

INHERITANCE LAW IN TANZANIA: THE IMPOVERISHMENT OF WIDOWS AND DAUGHTERS

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I. INTRODUCTION

Tanzania's inheritance laws are in urgent need of reform.¹ Both customary and Islamic law, the two predominant systems of intestate succession in Tanzania, limit women's inheritance on the basis of their gender. Under customary law, a widow is generally denied inheritance altogether: "[H]er share is to be cared for by her children, just as she cared for them."² Daughters inherit the smallest share with attached restrictions, and under governing Islamic law, women only inherit half as much as men. Tanzania's inheritance laws thus impoverish women and leave their survival at the mercy of men.

The effect of these discriminatory laws is further magnified by procedural inequalities, exploitative practices, and the spread of AIDS. Procedural laws favor the selection of male administrators, even if they are distant relatives of the deceased, thus excluding women from the management of estates. Women also have to contend with widespread property grabbing, eviction from their homes under witchcraft accusations, and sometimes even the loss of their children by abusive relatives. Women in polygamous families have to further split any meager inheritance they do receive. Suffering is especially severe in light of the AIDS pandemic, which has increased the number and vulnerability of widows and orphans. The extent of this crisis is evident in the numerous Tanzanians seeking assistance for inheritance-related problems.³

1. This article deals solely with mainland Tanzania and does not discuss the situation in Zanzibar.

2. Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Second Schedule, Laws on Inheritance [Sheria za Urithi], rule 27 *in* Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS. [CAP 358 R.E. 2002] [hereinafter GN 436, 2d sched.].

3. The Tanzanian government identified "the main legal problems facing women" as including "property adjustment . . . after the death of the male spouse." United Republic of Tanzania, Second and Third Reports to Committee on the Elimination of Discrimination Against Women, para. 14, U.N. Doc. CEDAW/C/TZA/2-3 (Sept. 30, 1996). The Women's Legal Aid Centre (WLAC) reported that out of the

Tanzania's inheritance regime violates women's fundamental rights to equality, property, an adequate standard of living, family, and dignity under the Tanzanian Constitution and binding international conventions. In 2000, Tanzania amended its Constitution to prohibit discrimination on the basis of gender explicitly.⁴ Equality is likewise a basic principle under international law,⁵ requiring modification of Tanzania's inheritance laws. The Committee responsible for implementing the Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW Committee") specifically instructed that the allocation of unequal inheritance shares to widows and daughters "contravene the Convention and should be abolished."⁶ The Human Rights Committee focused on "property and inheritance rights" as requiring particular attention for Tanzania's compliance with the International Covenant on Civil and Political Rights.⁷ The Protocol to the African Charter on the Rights of Women in Africa, in force since November 2005, speaks directly to this issue:

A widow shall have the right to an equitable share in the inheritance of the property of the husband. A widow shall have the right to continue to live in the matrimonial house Women and men shall have the right to inherit, in equitable shares, their parents' properties.⁸

3,266 cases it handled in 2000, 575 were inheritance matters. WLAC 2000 ANNUAL REPORT 5 (2000). WLAC's paralegal centers throughout Tanzania additionally assisted over 127 women with inheritance problems the same year. *Id.* at 13-21. A Muslim leader in Kibaha estimated that his religious council advises three to five women per month with inheritance problems. Interview with Muslim Leader in Kibaha, Tanzania (Mar. 24, 2002). A village tribal leader, responsible for the oversight of 276 families in the same district, counsels another one to two women per month on these matters. Interview with Tribal Leader in Kibaha, Tanzania (Mar. 24, 2002).

4. TANZ. CONST. art. 13(5). Even previously, courts have held that the Constitution's general prohibition on discrimination included violations of women's equality, implicating discriminatory inheritance laws. As the Court explained in *Ephrahim v. Pastory*, decided in 1990, "[S]ince the Bill of Rights was incorporated in our 1977 Constitution . . . discrimination against women has been prohibited." *Ephrahim v. Pastory*, [1990] LRC (Const.) 757, 762 (Tanz. High Ct. 1990).

5. Human Rights Committee, General Comment 18, Non-discrimination, 37th Sess., 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 146, para. 1, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003) [hereinafter HRC General Comment 18] ("Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."). See *infra* Part V(A) for specific convention provisions on the right to equality.

6. CEDAW Committee, General Recommendation 21, Equality in Marriage and Family Relations, 13th Sess., 1992, U.N. Doc. A/49/38, at 1 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 257, para. 35, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003) [hereinafter CEDAW General Rec. 21].

7. HRC, Concluding Observations on Second Report: United Republic of Tanzania, para. 189, U.N. Doc. CCPR/A/48/40 (1993). In 1998, the Committee was likewise "concerned at the application of personal laws which discriminate against women with respect . . . to . . . land and inheritance." HRC, Concluding Observations on Third Report: United Republic of Tanzania, at 3, para. 12, U.N. Doc. CCPR/C/79/Add.97 (Aug. 18, 1998).

8. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 21(1), (2) (Nov. 25, 2005), available at <http://www.umn.edu/humanrts/africa/protocol-women2003.html> [hereinafter African Women's Protocol].

The necessity for change to protect women's basic rights could not be any clearer.

This need to reform outdated inheritance laws is widely recognized. As Tanzania's Law Reform Commission explained, "[D]iscrimination in inheritance on the basis of sex has received critical judicial assessment. Not only judges, but academic writers, politicians and women [activists] have decried this appalling state of affairs."⁹ In *Ephrahim v. Pastory*, the High Court characterized restrictions on women's ability to inherit clan land as "oppressive and unjust laws of the past"¹⁰ and the cause of women's "suffering at the hands of selfish clan members."¹¹ The Tanzanian government itself has called for the elimination of "customs and traditions which negatively affect development," such as "discriminative gender practices in . . . inheritance"¹² and acknowledged the need "[t]o revisit, review, and abandon outdated laws."¹³ Tanzania's inheritance laws are especially anachronistic in light of more recent statutes that recognize women's

9. LAW REFORM COMMISSION OF TANZANIA, THE LAW RELATING TO CHILDREN IN TANZANIA, para. 372 (Apr. 1994), available at <http://www.lrc-tz.org/pdf/watoto.pdf> [hereinafter LAW REFORM COMMISSION REPORT ON CHILDREN]. The Law Reform Commission of Tanzania is a government body, established "to take and keep under review all the law of the United Republic with a view to its systematic development and reform." Law Reform Commission of Tanzania Act, § 4(1), TANZ. LAWS [CAP 171, R.E. 2002]. For examples of academic work criticizing the Tanzania's current inheritance scheme, see Z. S. GONDWE, FEMALE INTESTATE SUCCESSION TO LAND IN RURAL TANZANIA: WHITHER EQUALITY (1990); Monica E. Magoke-Mhoja, *Impact of Customary Inheritance on the Status of Widows and Daughters in Tanzania: A Challenge to Human Rights Activists* 255, in VOICES OF AFRICAN WOMEN: WOMEN'S RIGHTS IN GHANA, UGANDA, AND TANZANIA (Johanna Bond, ed., 2005); M.C. Mukoyogo, *Theoretical Frame-Work on the Law of Inheritance*, in REPORT ON THE LAW OF INHERITANCE AND RESEARCH FINDINGS BY THE LAW REFORM COMMISSION OF TANZANIA (unpublished, on file with International Women's Human Rights Clinic, Georgetown University Law Center, presented to the Minister of Justice in March 1995); MAGDALENA K. RWEBANGIRA, THE LEGAL STATUS OF WOMEN AND POVERTY IN TANZANIA (1996).

