the nature of customary law is changing and flexible, regimenting it into a series of fixed rules, as proclaimed by the general law courts, changes its very nature.*

As we have seen, the existence of an ‘official’ version of customary law can be traced back to the colonial era. If we consider the situation in colonial South Africa, which can be assumed to have been fairly representative of the situation in many other parts of Africa at that time, it is clear that colonial authorities and indigenous elites manipulated cultural norms, sometimes unwittingly, often to satisfy their own needs. The colonial authorities knew that they would not gain the power they desired merely by substituting English or Dutch law for African indigenous law, which they found to be complex and deeply entrenched. Instead, they found ways to use the indigenous system to their own advantage.

Knowing that traditional leaders wielded enormous authority over the everyday lives of Africans, the colonials made them a part of their master plan to gain power over the indigenous population.

*The eventual effect of colonial state support for the chiefs was to undermine their prestige and to subvert the basis of the traditional order. Before colonisation, most chiefs had governed in part, at least, with the consent of their people. This check on any abuse of power was removed when the chiefs’ positions came to depend instead on government subventions.*

The long period of subtle, manipulative, colonialist interference with the indigenous system, coupled with the desire to impose at least some sort of fixed ‘law’ on the indigenous people, caused customary law to stagnate. Attempts to codify customary law by the colonialists were made with the help of those with power over the communities — the tribal leaders.

*Colonial governors looked to customs and practices, to oral histories, and especially to tribal leaders, to establish baselines of expectation of traditional rules. Generally, these cultural investigators were male members of white patriarchal societies. They interviewed men to determine customs or traditions almost exclusively; almost as equally, and without exception, they would defer to or assign power to the men and male authorities within the tribal structures.*

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574 WLSA (n. 380 above), p. 25.
Such stagnation of law was not dealt with by the later government, due to an overall non-interventionist policy and the disenfranchisement of the indigenous people.

*By the mid twentieth century, it was obvious that the African family was not what it had been at the time of colonial conquest, and that legal reforms were urgently needed to ameliorate the position of women and children. Yet the courts, and at least until 1985, the legislative, clung to their policy of non-intervention...*

The position of African women became fossilised in this stagnant body of law, ultimately cloaked in the guise of culture. A fact not reflected in this body of law was that, in some societies, women had attained high status and authority — an authority that was not accorded to them under customary law as codified by the colonisers. Thus, in recording and codifying unequal concepts of customary law, the colonisers to some extent stripped indigenous law and oral traditions of their inherently flexible and reactive nature, and thereby set in stone the concept of women’s inferior position in customary cultures. This effect is still being felt today, to the great detriment of women.

In sharp contrast to this staunch approach is the day-to-day application of customary law in villages and communities throughout Africa. The COHRE WHRP interviewed members of several traditional communities that have adapted their customs and traditions to the realities of the day. Sometimes, this kind of change was driven by the necessity of addressing such harsh realities as HIV/AIDS; sometimes, there was genuine recognition that women are indeed equal with men and that there is no reason to perpetuate discrimination against them. The notion of gender equality was not seen to be inconsistent with cultural values and norms — on the contrary.

Perhaps most indicative of the living nature of customary law was the assertion by amaHlubi residents in South Africa that their cultural traditions uphold women’s equality rights, and that other communities who do not accept that are interpreting their culture incorrectly.

This is not to say that all communities practise such ‘enlightened’ versions of customary law. As this report shows, many customs still practised in various parts of sub-Saharan Africa perpetuate severely unequal treatment of women. However, learning from the amaHlubi and others helped us to understand that cultural identities are neither static nor uniform, and that it is not appropriate to regard traditional culture as being always at odds with women’s equality — there really can be ‘living’ customary law.

"Culture is not some static body of practices handed down intact over the generations but is changing, contested, and practised differently at different times by different people in different places. This is why generations of elders have consistently complained about the manners and mores of the younger generation."
Traditional culture is not the automatic enemy of women. There are some very positive aspects of traditional African culture that deserve to be celebrated and emphasised, including the emphasis on participation and communal life — concepts that truly reflect the basis of human rights.

Indeed, traditional culture may well inform human rights, and vice versa. If traditional culture truly embodied protection of human dignity and equality,

...then human rights, by definition, would be compatible, posing no threat to the traditional culture. As such, the traditional culture can absorb and apply human rights, and the governing State should be in a better position not only to ratify, but to effectively and fully implement, the international standards. 582

Human rights can and should be integrated into customary law, for:

[...]traditional culture is not a substitute for human rights; it is a cultural context in which human rights must be established, integrated, promoted and protected. Human rights must be approached in a way that is meaningful and relevant in diverse cultural contexts. 583

Customary law and human rights, rather than being mutually exclusive, can and should complement each other. Good examples of this are found in the cases of Bhe in South Africa and Mojekwu in Nigeria. In Bhe, although the Court found that the legal recognition and application of customary law was not in accordance with the Constitution, it still upheld the sanctity of informal traditions and culture:

This does not mean that there may not be instances where differentiation on gender lines may not be justified for purposes of certain rituals. As long as this does not amount to disinherison [sic] or prejudice to any female descendant. 584

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582 Ayton-Shenker (n. 569 above).
583 Ibid.
584 Bhe & Others v. Magistrate, Khayelitsha & Others [2003] (n. 364 above), extract from decision by Justice Ngewnya.
In *Mojekwu*, the Court ruled that the *nrachi* tradition was unconstitutional and violated anti-discrimination laws, yet did not deny the importance of traditions. Both courts were applying human rights standards of equality and non-discrimination, without discarding culture.

It is in this sense that human rights and cultural norms can be harmonised. The values which can be – and are – reflected in the ‘living’ system of customary law, promoting dignity, security and equality for all, already comply with human rights. Those customary laws and practices which do not promote such rights must be brought into line with the core tenets of human rights, informed by positive traditional cultural values.

Rather than limit human rights to suit a given culture, why not draw on traditional cultural values to reinforce the application and relevance of universal human rights? There is an increased need to emphasize the common, core values shared by all cultures: the value of life, social order and protection from arbitrary rule. These basic values are embodied in human rights.

In addressing traditional norms, then, a holistic approach is clearly essential. Human rights advocates need to know that all cultures have negative and positive attributes. We should not accept narrow interpretations of culture which insist that women’s inferior position is somehow justified. We must work together to uphold cultural identity and diversity, while at the same time upholding the essential human dignity of all women, and of all men, on the basis of equality.

Governments must not use arguments of culture as an excuse for allowing discriminatory customs and traditions to continue. Culture can and does co-exist in harmony with human rights.

Traditional cultures should be ... recognized as partners to promote greater respect for and observance of human rights. Drawing on compatible practices and common values from traditional cultures would enhance and advance human rights promotion and protection. This approach not only encourages greater tolerance, mutual respect and understanding, but also fosters more effective international cooperation for human rights.

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586 Ayton-Shenker (n. 569 above).
587 Ibid.
WORKING TOGETHER TO
MAKE A CHANGE
The scale and scope of violations of women’s inheritance rights in sub-Saharan Africa are daunting, and may seem overwhelming. It is clear, though, that what women ultimately require to overcome the legal and non-legal obstacles to realisation of their inheritance rights are multi-pronged and creative solutions and strategies. The good news is that change, while slow, is happening — mainly due to the tremendous efforts of women’s advocacy groups throughout sub-Saharan Africa.

Various organisations have developed a range of effective strategies aimed at challenging discriminatory attitudes and, ultimately, at changing discriminatory practices. These strategies target various groups, from high-level political decision-makers, through traditional community leaders, to women living in remote rural areas. Although these strategies employ a variety of methods, including training, advocacy work and capacity-building, all have the same objective: to improve women’s access to and realisation of their rights to housing, land and, ultimately, inheritance.

While by no means comprehensive, this section highlights some key strategies that have already been developed by women’s organisations in sub-Saharan Africa. The COHRE Women and Housing Rights Programme (WHRP) hopes that other concerned actors may learn from and adapt these strategies with a view to further developing their own work to secure and protect equal inheritance rights for all women in the region.

4.1 KNOW YOUR RIGHTS

Many women’s rights advocacy groups in Africa have undertaken the very challenging work of sensitising communities to the importance of women’s human rights and, in particular, women’s inheritance rights. Training and education can have several aims, and can be directed at different audiences, be they politicians and other authorities, community leaders, communities, or individual men and women.

Women for Change (WFC), a non-governmental organisation based in Lusaka, Zambia, is committed to working with and empowering remote rural communities, and especially women. They use popular education methodologies and advocacy in working towards the eradication of all forms of poverty.

The principle objective of WFC is to contribute to the creation of sustainable economic and social systems that are controlled by rural communities and that respond to their needs. Awareness-raising and analysis involves working directly with women as entry points into the community, whereby women themselves are empowered to identify their own issues and concerns, and to analyse causes and effects. This is done in a number of ways, including role-plays, songs, drama and participatory training sessions that help to illustrate why discrimination against women is wrong and how it impacts negatively upon women and the community as a whole.

This kind of direct community involvement is only one strategy utilised by Women for Change. In many rural Zambian communities, traditional leaders are regarded as the custodians of culture and development. Recognising the cultural context in which they are working, WFC has embarked on a training programme for all the traditional leaders in Zambia. Specific training for human rights promotion emphasises areas including women and children’s rights, land, and poverty eradication. In the category of poverty eradication, five basic rights have been identified, and these are the focus areas for WFC advocacy work: food security, provision of clean water, shelter, health services and basic education — all aspects of the human right to adequate housing. This human-rights-based approach enables WFC to address the ways in which women’s empowerment can
impact upon poverty and underdevelopment issues. This is a message that clearly resonates in rural Zambia. Indeed, WFC has noted that most of the cultural practices that have negative effects on women, such as sexual cleansing, early marriages, polygamous marriages, wife inheritance, domestic violence and ‘property-grabbing’, have declined in its areas of operation. The Law and Development Association (LADA), also based in Zambia’s southern region, facilitates human rights education through awareness-raising among rural communities. Such education programmes are intended to assist both women and men to participate actively in their own development and that of their families, communities and society at large. In particular, the focus on the direct empowerment of rural women is important in changing the traditional beliefs that often go unchallenged within communities at grassroots level.

Reaching individual communities at the grassroots level helps to change discriminatory norms and values, which are too often used to justify women’s disadvantaged position within society. LADA travels to the remotest rural villages, often conducting week-long human rights training sessions for as many as one thousand persons. LADA also works hard to train rural women and men as paralegals, who then assist the communities in family-dispute mediation. The paralegals are trained to give legal advice when mediation cannot solve the problem, and, if necessary, they can assist with filing claims in court. LADA’s commitment to enabling community women to develop their own solutions to their problems is an empowering strategy that values women’s unique contributions to and perspectives on their communities. The COHRE WHRP, in its discussions with various communities with whom LADA has worked, found great understanding of human rights issues and, importantly, an acknowledgement of women’s equality.

The Development Cooperative (DECOP), which is active in Zambia’s Copperbelt, provides similar human rights training and education for impoverished communities adversely affected by the collapse and privatisation of the copper-mining sector. Through awareness-raising on human rights and equality, women in DECOP-assisted communities have made great strides. In one such community, two-thirds of all leases on newly acquired land are to be issued in the name of women.

The Women’s Aid Collective (WACOL) of Nigeria seeks to mobilise women and men around issues of gender, democracy and good governance. WACOL makes creative use of popular media such as radio and television to spread the message of gender equality throughout Nigeria. It also produces popular materials such as easy-to-read pamphlets, posters and booklets on various gender-related issues, especially violence against women, denial of women’s inheritance, and female genital manipulation (FGM). These materials are widely disseminated for use in training programmes and everyday discussions. In addition, WACOL conducts group-sensitisation and training targeted at judges and police officers, in order to build awareness of gender issues and to promote the enforcement of women’s rights. Furthermore, WACOL functions as a direct service provider to women, offering free legal aid and a shelter for female victims of violence. The Emang Basadi Association (EBA), Botswana’s longest-standing women’s association, employs similar strategies in its work to further the principles of equality, justice and peace. The EBA identifies problems related to discrimination against women and works to increase awareness of such problems within the broader society. It also develops action-orientated strategies and mobilises women to strengthen their social, political, economic and
legal position, and to achieve greater recognition of the important role women play in national development. The EBA has successfully implemented educational programmes designed to raise the profile of women's inheritance rights issues, and to sensitise communities to the importance of gender equality.

Training and education programmes and strategies provide a vital link to those women who are most susceptible to gender-based discrimination and the denial of inheritance rights. As so many women's human rights activists stress, laws and standards on paper are practically meaningless if women do not know their rights and lack the capacity to enforce them. Empowerment and sensitisation at the individual level also serves to build new communities of women working together to improve their lives and claim their rights. The power of such communities should not be underestimated. With the right support, women can effectively fight systems of entrenched discrimination.

Such training and sensitisation programmes often have as a fundamental objective the changing of attitudes. After all, if one cannot change the attitude that women should be discriminated against simply because they are women, little progress is possible. With this in mind, training and educational programmes should target key constituencies, including political and traditional leaders, judicial and law-enforcement authorities, and, even more broadly, all men, with a view to changing attitudes, perspectives, and, ultimately, societies.

4.2 CLAIM YOUR RIGHTS: CREATIVE METHODS THROUGH CAPACITY-BUILDING

Mere knowledge of one's rights is not enough — systems must be put in place through which women can actually claim their rights. One of the most formidable obstacles to this is economic deprivation, so many women's organisations work hard to ensure that women can build their capacity and obtain the resources necessary to claim their rights.

The Rwanda Women's Network (RWN) empowers women to claim their rights at all levels. In the aftermath of the genocide, women's economic marginalisation was a stark reality, as many widows were illiterate and lacked marketable skills. Economic empowerment is necessary if women are to attain a sense of security, which is a key to the healing process. The RWN recognises that women have specific basic needs for their sustenance and health management, and works to improve women's access to financial credit, in order that they may develop income-generating activities. The RWN also works on shelter construction and housing rehabilitation, training in business and management skills, and organisational capacity-building for women in their enterprises.

In addition to this individual rehabilitation, the RWN assists widows in seeking legal recourse when denied their rights to work or own property. The RWN believes that women, with awareness of their rights and a full understanding of the country's marriage and inheritance laws, will not only be able to protect themselves, but will also demand full inclusion in all aspects of daily life. With knowledge of human and legal rights, women can work together to achieve a more just and egalitarian society.
Giving women an opportunity to discuss the atrocities of the genocide is playing a vital role in the recovery and reconciliation process. The Association of Genocide Widows (AVEGA) creates a space for women to talk about the pain and trauma of the genocide, and assists them co-operatively through income-generation, legal and social support. AVEGA also provides healthcare services to genocide victims, many of whom are HIV-positive, as well as capacity-building programmes whereby micro-credits and other funds are used to build better homes for widows still living in inadequate shelters.