10. *Ephrahim v. Pastory*, [1990] LRC (Const.) 757, 767 (Tanz. High Ct. 1990).

11. *Id.* at 762; see also *Ndeamtzo v. Malasi*, [1968] HCD 127, at 99 (Tanz. High Ct. 1968) (under customary inheritance laws, essential property is "snatched from the widow and unfortunate daughters by undeserving clan members," "putting the widow and daughters into terrible confusion, fear, and misery").

12. MINISTRY OF COMMUNITY DEVELOPMENT, WOMAN AFFAIRS AND CHILDREN, COMMUNITY DEVELOPMENT POLICY 41 (June 1996).

13. MINISTRY OF COMMUNITY DEVELOPMENT, WOMAN AFFAIRS AND CHILDREN, CHILD DEVELOPMENT POLICY 32 (Oct. 1996). In particular, the Ministry referred to the codification of customary inheritance law. *Id.* at 37. Tanzania's government has described the dire state of affairs:

[W]ives are widely considered a part of their husband's labour force, and married women are largely not given inheritance rights but only enjoy the use of their deceased husband's property by [sic] virtue of their male children. Childless women are therefore accorded very limited rights. Unmarried daughters also suffer from similar problems since they have no full inheritance rights to family property compared to their brothers. Thus the adult woman of today is very much a product of the socialization process and lack of opportunities that faced her as a child since the day of her birth.

United Republic of Tanzania, Revised Initial Report to Committee on the Right of the Child, at 16, para. 20, U.N. Doc. CRC/C/8/Add.14/Rev.1 (Sept. 25, 2000) [hereinafter Revised Initial Report to CRC].

equal property rights.¹⁴ In fact, Tanzanian women are economically better off if their marriages end in divorce than by the death of their husbands.¹⁵

However, the “law has remained immutable and insensitive to . . . public outrage.”¹⁶ Reform efforts date back to 1968 when the government appointed a special committee to investigate inheritance matters, but failed to implement the committee’s recommendations.¹⁷ In 1987, Tanzania’s Attorney General asked the Law Reform Commission to study problems in inheritance law and recommend reforms.¹⁸ The Commission published a report urging the creation of a uniform, non-discriminatory intestate succession statute in 1995.¹⁹ As of yet, no action has been taken.

In spring 2002, in collaboration with the Women’s Legal Aid Centre (WLAC) in Tanzania, Georgetown’s International Women’s Human Rights Clinic conducted a fact-finding mission on the inheritance regime in Tanzania. The Clinic and WLAC interviewed over sixty people, ranging from Tanzanian judges, Parliament members, and police officers, to religious leaders, advocates, and citizens. Through these interviews, the team tested reactions to a potential uniform intestate succession law, which it later refined.²⁰ Under this proposed statute, the surviving spouse—whether husband or wife—would inherit the matrimonial home, any household belongings, and property with a joint ownership interest. Thereafter, the surviving spouse would receive 45% of the

14. Law of Marriage Act of 1971 §§ 56, 65, 114, TANZ. LAWS [CAP 29, R.E. 2002] [hereinafter LMA]; Land Act of 1999 § 3(2), TANZ. LAWS [CAP 113, R.E. 2002] [hereinafter Land Act]; Village Land Act of 1999 § 3(2), TANZ. LAWS [CAP 114, R.E. 2002] [hereinafter Village Land Act].

15. See LMA, *supra* note 14, § 114 (recognizing the wife’s contribution in the division of marital assets at divorce). See also *infra* Part V for a discussion on the right to property.

16. LAW REFORM COMMISSION REPORT ON CHILDREN, *supra* note 9, para. 372.

17. LAW REFORM COMMISSION OF TANZANIA, THE LAW OF SUCCESSION/ INHERITANCE 12 (1994), available at <http://www.lrc-tz.org/pdf/mirathi.pdf> [hereinafter LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE].

18. *Id.* at 13.

19. *Id.* The Law Reform Commission highlighted how in various regions of Tanzania, “[t]he majority views are that, only unification of the laws of Succession/ Inheritance could do away with the problems of uncertainty which brings about confusion and choice of law.” *Id.* at 34. It further explained, “In keeping with the provisions of the Constitution on human rights as also embodied under the Law of Marriage Act . . . the proposed Law of Succession must also give recognition to and protect such women’s rights to acquire, manage, and dispose of their property by way of inheritance.” *Id.* at 65.

20. See *infra* Appendix A for the text of the Clinic’s Proposed Statute, developed in collaboration with WLAC [hereinafter Clinic’s Proposed Statute]. The Clinic’s proposed statute provides for the transfer of up to a third of an individual’s property by will, enabling Tanzanians to give effect to their personal preferences and religious convictions, while still allowing widows and daughters the chance at a decent life. Tanzania’s Law Reform Commission likewise recommended that “the rules on Wills . . . limit the power of testamentary disposition” to 1/3 of the estate. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 67. See *infra* Appendix B for the text of the Revised Proposed Statute [hereinafter Revised Proposed Statute], which is currently before the Tanzanian government. See also *infra* note 22 (discussing the revised proposed statute).

estate, the children 45%, and the parents 10%.²¹ Additionally, the Clinic's proposed bill favors the surviving spouse as the administrator of the estate, and it criminalizes property grabbing, eviction from the family home, the taking of children, and widow inheritance—that is the “inheritance” of the widow herself by male relatives. The following summer, WLAC continued work on the proposed statute to ensure it best fit the needs of Tanzanians through meetings and discussions with other NGOs and government officials.²² The resulting bill received substantial public support and was submitted to the Minister of Justice and Constitutional Affairs in the President's Cabinet. The Bill needs to receive Presidential approval before it can be presented to Parliament, but work came to a halt in early 2004 as government decided to wait until after the 2005 elections.²³ Tanzania's inheritance laws continue to impoverish widows and daughters, and the time for action has never been more urgent.

This article analyzes the current inheritance system in Tanzania and advocates for the enactment of a uniform and non-discriminatory succession act in order to meet Tanzania's constitutional and international obligations. Parts II and III describe the shortcomings of existing inheritance law: both in its substantive provisions and procedural provisions governing the administration of estates. Part IV situates discriminatory inheritance laws within the social context in Tanzania and alongside aggravating exploitative practices. Part V lays out women's fundamental rights to equality, property, an adequate standard of living, family, and dignity violated by the current regime. Appendix A provides the Clinic's proposed statute, and Appendix B provides the revised proposed statute put together by WLAC.