In Senegal, the African Network for Integrated Development (RADI), focuses on legal aid and assistance, coupled with economic empowerment and assistance. Through a team of paralegals and the operation of a mobile clinic, RADI is able to provide legal advice and mediation to the remoter areas, assisting women who would otherwise have no access to any form of justice. Through a ‘revolving credit’ fund, they are able to provide small loans for subsistence needs, and larger loans for economic projects and activities.

4.3 ADVOCACY AT NATIONAL LEVEL

Advocacy work can also attempt to address structural rather than individual issues, including legal reform and policy change. For example, Women and Law in Southern Africa (WLSA), a regional women’s rights advocacy organisation, contributes to the socio-economic, political and legal advancement of women in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe. The focal points of WLSA’s work include: (a) collaborative strategic and action research in the socio-legal field; and (b) lobbying for legal reforms and policy changes on laws and practices which discriminate against and disadvantage women. WLSA’s programme areas include:

- Information dissemination and documentation;
- Action research;
- Legal advice and services;
- Lobbying and advocacy for policy change and legal reform;
- Networking;
- Training and education on women’s rights as human rights.

WLSA’s combined strategy of research and targeted advocacy has proven to be a powerful tool in highlighting the fact that gender-based discrimination is widespread in Southern Africa and has far-reaching detrimental consequences. Armed with this kind of information, WLSA has placed itself in a strong position to argue for social and political change, and has developed well-informed advocacy strategies and guidelines. Pressuring governments to adopt more gender-aware and gender-sensitive policies and legislation in matters related to housing, land, property and inheritance is an invaluable tactic. Women’s rights advocates must engage in this kind of political work if they are to bring about broad political change in the region. As WLSA has shown, governments should be encouraged to measure their national legislation against internationally established human rights norms and to use international human rights law in developing new legislation.

The International Federation of Women’s Lawyers (FIDA) provides legal advocacy at the national, regional and, often, international levels. FIDA was founded in Mexico in 1968 by a small group of women lawyers and has since grown into an international network. Yet it has not lost focus on the local areas where its numerous branches operate. FIDA’s offices around Africa are staffed by experts on the situation of women in the conti-
nent, and have thus gained credibility, while still wielding the full pressuring power of the worldwide network. FIDA Ghana runs a large legal aid clinic, which combines counselling, alternative dispute-resolution, and court representation in matters ranging from child maintenance to marital difficulties and violence against women.

Legal reform at the national level can also be fought out within the courts, and this is the tactic adopted by the Women’ Legal Centre (WLC), based in Cape Town, South Africa. The WLC is a non-profit law centre established by a group of women lawyers with the aim of advancing women’s rights through constitutional litigation and advocacy work on gender issues. The WLC has successfully litigated for inheritance rights for women and girls. To achieve its objectives, the WLC has adopted several effective legal strategies, including litigating cases that advance women’s rights and are in the public interest, particularly constitutional cases, and producing briefs to assist courts in constitutional cases related to women’s rights and gender equality.

In addition, where resources permit, the WLC provides other women’s organisations with technical legal assistance in making submissions to parliament and other institutions. The WLC also provides programmes for paralegals and women lawyers who wish to conduct constitutional litigation in relation to gender issues. This specialised legal training helps to capacitate key advocates in their work to uphold women’s equality rights.

The Ethiopian Women Lawyers Association (EWLA), an independent women’s organisation, also works to defend women’s rights through legal channels, by providing legal services to female victims of discrimination and abuse; in particular, poor women who could not otherwise afford legal representation. EWLA raises gender awareness by providing training on women’s human rights. It has advocated a revision of gender-insensitive articles in Ethiopian law, a major success being the revision of the Civil Code, which led to the adoption of a new Family Law by the Ethiopian parliament.

The Rural Women’s Movement (RWM) in KwaZulu-Natal Province, South Africa, has engaged in creative advocacy to ensure that, for the first time, the voice of the province’s poor rural women is heard. In particular, the RWM worked on issues related to the Communal Land Rights Bill, which has direct consequences for local women. The RWM held a series of consultative workshops, inviting hundreds of rural community women to voice their issues and concerns, and to make suggestions for input into the Bill. When the Bill was being heard in parliament, the RWM organised smaller groups of community women, who travelled to the capital to directly intervene on behalf of their friends and neighbours. This method was very effective in ensuring that rural women’s voices were indeed heard at the highest level.
4.4 STRATEGIES FOR LOCAL USE OF HUMAN RIGHTS

International human rights standards can and should be invoked within national courts systems to strengthen arguments that women have a right – a human right – to non-discrimination and thus to equal inheritance. When a government is involved in court proceedings, it should promote interpretations of domestic law that are fully in accordance with the State’s international human rights obligations. International law requires that domestic decision-makers reject any interpretation of domestic law that would place the State in breach of its international human rights obligations.

General Comment No. 9\(^{588}\) of the UN Committee on Economic, Social and Cultural Rights (CESCR) offers important guidance on the application in national courts of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This General Comment argues that remedies do not necessarily have to be judicial in nature; administrative remedies, for example, can also be effective. However, in order to make a Covenant right fully effective, it is sometimes essential that the judiciary be involved. The General Comment states that all Covenant rights, in most legal systems, are to some extent justiciable (in other words, that matters related to such rights can be decided by the courts).

The newly adopted General Recommendation No. 25\(^{589}\) of the UN Committee on the Elimination of Discrimination Against Women, the body that monitors State Party compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), also provides important guidelines on achieving de facto or substantive equality for women. It recommends that States implement temporary special measures to accelerate the realisation of substantive equality for women. These may be in the form of legislation, policies or decrees and may include agreements with the private sector. States must provide adequate explanation as to why they fail to implement feasible and effective special measures. This General Recommendation is a vital tool in advocating that States take positive action to address inheritance rights inequities. It may be used to call upon States to implement not only special legislation or policies to protect women’s inheritance rights (such as automatic joint titling, and surviving spouse protection acts), but also education and awareness-raising programmes that focus on the negative consequences of the denial of women’s inheritance rights.

Advocates can help to bring a country’s international human rights obligations to the attention of the broader society, especially women’s rights organisations, the media, and lawyers working within the courts system to protect and enforce women’s rights to housing, land, property and inheritance. In any legal initiatives aimed at securing these rights at the local level, lawyers and advocates should be encouraged to refer to international treaties, general comments/recommendations and resolutions. Similarly, legal cases relating to these women’s rights should invoke international human rights standards and obligations to protect women’s equality rights at the national level.

\(^{588}\) Contained in document E/1999/22.

Advocates should hold governments accountable to their legal obligations to respect, protect, promote and fulfill the right to housing for all, and related rights such as equality and protection against discrimination. International strategies may serve to strengthen and amplify other strategies focused more on the national or local levels. For this reason, African women’s advocacy organisations should be encouraged to participate in international legal bodies such as UN treaty-monitoring bodies (for example, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the Human Rights Committee). By using the available mechanisms established by the UN to monitor State Party compliance with treaties, these groups can ensure that the treaty-monitoring bodies receive full information, gathered independently and not just by government agencies, on whether women’s inheritance rights are being protected by the State Parties in question.

For example, a very important opportunity for housing rights action is provided by the state-reporting process under the International Covenant on Economic, Social and Cultural Rights (ICESCR). All State Parties to the ICESCR have to present periodic reports, conforming to set guidelines, to the UN Committee on Economic Social and Cultural Rights (CESCR). The CESCR is charged with monitoring State Party compliance with the Covenant. This reporting process gives women’s rights organisations at the national or local levels an ideal opportunity to engage in advocacy work at the international level. Compelling information provided by civil society organisations can succeed in convincing a UN treaty-monitoring body to place pressure on a State Party to comply with its international human rights obligations; in particular, the obligation to protect women’s inheritance rights.

The CESCR monitors treatment of poor and other disadvantaged groups and assesses whether Governments are meeting their obligations. The CESCR does this by:

- Receiving and reviewing reports from governments every five years;
- Receiving and reviewing parallel or shadow reports from NGOs;
- Requesting further information and clarification of particular issues that may constitute violations of rights contained in the ICESCR;
- Conducting oral hearings, where it questions representatives of State Parties about laws and policies related to economic, social and cultural rights;
- Listening to oral submissions from NGOs;
- Assessing all the information it has received throughout the review process;
- Writing reports, known as Concluding Observations, that evaluate each State Party’s performance based on this information.

These Concluding Observations, published by the CESCR, may include very useful information, such as:

- A finding that a government has violated the ICESCR;
- A statement urging that a government adopt new legislation; for example, legislation that nullifies the application of discriminatory customary law;
- A statement urging the repeal of legislation, such as a law that upholds the application of discriminatory provisions;
- An appeal to a government to implement existing laws; for example, laws that would provide women with legal aid in cases of gender-based discrimination;
• A statement encouraging a government to heed input from civil society when taking a decision with a bearing on economic, social and cultural rights;
• A recommendation that a government provide specific services, policies or institutions; for example, that the government in question should ensure that female victims of ‘property-grabbing’ have access to legal recourse.

In general, the Committee accepts written materials from NGOs at any time. However, for written materials to be most effective, they should take the form of an alternative or shadow report submitted in reply or subsequent to the report submitted by the government in question. However, the Committee Secretariat does maintain a ‘country file’ on every State Party to the Covenant. You may submit any information you consider relevant to your country’s compliance with the Covenant at any time, and request that this be included in the country file of your country.\textsuperscript{590}

Similar reporting procedures exist with the Human Rights Committee\textsuperscript{591} and the Committee on the Elimination of Discrimination Against Women.\textsuperscript{592} Such procedures are effective, in that they recommend action for change.

For example, the CEDAW, in its consideration of Zambia’s State Party Reports, stated in its Concluding Observations on Zambia (2002) that:

\begin{quote}
228. The Committee commends the efforts made by the State party to review existing laws that discriminate against women. It also notes the enactment of the Marriage Act and the Intestate Succession Act, which provide protection for women in marriage and inheritance.

... Principal areas of concern and recommendations

230. The Committee expresses concern at the contradictory provisions contained in the Constitution whereby article 11 guarantees the equal status of women and article 23 (4) permits discriminatory laws to exist in the area of personal law, namely: revenue allocation, adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law and customary law with respect to any matter.

231. The Committee urges the State party to repeal article 23 (4) of the Constitution, which permits discrimination in the area of law that most affects women.\textsuperscript{593}
\end{quote}

It should be noted that even if the CESCR issues helpful language in the form of a concluding observation or urgent letter, it is unlikely that a government will implement the CESCR’s recommendations without follow-up actions by women’s advocacy groups. However, many Governments take their human rights obligations seriously, and the CESCR’s activities may open up new opportunities for advocates to convince policy-makers and judges, attract media attention and change public opinion. By using international human rights treaties in the struggle to promote, protect and enforce women’s housing rights, advocates can become part of a broader community striving for common objectives. This, in turn, can lead to greater access to resources and a sharing of similar experiences.

\textsuperscript{590} For more information on the reporting procedures, see http://www.unhchr.ch/html/menu2/6/cescr.htm, or call the UN Office of the High Commissioner for Human Rights, Geneva, Switzerland, on +41.22.917.9000.
\textsuperscript{591} For further information, see http://www.unhchr.ch/html/menu2/6/hrc.htm, or call the UN Office of the High Commissioner for Human Rights, Geneva, Switzerland, on +41.22.917.9000.
\textsuperscript{592} See n. 591 above.
\textsuperscript{593} Concluding observations of the UN Committee on the Elimination of All Forms of Discrimination Against Women: Zambia. A/57/38 (Part II), 8 October 2002 (emphasis in original).
Finally, the African Commission on Human and People’s Rights recently created the African Court of Human Rights. In addition, the Optional Protocol on the Rights of Women in Africa has been adopted and is awaiting ratification. Once ratified, this will provide women in Africa with an important tool. Both the Commission and the Court can hear cases of human rights violations. Their decisions are binding, though only the Court’s will be enforceable. The WHRP welcomes these new tools for enforcing women’s rights.

4.6 WORKING TOGETHER ACROSS BORDERS

There is strength in numbers. Women’s groups in Africa are working together across national borders to meet the challenges they share and to overcome the common obstacles to full realisation of women’s inheritance rights. In late January 2004, COHRE convened a regional workshop on women’s inheritance rights in Johannesburg, South Africa, bringing together leading women’s rights organisations from various parts of sub-Saharan Africa. At the workshop, advocates worked to identify common obstacles and share strategies and experiences. The workshop provided a mutual, cross-border basis for the development of the Network for Inheritance Rights of Women in Africa (NIRWA). This new regional network is to focus on cooperative short-term and long-term actions, with the ultimate aim of realising women’s human rights to adequate housing, land and inheritance.594

It is crucial for women’s rights advocates to work together and draw upon each other’s experiences and strengths. As we have seen throughout this report, many of the obstacles to the realisation of women’s inheritance rights in sub-Saharan Africa are not confined to one particular country or situation. Rather, the political, legal and cultural underpinnings of the denial of these and other women’s human rights are universal in the region. Women’s groups in sub-Saharan Africa have already developed an impressive set of resources, arguments, tactics and strategies with which to fight for women’s inheritance rights. These groups need to share these resources with all other groups in the region, in the continent and, indeed, throughout the world that are working on similar issues. All the women’s advocacy groups with whom the COHRE WHRP conferred have at least two things in common: they are doing impressive work, but they are under-supported. To make real progress, women’s groups must not only work together but also support each other.

Therefore, we sincerely hope that the Network for Inheritance Rights of Women in Africa (NIRWA), born in Johannesburg, will continue to grow and gather strength as this important work develops in the future. For more information on the Network, or to get involved, please e-mail: women@cohre.org

594 For details of the organisations that are primary members of the Network, see Annex B.
CONCLUSIONS AND RECOMMENDATIONS
Women's right to inheritance is a vital and very concrete issue to address. It can serve as a portal to the broader issues of women's housing and land rights, and also as an indicator of women's overall status in culture and society. This report, in reviewing the legislative framework for women's inheritance rights in ten sub-Saharan African countries, has provided an important overview of the local legal tools that already exist, those that need reforming, and those that are lacking and must be put in place. Our overview of customary law and traditions in those ten countries has given graphic insight into the often stark reality of the lives of vast numbers of women who have no access to legal systems. In sub-Saharan Africa, such systems generally present women with formidable obstacles to the realisation of their inheritance rights, so much so that the false conclusion is drawn that such rights do not even apply to women. However, as repeatedly emphasised in this report, this is far from the truth. For even in a discriminatory legal context there is still the guarantee of universal human rights standards that inheritance rights, and housing and land rights more generally, apply equally to all men and women.

The human rights framework provides insight into the violations, obstacles and challenges that women face in the areas of inheritance and ownership. Most importantly, it offers women a ‘road map’ for progress. The human rights framework also provides not only a legal mechanism, but a system that translates ‘needs’ into entitlements and ‘charity’ into rights, a system in which women are not passive objects of others’ change, but active instruments of their own change. The solutions and strategies presented above, all based on human rights, will work. Not all of them will work immediately, but with strength and persistence, the undeniable truth that human rights are also women’s rights may eventually dawn on everyone.