21. In polygamous marriages, each widow would inherit her matrimonial home and household chattels, and the widows would share the spousal percentage of the estate. Clinic's Proposed Statute, *infra* Appendix A, § VIII(F)(1).

22. Under the revised proposed statute, the surviving spouse is similarly given priority in administering the estate and is entitled to “the matrimonial home and household chattels” and his or her share of all other property in accordance with the Law of Marriage Act and Land and Village Acts. Revised Proposed Statute, *infra* Appendix B, §§ 4(1), 10. However, all other property can be distributed by will. *Id.* §§ 4(2), 6. In the absence of a will, a widow or widower inherits 50% of the estate, and the children inherit the other 50%. *Id.* § 20(1)(b). The deceased's parents can only inherit when there is neither a spouse nor children. *Id.* § 20(1)(c)-(e). Mirroring the Clinic's proposal, the revised statute specifically provides that “[e]very heir shall receive an equal share regardless of his or her sex, age, religion, tribe, custom, tradition, disability, race, color, political or other opinion, national or social origin, place of origin, property, birth, health status, station in life, or other status” and that “[w]omen and men shall have equal rights to dispose clan land.” *Id.* §§ 16, 18. The statute likewise criminalizes the eviction of widows and children from their homes, property grabbing, the removal of children, and widow inheritance. *Id.* §§ 22-23. In addition, this version addresses forceful intercourse “to bless or cleanse” a widow, terming it “an offense of rape contrary to . . . the Penal Code as amended by the Sexual Offenses (Special Provisions) Act.” *Id.* § 24.

23. To further delay matters, the government is considering issuing a “White Paper,” calling for hearings throughout the country to determine citizens' reactions to changing customary inheritance law. This would duplicate the work already undertaken by the Law Reform Commission for its inheritance report.

II. INHERITANCE LAW IN TANZANIA SENTENCES WOMEN TO DEPENDENCE, POVERTY, AND SUBORDINATION

Tanzania's inheritance laws subordinate and impoverish women. Denied equal shares of inheritance, women lack access to economic resources and are kept in a state of perpetual dependence. Indeed, Tanzania's Law Reform Commission identified succession laws as "among [the] major factors that have greatly worked toward the derogation of the status of women"²⁴ The time has come for Tanzania to remedy this disempowerment and enact an intestate succession act protective of the rights of all Tanzanian women.

A. TANZANIA'S CHOICE OF LAW RULES FUNNEL THE MAJORITY OF ITS CITIZENS INTO DISCRIMINATORY INHERITANCE SCHEMES, DEPRIVING WOMEN OF PROPERTY SOLELY ON THE BASIS OF THEIR GENDER

Although three parallel systems of intestate succession operate in Tanzania,²⁵ choice of law rules channel the majority of Tanzanian citizens into a discriminatory regime. These three systems are customary law, referring to traditional tribal law; Islamic law; and the Indian Succession Act. While the Indian Succession Act is gender neutral, both customary and Islamic law are discriminatory, as discussed in detail below. Customary law is codified in Tanzania,²⁶ while various statutes provide for the application of Islamic law to govern the inheritance of Muslims²⁷ (approximately forty-five percent of the Tanzanian population).²⁸ The Indian Succession Act consists of codified English law from 1865 imported to

24. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 3.

25. There is also a fourth system which governs intestate succession for Hindus. However, it will not be dealt with in this article as it has only "limited applicability within the Hindu community," and "[s]o far there are no known court cases on the subject in the country." LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 24.

26. Customary law is codified in two Government Notices: GN 279 and GN 436. These Government Notices apply to the following districts through subsidiary legislation to the Judicature and Application of Laws Act: Handeni, Kahama, Kondo, Lushoto, Musoma, Ngara, Nzega, Pangani (Local Customary Law (Declaration) Order ¶ 2); Dodoma, Iramba, Mpwapwa, Manyoni, Shinyanga, Singida, Ufipa (Local Customary Law (Declaration) (No. 2) Order ¶ 2); Kasulu, Kibondo, Kigoma (Local Customary Law (Declaration) (No. 3) Order ¶ 2); Kilimanjaro, Maswa, Meru, Songea (Local Customary Law (Declaration) (No. 5) Order ¶ 3); and Biharamulo, Mpanda, North Mara, Tabora, and Ulanga (Local Customary Law (Declaration) (No. 7) Order ¶ 2). Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS. [CAP 358, R.E. 2002]. This codification covers Tanzania's patrilineal communities. Eighty percent of Tanzanian communities are patrilineal and the remaining twenty percent are matrilineal. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 21.

27. Probate and Administration of Estates Act, § 88(1)(a), TANZ. LAWS [CAP 352, R.E. 2002] [hereinafter Probate and Administration of Estates Act]; Statements of Islamic Law, Government Notice (GN) 222/1967 *in* Islamic Law (Restatement) Act, § 48(1)(c), TANZ. LAWS SUB. LEGIS. [CAP 375, R.E. 2002] (providing for the distribution of property "in accordance with the rules regulating inheritance" under Islamic law); Judicature and Application of Laws Act, § 11(c)(ii), TANZ. LAWS [CAP 358, R.E. 2002] [hereinafter JALA] ("[N]othing in this subsection shall preclude any court from applying the rules of Islamic law in matters of . . . inheritance."); Succession (Non-Christian Asiatics) Act, § 6(1), TANZ. LAWS [CAP 28, R.E. 2002] ("[T]he succession to the movable property in Mainland Tanzania of a deceased Non-Christian Asiatic . . . shall be regulated by the law of the religion professed by that

Tanzania from India by the British who exercised colonial powers over both countries at the time.²⁹ The Indian Succession Act is in need of updating to fit the needs of Tanzanians and to bring it into the modern era. Unlike in Tanzania, intestate succession law in both India and the United Kingdom has been modified from the 1865 version.³⁰ As explained below, choice of law and practical considerations combine against the application of the Indian Succession Act, and both customary and Islamic law deprive women of inheritance solely on the basis of their gender.

Tanzanian choice of law provisions favor the application of discriminatory customary law to most Tanzanians of African origin. By statute, customary law regulates succession for “a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted.”³¹ Customary law is thus the default system for Tanzanians of African, but not European or Asian, descent. Tanzanians from African communities can escape the application of customary law only if they can meet the requirements of one of two statutory tests: they must either show (1) that “it is apparent, from the nature of any relevant act or transaction, manner of life or business, that the matter is . . . to be regulated otherwise than by customary law,”³² or (2) that the deceased professed Islam or Christianity and “written or oral declarations . . . or his acts or manner of life [reveal] that he intended his estate to be administered” according to Islamic law or the Indian Succession Act.³³ Both of these tests are difficult to satisfy. The second test is especially problematic since the deceased

Non-Christian Asiatic at death.”); Magistrates’ Courts Act, § 18(1)(a)(i) and Fifth Schedule, § 1(1), TANZ. LAWS [CAP 11 R.E. 2002] [hereinafter Magistrates’ Courts Act].