**5.1 RECOMMENDATIONS TO THE INTERNATIONAL COMMUNITY**

1. The United Nations (UN) should strengthen its existing mechanisms to protect women’s housing and land rights, including the Beijing Platform for Action and the Habitat Agenda. The UN should encourage all governments to fulfil their obligations under these and other instruments, particularly emphasising the need to protect the rights to adequate housing, land and equal inheritance, as well as providing concrete suggestions as to how such rights may be fulfilled.
2. The Committee on the Elimination of Discrimination against Women (CEDAW) should adopt a General Recommendation on women and the right to adequate housing that should also substantively address issues of women's inheritance and ownership rights.
3. The United Nations Development Fund for Women (UNIFEM) should give priority to issues of women’s housing, land and inheritance, and integrate these into its work, especially that on issues of health and education for women and girls.
4. The Joint United Nations Programme on HIV/AIDS (UNAIDS) should continue to make inheritance rights a key focal point in its battle against AIDS. It should set up a programme directly relating to inheritance and HIV/AIDS education, further developing the links between these two areas.
5. UN organisations such as the UN Human Settlements Programme (UN-HABITAT), UNIFEM and the UN Development Programme (UNDP) should use their field knowledge and expertise to assist in documentation and development for a more comprehensive understanding of inheritance rights violations, and thus lay the basis for a more targeted policy to combat such violations.
6. The UN Secretary General should request a thorough global report on the inheritance rights situation of women, to be presented to the General Assembly for action and recommendations to UN Member States.
5.2 RECOMMENDATIONS TO THE AFRICAN UNION

1. The African Union should highlight the crucial role that women play in the African economy, and thereby emphasise the critical need for respect of women’s rights, including their rights to inherit.
2. The African Union should encourage all its Member States to amend laws and acts to ensure that women’s inheritance rights are adequately protected, not just on paper, but in practice. Member States should be urged to adequately address issues of customary law that breed patriarchy and denial of women’s rights. The aim should be to ensure that women gain substantive equality with men in all areas, especially inheritance rights.
3. The African Union should mandate that Member States integrate issues of equal inheritance as vital elements in all other programmes, including HIV/AIDS work and education initiatives. Education and sensitisation programmes around women’s rights, especially the right to inherit equally, should be encouraged.
4. As women’s empowerment and equality is part of the mandate of the African Union, it should actually work to fulfil this mandate, and maximise the role of the Women, Gender and Development Directorate, giving it its full support and making it a priority directorate.
5. The Women, Gender and Development Directorate of the African Union should develop and institute specific programmes focused on women’s inheritance rights, especially awareness-raising and sensitisation programmes, as well as credit programmes for widows and disinherited women.
6. Promoting the right of women to own land and housing in their own name should be a key focus of the work of the African Union. This would clearly have a large positive economic impact, given that women produce up to 80 percent of the food in certain countries and therefore must be allowed to realise their right to own the land they work and the housing they live in, in their own names.

5.3 RECOMMENDATIONS TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS

1. The African Commission on Human and Peoples’ Rights should take an active role in promoting and protecting women’s rights. It should solicit cases related to women’s rights, including women’s inheritance rights, in order to create a body of jurisprudence upholding women’s rights in Africa.
2. The African Commission should ensure that full support is given to the Special Rapporteur on Women to the African Commission, including financing and human resources, to enable her to effectively fulfil her mandate to promote and protect the rights of women in Africa.
3. The African Commission should undertake a comprehensive review of customs and traditions, law and practice in all countries within its jurisdiction, and encourage States to do the same in their local situations. The aim should be to address the concerns of the region’s women by repealing and reforming all discriminatory laws and practices.
4. The African Commission should hold a Special Session on women’s inheritance rights, inviting African women’s rights advocacy organisations and victims of inheritance rights violations to participate and testify before the Commission.
5. The African Commission should work closely with women’s rights advocacy organisations and grassroots groups to promote the full realisation of housing, land and inheritance rights for all women in Africa.
RECOMMENDATIONS TO GOVERNMENTS

1. All African States should ensure that international human rights law and standards are domesticated into their national and local legislation.
2. All African States who have not yet signed and ratified the Optional Protocol on Women to the African Charter on Human and Peoples’ Rights should do so without delay, and integrate the rights contained therein into their domestic legislation and policies.
3. States should review their existing law in a comprehensive and participatory manner to ensure that all laws adequately protect women’s equality and housing and land rights, including inheritance rights, and, where necessary, should adopt new legislation and policies to ensure the complete fulfilment of these rights.
4. States should design and implement extensive popular education and sensitisation programmes to raise awareness of women’s rights to equality and non-discrimination. States should ensure that such programmes address laws and standards related to human rights, especially the rights to adequate housing, land and inheritance. The programmes should target individual communities and the general populace, as well as members of the executive, legislative, judicial and law enforcement branches.
5. States should also design and implement legal education programmes specially targeted at women in all segments of society and geographical areas, especially rural areas, where rights awareness is usually minimal. All these women should be made aware not only of their rights but also how to claim and enforce them.
6. States should establish enforcement systems, including a special police unit and a legal aide, to ensure that women are freely able to claim their inheritance rights without fear of reprisal. Such enforcement systems should be generously supported with all necessary financial and other resources.
7. States should establish shelters for women who are victims of ‘property-grabbing’, and offer them legal, financial and all other necessary support while their property claims are pending. The main aim should be to ensure that such women do not become homeless after their housing, land and other property is stolen.
8. States should ensure that women benefit equally with men from all legal and land reform procedures.
9. States should ensure that their legal systems are readily accessible to women, which requires a non-discriminatory and unbiased judiciary, administrative systems that adequately protect women’s rights, and affordable or even free legal aid for women who cannot afford lawyers.

RECOMMENDATIONS TO THE NGO COMMUNITY

1. Non-governmental organisations (NGOs) should emphasise, as a priority issue in their work, the role that housing and land plays in women’s lives. Such a focus would also assist in improving other aspects of women’s lives.
2. NGOs should work with governments to domesticate international human rights standards, paying particular attention to women’s housing and land rights, including women’s rights to equal ownership and inheritance.
3. NGOs should share with one another all strategies and best practices related to advocacy on women’s housing, land and inheritance rights.
4. NGOs should utilise international human rights standards as a vital resource in their advocacy efforts for women’s inheritance rights. Legal aid providers should emphasise the protections offered by human rights in their legal advocacy for women’s inheritance rights.

5. NGOs should use the various mechanisms available at the international level to raise awareness of women’s inheritance rights. For example, NGOs should participate in the UN treaty-monitoring system by presenting reports to the relevant Committees, identifying the ways in which women’s human rights are violated through denial of inheritance.

6. When advocating for women’s inheritance rights, women’s rights organisations should adopt a human rights perspective, focusing on the interrelatedness of all human rights for women. They should work to raise the awareness among the general populace and the communities in which they work of human rights in general, and of women’s rights to equality and non-discrimination in particular.

7. NGOs should focus their efforts on training judges and magistrates, traditional and community leaders, administrative officials, and other authorities, on women’s rights to equality and non-discrimination, as well as women’s rights to adequate housing, land and inheritance.

8. NGOs should utilise the mass media in their countries to draw popular attention to and raise awareness of the issue of violations of women’s inheritance rights, and to mobilise for positive action and change.