Section 7(3) of the Magistrates’ Courts Act provides for assessors to sit on Tanzanian courts and advise magistrates as to matters of customary and Islamic law: “In any proceedings . . . in which any rule of customary or Islamic law is in issue or relevant the court may, and when directed by an appropriate judicial authority shall, sit with an assessor or assessors; and every assessor shall be required, before judgment, to give his opinion as to all questions relating to customary or Islamic law in issue in, or relevant to, the proceeding; save that in determining the proceeding, the court shall not be bound to conform with the opinion of the assessors.” Magistrates’ Courts Act, *supra* note 27, § 7(3). See also *infra* Part III for a further discussion of the Probate and Administration of Estates Act.

28. Approximately forty-five percent of the Tanzanian population is Christian, and forty-five percent is Muslim. U.S. DEP’T OF STATE, BACKGROUND NOTE: TANZANIA, available at <http://www.state.gov/r/pa/ei/bgn/2843.htm>.

29. The Indian Succession Act of 1865 (as amended through 1920) applies to Tanzania under the Judicature and Application of Laws Act. JALA, *supra* note 27, §§ 14-18; *id.* 2d. sched. § 14 (“The Acts of the Governor-General of India in Council, . . . ‘the Indian Acts’ . . . and such amendment of or substitution for the same as was in force on 1st December, 1920 are . . . hereby applied to Tanzania”).

30. As the Law Reform Commission remarked, “While in India, the Indian Succession Act . . . has undergone a number of amendments and modifications, this has not been case with the one in Tanzania.” LAW REFORM COMMISSION REPORT, ON SUCCESSION/INHERITANCE, *supra* note 17, at 25. Moreover, “[t]he provisions of the Indian Succession Act 1865 differ from those under the English law today.” *Id.*

31. JALA, *supra* note 27, § 11(1)(b).

32. *Id.* § 11(1).

33. See Probate and Administration of Estates Act, *supra* note 27, §§ 88(1)(a), 88(2). Although this test is found in the section governing small estates, case law has extended its application to all estates. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 28 (citing *Re Estate of the late Suleman Kusundwa*, [1965] E.A. 247).

most likely did not consider inheritance matters or even understand the various options available. True intent can only be determined by a will, which would obviate the need to apply any intestate succession law. Under current practices, as Tanzania's Law Reform Commission reported, customary law is generally applied to "all members of the African tribal Communities . . . irrespective of where they happen to be, places of origin and their religious beliefs."³⁴ This predominance of customary law has dire consequences for women. As Tanzania itself acknowledged, women's rights are "insecure . . . because most of the inheritance laws are based on customary law."³⁵

This funneling of citizens of African origin into a discriminatory customary law regime also constitutes discrimination on the basis of race or ethnicity. As discussed below, while the Indian Succession Act is gender neutral, and Islamic law at least gives widows some inheritance rights, customary law is the most discriminatory—in many cases not recognizing women's rights to inherit at all. Tanzania's choice of law rules function along both religious and racial lines. As the Law Reform Commission reported, The Indian Succession Act applies to "Christians and all those of European origin,"³⁶ while customary law "is applicable to African members of the community irrespective of their religious affiliation"³⁷—whether Christian or Muslim. Indeed, the Tanzanian government criticized the inheritance regime applying customary, Islamic, and Hindu law for its "negative effect of reinforcing and perpetuating racial and tribal divisions among citizens."³⁸ This differential treatment between women of African origin compared to women from Europe and Asia further violates the equal protection guarantees in both Tanzania's Constitution and international law.³⁹ Thus, a

34. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 26; *see also id.* at 21 (noting that customary law "is applicable to African members of the Community irrespective of their religious affiliation."); Interview with Assistant Administrator General and Principal Probate Officer, in Dar es Salaam, Tanzania (Mar. 26, 2002) (explaining that the estates of "even Christians" are administered under customary law as "[t]hey are always Africans").

35. United Republic of Tanzania, Initial Report to CEDAW Committee, para. 2.27, U.N. Doc. CEDAW/C/5/Add.57 (May 4, 1988) [CEDAW, Initial Report].

36. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 20.

37. *Id.* at 21.

38. *Id.* at 13.

39. Tanzania's Constitution guarantees "equal protection" and "equality before the law" and prohibits discrimination "on the basis of . . . nationality, tribe, place of origin . . . colour, [and] religion." TANZ. CONST. arts. 29(2), 13(1), 13(5). Discrimination on the basis of ethnicity or national origin is similarly prohibited by international law. International Covenant on Civil and Political Rights, art. 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *acceded to by Tanzania* June 11, 1976, *available at* <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm> ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. . . . [T]he law shall . . . guarantee to all persons equal and effective protection against discrimination on any ground such as . . . race, colour . . . religion . . . national or social origin.") [hereinafter ICCPR]; African Charter on Human and Peoples' Rights, art. 19, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, *ratified by Tanzania* Feb. 18, 1984, *available at* <http://www1.umn.edu/humanrts/instreet/z1afchar.htm> [hereinafter African Charter] ("All peoples shall be equal; they shall enjoy the same respect and shall have the same

woman's African ancestry channels her into a sex discriminatory inheritance scheme, which, as shown below, deprives her of equality, property, an adequate standard of living, family protection, and dignity.

B. CUSTOMARY LAW DENIES WIDOWS INHERITANCE AND LIMITS DAUGHTERS TO THE SMALLEST SHARE WITH ATTACHED RESTRICTIONS

The customary laws of intestate succession either completely deny women inheritance or severely limit their shares. They thus maintain women's dependence on men, enforcing outdated stereotypes about the inferior roles and status of women in society.

1. Instead of Recognizing Widows' Right to Inherit Matrimonial Property, Customary Law Treats Them as Minors Dependent on the Care of Others and as Property to be Inherited by Men

*"Customary law is a problem area. Women get nothing. Woman is owned."*⁴⁰

Customary law explicitly denies widows inheritance. As codified, "The widow has no share of the inheritance if the deceased left relatives of his clan; her share is to be cared for by her children, just as she cared for them."⁴¹ Customary law treats widows as dependents who require care, rather than as mature adults who can inherit and manage property. Customary law thus delegates "the responsibility of taking care of the widow" to the "deceased's heir."⁴² If the widow's children are minors, a guardian is appointed to look after them, their mother, and their property.⁴³ This guardian can be an adult son or one of her husband's brothers if she "agrees to be inherited" by him.⁴⁴ This guardian assumes vast power in the household with the authority to manage the family's agricultural work,⁴⁵ livestock,⁴⁶ and budget.⁴⁷ Thus, upon her husband's death, a widow finds herself economically disempowered and her decision-making usurped within the family.

rights."). The South African Constitutional Court rejected a similar inheritance system that channeled black Africans into a "parallel" discriminatory "regime of intestate succession" as "blatant discrimination on grounds of race, colour and ethnic origin" in contravention of both the South African Constitution and international human rights. *Bhe v. Khayelitsha*, paras. 61, 60, 2004 (1) BCLR 1 (CC) (S. Afr.).

40. Interview with Consultant for Deputy Mayor, in Dar es Salaam, Tanzania (Mar. 27, 2002).

41. GN 436, 2d sched., *supra* note 2, R. 27.

42. *Id.* R. 51.

43. Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, First Schedule, Laws on Guardianship [Sheria za Ulinzi] R. 11 in *Judicature and Application of Laws Act*, TANZ. LAWS SUB. LEGIS. [CAP 358, R.E. 2002] [hereinafter GN 436, 1st sched.]. For a detailed discussion of these guardianship laws, see Tamar Ezer, Kate Kerr, Kara Major, Aparna Polavarapu & Tina Tolentino, *Child Marriage and Guardianship in Tanzania: Robbing Girls of their Childhood and Infantilizing Women*, 7 GEO. J. GENDER & L. 357 (2006).

44. GN 436, 1st sched., *supra* note 43, R. 5, 7.

45. *Id.* R. 12.

46. *Id.* R. 19.

47. *Id.* R. 14.

While a widow only has the right to be cared for, a widower assumes complete control and ownership of his spouse's property. Widowers are presumed to own the entire marital property, making it unnecessary to administer an estate and divide inheritance at the wife's death. The Law Reform Commission noted that relatives apply for letters of administration "only when the husband dies and not when the wife dies . . . [This] presupposes that it is only the husband who had personal property interest in the property so jointly acquired by the couple during their marriage."⁴⁸ Moreover, customary law appoints a guardian to look after children and property only when a man, not a woman, dies.⁴⁹

Customary law provides certain limited inheritance rights to widows, but they forfeit even these limited rights upon remarriage. A widow can inherit property in the rare cases when she is childless⁵⁰ and when there are no other relatives.⁵¹ A childless widow receives one-twentieth of one-half of any movable property, land, and crops for every year of her marriage.⁵² However, this benefit ceases when "she remarries or dies," and the "property shall promptly be given to the deceased's relatives."⁵³ The widow's enjoyment of the property is thus only temporary. Under customary law, the husband's family remains the true owners of the property, and it "promptly" reverts to their possession upon the widow's death or remarriage. The widow's use of the property is also conditional. Her entitlement to land requires her to use it "for cultivation, using proper methods during her life time," and she cannot sell or bequeath it.⁵⁴ Moreover, in practice, as the Law Reform Commission remarked, even these limited protections for childless widows are "never put into effect."⁵⁵

Widows may continue to live in the family home as long they do not remarry. A childless widow "shall *be allowed* to live in the matrimonial house until she remarries or dies,"⁵⁶ and a widow with children "*may demand* to live with her children in the house of the deceased as one of the members of the deceased's family."⁵⁷ Here again, the husband's family are the owners of the family home, and the widow's presence is merely permitted or tolerated. Customary law goes

48. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 7; *see also id.* at 42 (explaining that "the question as to who should inherit" only arises when the husband dies "because a woman is considered to have neither testamentary capacity nor wealth of her own."); Interview with Parliament Member, in Dar es Salaam, Tanzania (Mar. 28, 2002) (noting that this attitude pervades law enforcement as the police "believe that the property in the house belongs to the man.>").

49. GN 436, 1st sched., *supra* note 43, R. 1(a), 2-27.

50. Local Customary Law (Declaration) Order, Government Notice (GN) 279/1963, First Schedule, Laws of Persons [Sheria Zinazohusu Hali ya Watu], R. 77 in Judicature and Application of Laws Act, TANZ. LAWS SUB. LEGIS. [CAP 358, R.E. 2002] [hereinafter GN 279, 1st sched.]. There are no similar provisions for childless widowers; only widows are so completely at the mercy of their children.

51. GN 436, 2d sched., *supra* note 2, R. 50.

52. GN 279, 1st sched., *supra* note 50, R. 77.

53. *Id.*

54. *Id.* R. 77(1).

55. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 23.

56. GN 279, 1st sched., *supra* note 50, R. 77(3) (emphasis added).

57. *Id.* R. 66(A) (emphasis added).

on to further curtail the widow's associations: "If the widow, by her persistence, lives with a man who is not her deceased husband's relative, the clan council has the right to warn her and if it is not heeded, the council may send her back to her father's family and also take the children from her."⁵⁸ Thus, not only can a remarried widow lose the family home, but she further risks expulsion from the community and the loss of her children. There are no comparable provisions governing a widower's conduct upon the death of his spouse.

Denied any meaningful inheritance, widows are reduced to property—eligible for "inheritance" *by* men. In addition to distributing the estate, customary law creates a method for distributing the widow herself: "The deceased's relatives may ask a widow whether she wishes to be inherited."⁵⁹ Then, "[i]f the widow agrees to be inherited as a wife of one her deceased husband's relatives,"⁶⁰ this new husband can take over the property as "guardian of the deceased's children."⁶¹ Thus, if a widow wishes to remain with and provide for her children, she often has no choice but to give in to widow inheritance.⁶²

The persistent phenomenon of widow inheritance⁶³ has deadly consequences for Tanzanian women. Widow inheritance contributes to the spread of HIV and to a cycle of women's disempowerment. If the widow's husband died of AIDS, she will be spreading the disease to her new husband and any of his other wives, and she is likewise susceptible to contracting the disease from him.⁶⁴ Widow inheritance also perpetuates the stereotype of women as helpless and economically incapable, treating them as property to be owned by men. Even professional women face the pressure of inheritance by a deceased husband's relative. As the Director of Primary Court recalled:

When I lost my husband the . . . problem I had was with wife inheritance. I said [to my husband's relatives], 'keep away from me . . .' They said they would assist me and I said, 'What help can you give me?' But women in villages have no economic power, so they can't say no.⁶⁵

58. *Id.* R. 68.

59. *Id.* R. 62.

60. *Id.* R. 64.

61. *Id.* R. 7.

62. Customary law and some Tanzanians suggest that a widow who does not desire to be inherited may go back to her parents' home. *Id.* R. 62. However, in order to do this, a widow will generally have to leave her children behind with her husband's family. E-mail from WLAC's Executive Director to Tamar Ezer, Georgetown International Women's Human Rights Clinic (Mar. 29, 2006).

63. A high-ranking government officer estimated that ten percent of widows were inherited. Interview with Attorney at the Ministry of Community Development, Women's Affairs and Children, in Dar es Salaam, Tanzania (Mar. 25, 2002).

64. Magoke-Mhoja, *supra* note 9, at 263 ("With the scourge of AIDS, wife inheritance is often the equivalent of committing suicide.").