### 5.6 Recommendations to the Donor Community

1. The donor community should support locally targeted and implemented projects that are designed to educate, inform and sensitise the general populace, women, communities and local and national authorities about women’s human rights to equality and non-discrimination, as well as to housing, land and inheritance.

2. The donor community should support all efforts to reform legal systems, being watchful that any reformed or new laws conform fully with international human rights standards.

3. The donor community should support all efforts to provide women with the economic and legal resources they need to claim and enforce their rights. Such resources should include shelters for victims of inheritance rights and other violations, funding for legal aid programmes, and funding for economic empowerment of women.

4. The World Bank and the International Monetary Fund (IMF) should ensure that their Poverty Reduction Strategy Papers (PRSPs) include as a key issue the protection and fulfilment of women’s rights to housing, land and inheritance, while also encouraging governments to abide by their commitments under the international human rights instruments they have ratified.

5. The donor community should focus on women’s rights to equal property ownership and inheritance, as well as to adequate housing and land, in a systematic and sustained manner, to ensure that these issues are not ignored and that the momentum already gained is not lost.
Throughout this report, the COHRE Women and Housing Rights Programme (WHRP) has critically examined laws and legislation, policies and administrative codes as they relate to women's inheritance rights. As far as legislation governing inheritance is concerned, examining these applications has provided valuable insight into what works and what does not in the real world. The COHRE WHRP has endeavoured to conduct this examination 'through the lens' of human rights; in particular, the principles of equality and non-discrimination, and the rights to adequate housing and land, security and dignity for everyone, everywhere. In conclusion, based upon our findings and upon the human rights principles that we cherish, the COHRE WHRP makes the following recommendations for legislation on inheritance:

1. The basic premise of any legislation should always be equality and non-discrimination.
2. In formulating and implementing the legislation, consultations with and the participation of all stakeholders is essential.
3. All ownership systems, through titling or other forms of tenure, and whether formal or informal, must provide for legal recognition and protection of both spouses' rights to adequate housing and land.
4. Inheritance and succession acts should provide for minimum disturbance of the family situation once the deceased has passed away. Such legislation, first and foremost, should recognise the surviving spouse(s) and children as primary beneficiaries of the estate. The needs of other beneficiaries, such as parents and/or siblings, should also be considered as important but secondary.
5. Inheritance rights protections and the rights to equality and non-discrimination should apply to all marriages, whether entered into under customary and/or religious rites and/or civil or common law. This is important to ensure that women married under customary and/or religious systems are not unduly prejudiced.
6. Female and male children should be treated equally in all inheritance matters. There should be adequate protection against the consequences of discriminatory notions that a male heir is superior or more deserving (primogeniture) or that a female does not need a share of the estate as she will be cared for by relatives or a future husband.
7. All discriminatory marriage laws should be amended and/or repealed to ensure that both spouses enjoy equal property rights in marriage. All laws providing for 'marital power', either explicitly or implicitly, should be repealed. Marital property should be administered through joint decision-making by both spouses. Property gained during marriage should be registered in the name of both spouses in order to ensure that once the marriage is dissolved the female is able to maintain interest in the marital property, including the home and land.
8. In order to avoid confusion in intestate succession, the writing of wills should be encouraged and a proper system for validating wills should be established. Such a system should be readily accessible to those who cannot afford legal representation, trips to a registrar, or related fees.
9. Under all marriage types and regimes, devolution of intestate estates should be regulated by civil law to ensure that, first and foremost, the rights of the surviving spouse and children are protected. Devolution processes should, as far as possible, include consultation with all stakeholders.
10. Deeds registry and all administrative systems that oversee such registration of property should be so regulated that women’s interest in property is guaranteed. The system should be readily accessible to women, on whom prohibitive fees and other obstacles should not be imposed. Documentary proof of registration should be given to both spouses.
11. Legislation should stipulate that all officials and/or authorities engaged in the inheritance process are to receive gender sensitisation and human rights training.
12. Legislation should set forth a master plan for public awareness and education programmes designed to inform women of their inheritance rights and ways to claim and enforce these rights.
ANNEX A

A.1 INTERNATIONAL INSTRUMENTS

A.1.1 Basic instruments

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS
Adopted and proclaimed by U.N. GA Res. 217A (III) of Dec. 10, 1948

Article 2
Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.

Article 7
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 16
1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Article 17
1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 25
1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 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.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 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.

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 race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Article 2(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.

Article 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.

Article 11(1)
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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

THE DECLARATION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN
Proclaimed by General Assembly resolution 2263(XXII) of 7 November 1967

Article 6
1. Without prejudice to the safeguarding of the unity and the harmony of the family, which remains the basic unit of any society, all appropriate measures, particularly legislative measures, shall be taken to ensure to women, married or unmarried, equal rights with men in the field of civil law, and in particular:

(a) The right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage ...
THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN


Article 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:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(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;
(g) To repeal all national penal provisions which constitute discrimination against women.

Article 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.

Article 5
States Parties shall 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 ...

Article 15
1. States Parties shall accord to women equality with men before the law.

2. 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. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

**Article 16**

1. 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.

**CONVENTION ON THE RIGHTS OF THE CHILD**  
*Adopted by GA Res. 44/25, 20 November 1989, entered into force Sept. 2, 1990*

**Article 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.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.
A.1.2 General comments

UNITED NATIONS HUMAN RIGHTS COMMITTEE
General Comment No. 18 on Article 3 (Non-Discrimination)

The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. ...

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

UNITED NATIONS HUMAN RIGHTS COMMITTEE
General Comment No. 28 on Article 3 (Equality of Rights Between Men and Women)

States parties must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children. Determination of the need to maintain contact between children and the non-custodial parent should be based on equal considerations. 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.

UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
General Comment No. 7 on the Right to Adequate Housing (art. 11); Forced Evictions

Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. 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.
UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

General Comment No. 12 on the Right to Adequate Food (art. 11)

[National strategies] should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on rights in land (including forests).

UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW)

General Recommendation No. 21 on Equality in Marriage and Family Relations

34. Reports of States parties should include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women as provided in the Convention and in Economic and Social Council resolution 884D (XXXIV), in which the Council recommended that States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession. That provision has not been generally implemented.

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.
A.1.3 Other related United Nations documents

REPORT OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN (2000)
Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report
of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coom
araswamy, submitted in accordance with Commission on Human Rights resolution 1997/44 (Addendum
on Economic and social policy and its impact on violence against women), page 6, paragraphs 14-18 of E/
CN.4/2000/68/Ad.5

14. Unequal ownership rights leave women dependent on men. In Cameroon there is no legal provision for
women to own property. Following traditional laws, a woman does not inherit land since she will marry
and then be provided for by her husband outside her community. When her husband dies, again she
will not inherit as the land returns to the husband’s family. In many African countries formal law has
no provision for women’s inheritance rights; in others customary law is an obstacle to women making
use of legal provisions. Widows are often left without the means to support themselves financially or to
obtain necessary medical care, and may be made to leave their marital home. Where women are made
recipients of property or funds, they may incur the anger of other family members. They suffer from
(threats of) violence or even death: Uganda and Nigeria can both offer examples of abused widows.

15. In Nigeria, 90 per cent of land and property are in the name of men. Accommodation grants from the
employer can only be received by men as women are expected to move in with the husband. Single
mothers fall through this safety net. In Nigeria, landlords are reluctant to give accommodation to single
women or mothers, who have the reputation of being promiscuous. Should they become homeless,
women are at a great risk of becoming victims of violence such as rape.

16. When women do not hold any land, they are frequently unable to obtain credit, even when they are
legally able to do so, as land is required as collateral. This is the case in Nigeria, where women are
effectively barred from obtaining credit, as they do not possess land, a house or other property. In South
Africa, in order to obtain credit from public banks often requires the husband’s signature and surety.