65. Interview with Director of Primary Courts, in Dar es Salaam, Tanzania (Mar. 25, 2002); *see also* Interview with WLAC Attorney, in Dar es Salaam, Tanzania (Mar. 23, 2002) ("In the villages, [widow inheritance] is a big problem, especially in the world of AIDS.").

2. Customary Law Limits and Restricts Daughters' Inheritance

Customary law grants daughters the smallest share of inheritance. Tanzania's Law Reform Commission characterized customary law as "embarrassingly discriminatory to children."⁶⁶ It sets out a hierarchical scheme based on gender under which "older children receive more than the younger ones and males receive more than females."⁶⁷ Customary law divides heirs into three degrees, where the first degree obtains the largest share, and the third degree the smallest.⁶⁸ Under this scheme, "the first degree is for the first son, the second degree is for other sons, and the third degree is for daughters."⁶⁹ Thus, daughters inherit less than both their older and younger brothers. The law demonstrates this inequality by providing an example that limits the shares of three daughters to 25% of the family cattle, while granting three sons 75%.⁷⁰ The Tanzanian government identified this differential treatment between boys and girls as a "glaring example" of continuing discrimination in violation of the Constitution.⁷¹

In addition to allocating daughters smaller shares, customary law attaches limitations to property they do inherit. A woman cannot fully inherit clan land. She may use the land, but, unlike her brother, she is forbidden to sell it,⁷² even if she is the only child.⁷³ Women can only inherit "completely" in the rare cases when there are no men in an entire clan.⁷⁴ The Tanzanian government itself criticized this restriction on women's inheritance of clan land for "perpetuating inequality between men and women."⁷⁵

66. LAW REFORM COMMISSION REPORT ON CHILDREN, *supra* note 9, para. 363. The Law Reform Commission Report on The Law of Succession/Inheritance referred to "a long standing outcry in the country that daughters are generally discriminated as against sons when it comes to . . . succession." LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 8.

67. GN 436, 2d sched., *supra* note 2, R. 30.

68. *Id.* R. 21-23. Moreover, polygamy complicates matters as the law discriminates among children of different wives. *Id.* R. 19.

69. *Id.* R. 25.

70. *Id.* R. 30. In the example, the 23-year-old son inherits nine heads of cattle; the 20-year-old brother, five heads of cattle; the 14-year-old-brother [youngest sibling], four heads of cattle; the 25-year-old-daughter [oldest sibling], three heads of cattle; the 22-year-old-daughter, two heads of cattle; and the 18-year-old daughter, one head of cattle.

71. Revised Initial Report to CRC, *supra* note 13, at 28, para. 118.

72. GN 436, 2d sched., *supra* note 2, R. 31; *see also id.* R. 20 ("Women . . . can use clan land without selling it during their lifetime.").

73. *Id.* R. 31.

74. *Id.* R. 20. In *Ephrahim v. Pastory*, the High Court declared this custom "discriminatory of females" and "inconsistent with art 13(4) of the Bill of Rights of our Constitution which bars discrimination on account of sex." *Ephrahim v. Pastory*, [1990] LRC (Const) 757, 770 (Tanz. High Ct. 1990). However, not all High Court judges have followed this decision, and the Court of Appeals has not yet ruled on this issue. Florence Butegwa, *Using the African Charter on Human and Peoples' Rights to Secure Women Access to Land in Africa*, in HUMAN RIGHTS OF WOMEN 495, 498 (Rebecca J. Cook ed., 1994).

75. United Republic of Tanzania, Second Report to HRC, para. 49, U.N. Doc. CCPR/C/42/Add.12 (Jun. 4, 1991).

3. Inheritance by Other Family Members Follows a Gender Discriminatory Scheme, Generally Passing through Men

Other family members inherit under a similarly gender discriminatory scheme.⁷⁶ If the children are no longer alive, grandchildren inherit in their place under the same discriminatory allocation.⁷⁷ If there are no children or grandchildren, the deceased's siblings inherit with "the first brother . . . in the first degree, the other brother in the second degree and the sister . . . in the third degree."⁷⁸ Once again, the largest share of inheritance is reserved for the men. If the deceased's siblings are no longer alive, the deceased's nephews and nieces inherit.⁷⁹ If there are no nephews or nieces, the deceased's father inherits.⁸⁰ After that come uncles and paternal aunts,⁸¹ paternal relatives,⁸² the spouse,⁸³ and finally the local government.⁸⁴ The deceased's mother and maternal relatives nowhere figure in this hierarchy; even the local government takes precedence over them.

Customary law not only limits women's ability to inherit, but also their ability to pass on inheritance to others. Customary law keeps others (of both genders) from inheriting through women. The very first rule of inheritance specifies, "Inheritance follows the patrilineal side."⁸⁵ It therefore, cuts off maternal relatives from inheritance. Customary law also recognizes inheritance from a grandfather,⁸⁶ but is conspicuously silent as to the grandmother.⁸⁷ Moreover, as discussed above, any inheritance by women generally only lasts for their lifetime⁸⁸ or until marriage.⁸⁹ Customary law thus sharply curtails women's right to own or transfer property.

4. The Limited Customary Rights Granted Women Are Even More Uncertain in Practice

Even the limited inheritance rights granted women under customary law remain uncertain. Despite the codification of customary law, its application varies

76. This gender discriminatory scheme directly contravenes the CEDAW Committee's mandate 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." CEDAW General Rec. 21, *supra* note 6, at 256, para. 34.

77. GN 436, 2d sched., *supra* note 2, R. 34.

78. *Id.* R. 44.

79. *Id.* R. 46.

80. *Id.* R. 47.

81. *Id.* R. 48, 49.

82. *Id.* R. 49.

83. *Id.* R. 50.

84. *Id.* R. 52.

85. *Id.* R. 1.

86. *Id.* R. 34, 38, 40.

87. This omission reflects customary law's assumption that women do not own property, so there is no need to provide for its inheritance.

88. GN 436, 2d sched., *supra* note 2, R. 20, 31.

89. GN 279, 1st sched., *supra* note 50, R. 77, 68. Rule 68 is not limited to marriage, but goes so far as to throw a widow out of the matrimonial home if she just lives with another man. *Id.* R. 68.

enormously depending on the region and the judge's discretion. Though there is widespread awareness of this codification, its provisions are frequently ignored in favor of a more particularized application of tribal customary inheritance laws. As a law professor explained, "The pattern of application of the customary law declaration order depends on the lifestyle of the particular community. One cannot generalize about the practice of customary laws."⁹⁰ Tanzanian law itself instructs a court to "apply the customary law prevailing within the area of its local jurisdiction."⁹¹ Thus, despite codification, "[t]here are as many Customary laws as there are tribes"⁹² Under this system, minimal customary law protections are often disregarded to apply the customs of a particular locality, which may be even more disadvantageous to women. As the Law Reform Commission noted, "[I]n some tribes, where, besides the daughters, there are also sons surviving the deceased, the daughters are denied in toto such right of inheritance."⁹³

Moreover, judges and magistrates frequently disregard customary law altogether.⁹⁴ A Resident Magistrate explained that customary law is not carefully followed in cities.⁹⁵ A High Court Judge stated that he preferred "to apply customary law because it allows [him greater freedom] to decide better" than a rigid statutory scheme.⁹⁶ A Primary Court Magistrate described, "Some primary courts strictly follow the law, while others follow justice."⁹⁷ This free reign exercised by judges can be detrimental to women as it allows gender bias to inform their rulings.⁹⁸ As an attorney explained, "[T]he law of inheritance is messed up so much" because it "depends . . . on the wisdom of the judge on the case."⁹⁹

In this way, judgments vary widely, depending on the court's location and the judge. The resulting confusion and, at times, outright contradiction surrounding the practice of customary law exacerbate the difficulties of women. Uncertainty about the law impedes women in attempting to enforce even limited rights.

90. Interview with Law Professor, in Dar es Salaam, Tanzania (Mar. 28, 2002).

91. JALA, *supra* note 27, § 11(3). Moreover, "if there is more than one such law, the law applicable in the area in which the act, transaction, or matter occurred or arose" governs. *Id.*

92. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 25.

93. *Id.* at 29.

94. Tanzania's highest court is its Court of Appeals. Below that are the High Courts, Resident Magistrate Courts, District Courts, and Primary Courts. Judges preside in the Court of Appeals and High Courts, and magistrates preside at the lower levels. Tanzania National Website, *Administration: The Government Structure in Summary*, <http://www.tanzania.go.tz/administrationf.html>; *see also* Magistrates' Courts Act, *supra* note 27.

95. Interview with Resident Magistrate, in Dar es Salaam, Tanzania (Mar. 26, 2002).

96. Interview with High Court Judge, in Dar es Salaam, Tanzania (Mar. 27, 2002).

97. Interview with Primary Court Magistrate, in Dar es Salaam, Tanzania (Mar. 26, 2002).

98. Interview with Law Professor, *supra* note 90 (explaining that even if primary courts are aware of customary inheritance rules, "because they are male dominated problems arise."); Interview with Resident Magistrate, *supra* note 95 ("It all depends on the judge's background. Most judges who uphold discriminatory laws are from the same areas.").

99. Interview with Founding Member and Former WLAC Attorney, in Kibaha, Tanzania (Mar. 24, 2002).

C. UNDER ISLAMIC LAW, WOMEN CAN INHERIT ONLY HALF AS MUCH AS MEN,
PERPETUATING WOMEN'S DEPENDENCE

Islamic law similarly disadvantages women and perpetuates their dependence on men. Islamic law facially discriminates against widows and daughters, granting women one-half the share of men. Under the Qu'ran a widower with children is entitled to a quarter of his spouse's estate, while a widow with children is only entitled to one-eighth. Similarly, a widower without children is entitled to one-half of his spouse's estate, while a childless widow is only entitled to one-quarter.¹⁰⁰

This facial discrimination is compounded by the fact that many marriages in Tanzania are polygamous.¹⁰¹ Islamic law stipulates that in cases of polygamous marriage, the wives must equally divide the share allocated to the "wife."¹⁰² If there are four wives, as Islam permits in Tanzania, each wife will get one-thirty-second of the estate. Men, however, never face this problem, because it is illegal in Tanzania for a woman to have more than one husband.¹⁰³ Moreover, a man in a polygamous marriage will inherit a spousal share of at least one-quarter from *each* of his wives or the equivalent of a whole share when he has four wives. Thus, the use of Islamic inheritance law discriminates against women by further reducing their already small inheritance shares if they are in polygamous marriages, while greatly increasing men's inheritance shares if they have more than one wife.

Islamic inheritance law likewise discriminates against daughters and sisters by granting them only half the inheritance sons and brothers receive. The Qur'an explicitly outlines: "Allah enjoins you concerning your children: for the male is the equal of the portion of two females."¹⁰⁴ If there are no descendants or parents, the deceased's brothers and sisters inherit under a similar pattern, and "the male is the like of the portion of two females."¹⁰⁵

Thus, Islamic law allocates to women smaller inheritance shares, making them

100. Holy Qur'an 4:12 (Ahmadiyyah Anjuman Isha'at Islam, Lahore, Inc., ed. 1995) [hereinafter Qur'an]. "And you shall have half of what your wives leave if they have no child, but if they have a child, then you shall have a fourth of what they leave after (payment of) any bequest they may have bequeathed or a debt; and they shall have the fourth of what you leave if you have no child, but if you have a child then they shall have the eighth of what you leave after (payment of) a bequest you may have bequeathed or a debt." *Id.*

101. An estimated twenty-nine percent of married women in Tanzania are in polygamous unions. CTR. FOR REPRODUCTIVE RIGHTS, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGLOPHONE AFRICA, PROGRESS REPORT 2001 116 (2001), available at <http://www.reproductive-rights.org/pdf/wowaapr-tanzania.pdf> [hereinafter WOMEN OF THE WORLD: ANGLOPHONE AFRICA, PROGRESS REPORT].

102. MAHOMED S. OMAR, THE ISLAMIC LAW OF SUCCESSION AND ITS APPLICATION IN SOUTH AFRICA 42 (1988).

103. LMA, *supra* note 14, § 152 ("A married woman who is party to a ceremony whereby she purports to marry another man shall be guilty of an offence.").

104. Qur'an, *supra* note 100, at 4:11.

105. *Id.* at 4:176 ("Allah gives you a decision concerning the person who has neither parents nor children. If a man dies (and) he has no son and he has a sister, hers is half of what he leaves, and he shall

dependent on men for support. An Islamic leader justified the discriminatory division of property as fair because sons have to take care of their sisters and mothers, while fathers have to take care of their daughters.¹⁰⁶ Another leader echoed, “Men under *sharia* [Islamic law] . . . have been given responsibility over women, to take care of them. That’s why men need more property.”¹⁰⁷ However, this places women at the mercy of their brothers and sons, perpetuating stereotypes of inferior roles. The situation is further complicated when a widow has to rely on someone other than her children, such as her brother-in-law or father-in-law, for support.

D. ALTHOUGH GENDER NEUTRAL, THE INDIAN SUCCESSION ACT IS RARELY APPLIED

Intestate succession in Tanzania is further governed by the gender neutral Indian Succession Act, but it is only rarely applied. As discussed above, under Tanzania’s choice of law rules, this Act is mostly applied to Europeans, and Tanzanians of African origin seldom benefit from its provisions.¹⁰⁸ Under the Act, widows have the same rights as widowers.¹⁰⁹ If only the deceased’s spouse survives, the spouse receives the entire estate.¹¹⁰ If any of the deceased’s lineal descendants (children, grandchildren, etc.) survive, the spouse receives one-third of the property, and the remainder of the property is divided equally among the lineal descendants in the applicable class.¹¹¹ If there are no lineal descendants, but the deceased is survived by others “who are of kindred,” such as brothers and sisters, the spouse receives half of the estate, and the brothers and sisters split the remaining half in equal shares.¹¹² Men and women of the same relationship to the deceased receive equal shares of the property without regard to gender.¹¹³

be her heir if she has no son. But if there be two (sisters), they shall have two-thirds of what he leaves. And if there are brethren, men and women, then for the male is the like of the portion of two females.”).