17. Not being a full member of society in legal terms prevents female heads of household from being able to
support their family. Housing in the formal sector may not be available or affordable and the family may
be exposed to the vagaries of the informal housing sector. But married women also are affected by this
situation, as they are dependent on their husbands in legal and economic terms. Where the husband
does not allocate the resources equally, women are at a severe disadvantage and powerless. In cases of
domestic violence, the inability to live life independently without a husband or father may force women
to stay with their batterers.

18. Social, economic and legal dependence is an extremely important factor to be taken into account when
trying to place violence in its social and economical context. Violence is often a means by which the
dominant person asserts power. In equal relationships no one partner is dependent on the other one, as
both have sufficient power - in economic, as well as in social and legal, terms - to leave the relationship
and live independently.
The Special Rapporteur also specifically recommended that laws and programmes should be devised that would change status and attitudes with regard to the position of women in society. Women should be recognized as independent and equal human beings with the same legal capacity as men. In addition, she also recommended that programmes and policies should be devised that aim at increasing the economic independence of women so that their status in society will increase and so that they will not be forced to accept situations of abuse and exploitation.

**REPORT OF THE UN SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN (2002)**
Submitted in accordance with Commission on Human Rights resolution 2001/49 (on cultural practices in the family that are violent towards women), page 21, paragraph 68 of E/CN.4/2002/38.

68. Through various discriminatory statutory and constitutional regulations the economic status of women remains unequal. In many countries, inheritance laws remain linked to gender. Among the countries requiring male lineage for the inheritance of property or a male guardian for the exercise of joint custody of property are the Bahamas, Chile, most of the countries of sub-Saharan Africa and Nepal as well as many indigenous groups and tribal groups around the world. In Uganda, women make up over 80 per cent of the agricultural labour force, but owing to a combination of customary law, Islamic law and statutory law only 7 per cent of women own land.

**COMMISSION ON HUMAN RIGHTS RESOLUTION 2003/22**
Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing. Adopted at its 56th Session, 22 April 2003

The Commission on Human Rights,

Guided by the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination,

Reaffirming the human right to be free from discrimination, and the equal right of women and men to the enjoyment of all civil, cultural, economic, political and social rights,

Reaffirming also that all human rights are universal, indivisible, interdependent and interrelated and that women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing contribute to the full realization of human rights,

Recognizing that women can face multiple forms of discrimination,

Recalling its resolutions 2000/13 of 17 April 2000 and 2001/34 of 23 April 2001, Commission on the Status of Women resolution 42/1 of 13 March 1998 and the resolutions of the Sub-Commission on the Promotion and Protection of Human Rights on the matter,

Welcoming the findings of the Special Rapporteur on violence against women, its causes and consequences, contained in her report entitled “Economic and social policy and its impact on violence against women” (E/CN.4/2000/68/Add.5) submitted to the Commission at its fifty-sixth session, that women’s poverty, together with a lack of alternative housing options, make it difficult for women to leave violent family situations, and reaffirming that forced relocation and forced eviction from home and land have a disproportionately severe impact on women, including when these are committed by spouses or in-laws, and encouraging the Special Rapporteur to continue to take these findings into consideration in her future work,

Recognizing that laws, policies, customs and traditions that restrict women’s equal access to credit and loans also prevent women from owning and inheriting land, property and housing and exclude women from participating fully in development processes, are discriminatory and may contribute to the feminization of poverty,

Stressing that the impact of gender-based discrimination and violence against women on women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing is acute, particularly during complex emergency situations, reconstruction and rehabilitation,

Recognizing that the full and equal participation of women in all spheres of life is essential for the full and complete development of a country,

Acknowledging that women continue to suffer from discriminatory treatment in all areas decisive to the attainment of adequate housing,

Convinced that international, regional and local trade, finance and investment policies should be designed in such a way that they do not increase gender inequality in terms of ownership of, access to and control over land and the rights to own property and to adequate housing and other productive resources and do not undermine women’s capacity to acquire and retain these resources,

Mindful of the fact that elimination of discrimination against women requires consideration of women’s specific socio-economic context,
1. Takes note with interest of the preliminary findings of the study on women and adequate housing submitted by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination, in accordance with Commission on Human Rights resolution 2002/49 (E/CN.4/2003/55);

2. Reaffirms women’s right to an adequate standard of living, including adequate housing, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, and urges Governments to comply fully with their international and regional obligations and commitments concerning land tenure and the equal rights of women to own property and to an adequate standard of living, including adequate housing;

3. Affirms that discrimination in law against women with respect to having access to, acquiring and securing land, property and housing, as well as financing for land, property and housing, constitutes a violation of women’s human right to protection against discrimination;

4. Reaffirms Commission on the Status of Women resolution 42/1, which, inter alia, urges States to design and revise laws to ensure that women are accorded full and equal rights to own land and other property, and the right to adequate housing, including through the right to inheritance, and to undertake administrative reforms and other necessary measures to give women the same right as men to credit, capital, appropriate technologies, access to markets and information;

5. Encourages Governments to support the transformation of customs and traditions that discriminate against women and deny women security of tenure and equal ownership of, access to and control over land and equal rights to own property and to adequate housing, to ensure the right of women to equal treatment in land and agrarian reform as well as in land resettlement schemes and in ownership of property and in adequate housing, and to take other measures to increase access to land and housing for women living in poverty, particularly female heads of household;

6. Reaffirms the obligation of States to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise and recommends that Governments encourage financial lending institutions to ensure that their policies and practices do not discriminate against women;

7. Urges Governments to address the issue of forced relocation and forced evictions from home and land, and to eliminate its disproportionate impact on women;

8. Recommends that international financial institutions, regional, national and local housing financing institutions and other credit facilities promote the participation of women and take into account their views in order to remove discriminatory policies and practices, giving special consideration to single women and households headed by women, and that these institutions evaluate and measure progress to this end;

9. Encourages Governments, specialized agencies, funds, programmes and other organizations of the United Nations system, as well as other international organizations and non-governmental organizations, to provide judges, lawyers, political and other public officials, community leaders and other concerned persons, as appropriate, with information and human rights education concerning women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing;
10. **Invites** the Secretary-General to encourage all organizations and bodies of the United Nations system, individually and collectively, in particular the United Nations Development Programme, the United Nations Human Settlements Programme (UN-Habitat) and the United Nations Development Fund for Women, to undertake further initiatives that promote women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing, and allocate further resources for studying and documenting the impact of complex emergency situations, particularly with respect to women’s equal rights to own land, property and adequate housing;

11. **Invites** the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees and other relevant international organizations, within their respective mandates, to address discrimination against women with respect to land, property and adequate housing in their cooperation programmes and field activities;

12. **Encourages** all the human rights treaty bodies, in particular the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women, special procedures and other human rights mechanisms of the Commission and the Sub-Commission on the Promotion and Protection of Human Rights regularly and systematically to take a gender perspective into account in the implementation of their mandates and to integrate the content of the present resolution into their work, as appropriate;

13. **Encourages** the United Nations Housing Rights Programme to take into account the content of the present resolution and to continue its regional consultations, with the participation of representatives of Governments, United Nations agencies, intergovernmental organizations, and non-governmental organizations;

14. **Requests** the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, within his mandate, to submit a report to the Commission at its sixty-first session containing the study on women and adequate housing;

15. **Invites** all States to respond to the questionnaire prepared by the Special Rapporteur, as soon as possible;

16. **Decides** to consider the issue of women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing at its sixty-first session under the agenda item entitled “Economic, social and cultural rights”.


Inheritance has been the subject of law reform in many countries of anglophone Africa. Ghana, Malawi, Nigeria, Zambia and Zimbabwe are among those Governments that have legislated for equality in inheritance rights in compliance with their obligations under the Beijing Platform for Action and human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. However, it is clear that at the local level discriminatory customary rules on inheritance still apply, whatever constitutional guarantees or modern laws exist. In rare cases where courageous women have defied threats of violence and taken their cases to court, some independent and creative judges have decreed that international law as laid down under the Convention on the Elimination of All Forms of Discrimination against Women takes precedence over custom and religion.

... Many widows in traditional societies have no rights, or very limited rights, to inheritance under customary and religious law. Nor can they inherit, on an equal basis with male siblings, from their father’s estate. Across a wide spectrum of countries, religions and ethnic groups, upon the death of a husband a widow is often left destitute. The Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Platform for Action and the Outcome Document of the Beijing+5 special session, all require Governments to design and enact legislation to remove gender inequality in inheritance. It is disappointing that new laws, where enacted, have been inadequately publicized and poorly enforced. In addition, there has been little political will to intervene in traditions and customs which abuse widows and pauperize them. Several countries have retained their reservations on those sections of the Convention on the Elimination of All Forms of Discrimination against Women (articles 5 and 16) relating to Personal Status Law. Without inheritance rights, widows find themselves totally dependent on the charity of their husband’s relatives. They have no rights to the property of their birth family. “Property-grabbing” and “chasing-off” are part of the common experience of widows whether animist, Christian, Hindu or Muslim — regardless of their ethnic group, caste or culture.
A.2 BASIC REGIONAL INSTRUMENTS

AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS
The Africa Charter came into force 21 October 1986 and is ratified by all Member States of the African Union. (Formerly the Organization of African States)

Article 2
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Article 18(3)
The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

OPTIONAL PROTOCOL TO THE AFRICAN CHARTER ON THE RIGHTS OF WOMEN
The Optional Protocol was adopted in July 2003, and has been ratified by 21 countries as of January 2004

Article 16 Right to Adequate Housing
Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, State Parties shall grant to women, whatever their marital status, access to adequate housing.

Article 21 Right to Inheritance
A widow/widower shall have the right to inherit each other’s property. In the event of death, the surviving spouse has the right, whatever the matrimonial regime, to continue living in the matrimonial house.

Women and girls shall have the same rights as men and boys to inherit, in equal shares, their parents’ properties.
ANNEX B

MEMBER ORGANISATIONS OF THE NETWORK FOR INHERITANCE RIGHTS OF WOMEN IN AFRICA (NIRWA)

N.B. The organisations are shown in alphabetical order.

AVEGA
Association of Genocide Widows
Tel.: +250 5 516 125
Fax: +250 5 516 126
avega@rwanda1.com
PO Box 1535
Kigali, Rwanda

Development and Cooperation (DECOP)
edward_lange@yahoo.co.uk
Ndola, Zambia

Education Centre for Women in Democracy (ECWD)
Tel.: +254 257 0386
info@ecwd.org
P.O. Box 62714
00200 Nairobi, Kenya

Emang Basadi Women’s Association
Tel.: +276 390 9335
  +276 318 6249
  +276 395 9424
Fax: +276 390 9335
ebasadi@global.bw
Private Bag 0047
Gabarone, Botswana

Ethiopian Women’s Lawyers Association
Tel.: +251 1 505001
  +251 1 513973
  +251 1 523 945
Fax: +251 1 523 946
ewla@telecom.net
PO Box 13760
Addis Ababa, Ethiopia

LAMOSA (Land Access Movement of South Africa)
Tel.: +27 11 833 1060/3
Fax: +27 11 834 8385
lamosa@sn.apc.org
P.O. Box 62535
Marshalltown 2107, South Africa

Law and Development Association (LADA)
Tel.: +260 32 508 25
Fax: +260 32 508 25
lada@zamnet.zm
PO Box 660148
Monze, Zambia

Leadership and Advocacy for Women in Africa
Tel.: +233 21 22 4878
Fax: +23321 23 2296
PO Box 4889 GP
Accra, Ghana

OXFAM - Copperbelt Livelihoods Improvement Programme (CLIP)
Tel: +260 2 245 016
Fax: +260 2 231 615
oxfam@coppernet.zm
PO Box 21323
Kitwe, Zambia

RADI Senegal
RADI Senegal
Tel.: +221 8 246 048
  +221 8 243 337
radi@sentoo.sn
BP 12085 Colobane
Dakar, Senegal
Rural Women’s Movement (KwaZulu Natal)
Telephone: +27 33 343 4147
sanele@sn.apc.org
PO Box 1326
Hilton 3245
KwaZulu Natal
South Africa

Rwanda Women’s Network
Tel.: +250 583 662
Fax: +250 583 662
rwanet@rwanda1.com
PO Box 3157
Kigali, Rwanda

UNIFEM Regional office for the East and Horn of Africa
Tel.: +254 2 624 383
Fax: +254 2 624 494
nyaradzai.gumbonzvanda@undp.org
PO Box 30218
Nairobi, Kenya

WACOL Women’s Aid Collective
Tel.: +234 42 256 678
Fax: +234 42 256 831
wacolnig@yahoo.com
No 9 Umuezebi Street, New Haven
PO Box 2718
Enugu, Enugu State, Nigeria

Women and Law in Southern Africa (WLSA) Swaziland
Tel.: +268 404 7088
Fax: +268 404 6750
wlsaszd@africaonline.co.sz
Mbabane, Swaziland

Women and Law in Southern Africa (WLSA) Zambia
Tel.: +260 1 253 974/5
Fax: +260 1 255 209
wlsazam@zamnet.zm
PO Box 34777
Lusaka, Zambia

Women and Law in Southern Africa (WLSA) Zimbabwe
Tel.: +2634 25 3001/2/3
wlsadod@africaonline.co.zw
PO Box UA 171 Union Ave.
Harare, Zimbabwe

Women for Change
Tel.: +260 1 224 309
Fax: +260 1 224 296
+260 1 227 184
wfc@zamnet.zm
PO Box 33102
Lusaka, Zambia

Women’s Legal Centre
Tel.: +27 21 424 0870
Fax: +27 21 424 0875
sibongile@wlce.co.za
PO Box 5356
Cape Town 8000, South Africa

Independent consultant:
Sharon Porthen
Tel.: +27 21 361 9344
+27 21 361 9351
Fax: +27 21 361 5194
Ushani@absamail.co.za
59 Elizabeth Drive
Alicedale 7764, South Africa
The Centre on Housing Rights and Evictions (COHRE) is an independent, international, non-governmental human rights organisation committed to ensuring the full enjoyment of the human right to adequate housing for everyone, everywhere.

The COHRE Women and Housing Rights Programme (WHRP) seeks to ensure that the specific needs and concerns of women with regard to their housing and land rights are addressed and championed. Based in Geneva, it works in close collaboration with countless partners at all levels in supporting and empowering women worldwide to claim and realise their housing rights.

COHRE International Secretariat
83 Rue de Montbrillant
1202 Geneva, Switzerland
Tel: +41.22.734.1028
Fax: +41.22.733.8336
Email: cohre@cohre.org
Web: http://www.cohre.org

COHRE Women and Housing Rights Programme
83 Rue de Montbrillant
1202 Geneva, Switzerland
Tel: +41.22.734.1028
Fax: +41.22.733.8336
Email: women@cohre.org
Web: http://www.cohre.org/women