106. Interview with Muslim Leader, in Dar es Salaam, Tanzania (Mar. 27, 2002).

107. Interview with Muslim Leader, *supra* note 3.

108. According to the Assistant Attorney General, “Even Christians apply customary law. They are always Africans. Therefore customary law applies.” Interview with Assistant Administrator General and Principal Probate Officer, *supra* note 34.

109. MAHENDRA C. MAJUMDAR, THE INDIAN SUCCESSION ACT (ACT X OF 1865) WITH ELABORATE NOTES AND COMMENTARIES § 43 (M. Kirshnamachariar ed., 1924) (“The husband surviving his wife has the same rights in respect of her property, if she dies intestate, as the widow has in respect of her husband’s property if he dies intestate.”). Neither WLAC nor Georgetown’s International Women’s Human Rights Clinic could obtain a copy of the Indian Succession Act as it applies to Tanzania, despite visits to Tanzanian court libraries and even the U.S. Library of Congress. This article thus refers to Majumdar’s, *Indian Succession Act (Act X of 1865)* [hereinafter Indian Succession Act].

110. *Id.* § 27.

111. *Id.*

112. *Id.*

113. *Id.* §§ 30-41. The one exception is a case in which both parents of the deceased survive, in which case the father inherits the whole of the parents’ share. *Id.* § 35.

However, few courts apply the Indian Succession Act to an inheritance case.¹¹⁴ Besides the legal barrier of choice of law rules, judges and magistrates are typically unfamiliar with the Act and believe it to be inapplicable. A Primary Court Magistrate stated that the Indian Succession Act is not within the jurisdiction of the Primary Court.¹¹⁵ A High Court Judge likewise indicated that Primary Courts only handle Islamic, customary, and common law.¹¹⁶ He further had never read the Act and believed that it was “falling into disuse,” replaced by common law and “general principles” of inheritance.¹¹⁷ According to another High Court Judge, “if you deal with an appeal which started at the primary court level, you will apply customary law, almost always.”¹¹⁸ Furthermore, a written copy of the Act itself appears to be unavailable throughout the country.¹¹⁹ To apply this Act, judges would thus have to rely on case law using the Act or simply resort to common law principles of fairness and equity.

III. BOTH BY LAW AND PRACTICE, THE ADMINISTRATION OF ESTATES FAVORS THE SELECTION OF MALE ADMINISTRATORS TO OVERLOOK THE RIGHTS OF WOMEN

A. TANZANIAN LAW TENDS TO APPOINT MALE ADMINISTRATORS AND PROVIDES NO ADEQUATE ALTERNATIVE IN CASE OF PROBLEMS

Tanzanian law not only denies women inheritance, but also deprives them of procedural rights and bars them from the administration of estates. When a person dies intestate, a legally designated person must be chosen to distribute the deceased’s assets—the “administrator” of the estate.¹²⁰ Customary, Islamic, and general statutory law all operate to exclude women from administrator positions. Tanzania’s Office of the Administrator General, also authorized to administer estates, provides no remedy for these inequities.

Customary law is blatantly gender discriminatory in the selection of an administrator. If the decedent is an adult, the preferred candidate is his eldest brother.¹²¹ If the decedent is a minor, his father will generally be selected as the administrator of his estate.¹²² If the deceased’s father is no longer alive and he has no brothers, any of his male relatives may be “chosen with the help of the clan

114. Interview with Senior Resident Magistrate, in Dar es Salaam, Tanzania (Mar. 26, 2002); Interview with Assistant Administrator General and Principal Probate Officer, *supra* note 34.

115. Interview with Primary Court Magistrate, in Dar es Salaam, Tanzania (Mar. 28, 2002). However, according to the Director of Primary Courts, the Indian Succession Act is applied. She remarked, “I can’t see how a magistrate could fail to apply the Indian Succession Act, especially in Dar where people are all mixed from different races.” Interview with Director of Primary Courts, *supra* note 65.

116. Interview with High Court Judge, in Dar es Salaam, Tanzania (Mar. 26, 2002).

117. *Id.*

118. Interview with High Court Judge, in Dar es Salaam, Tanzania (Mar. 27, 2002).

119. Interview with Assistant Administrator General and Principal Probate Officer, *supra* note 34.

120. Probate and Administration of Estates Act, *supra* note 27, § 2(1).

121. GN 436, 2d sched., *supra* note 2, R. 2.

122. *Id.* R. 3. The Rule refers to the child’s father or guardian. Under customary law, guardians appointed for children are male. GN 436, 1st sched., *supra* note 43, R. 3, 4, 5, 7.

council.”¹²³ Only if there is no male relative at all, can a sister serve as administrator.¹²⁴ Thus, for a woman to become an administrator, the deceased must have absolutely no male relatives—a highly unusual occurrence. Though the spouse of the deceased is likely to have the clearest understanding of property left behind, she is not a candidate to administer the estate under any circumstance.

Although Islamic law does not facially discriminate against women in the administration of estates, it operates to exclude women in practice. Islamic law does not specify procedures for selecting administrators. However, a Muslim widow must remain in mourning for 120 days, during which she is confined to her home and may not participate in public activities. This mourning period affords her husband’s relatives an opportunity to control the administration of the estate.¹²⁵

General statutory law, under the Probate and Administration of Estates Act, likewise favors a male administrator. For “small” estates, valued at 10,000 shillings or less,¹²⁶ the Act requires that the nearest male relative of the deceased serve as the estate’s administrator.¹²⁷ The Act thus mandates male administrators for small estates. Only when the estate is very small (valued at less than 1,000 shillings)¹²⁸ may the surviving spouse distribute it.¹²⁹ However, this rule is virtually meaningless because no estates are valued so low.

The Probate and Administration of Estates Act provides a gender neutral system for appointing an administrator only when an estate is not considered “small,” but even this results in the exclusion of women. In the case of larger estates, the administrator may be “any person who, according to the rules for the distribution of the estate . . . would be entitled to the whole or any part of such deceased’s estate.”¹³⁰ However, in cases of conflict, the court “shall take into account greater and immediate interests in the deceased’s estate in priority to lesser or more remote interests.”¹³¹ Under the existing regime, the likelihood that a woman will have the greatest share in the estate is minute. Therefore, women are still prevented from administering estates.

This procedural exclusion of women from the administration of estates has dire consequences for their well-being. Overlooking the widow for a male administrator disregards the best interests of the widow and remaining children.

123. GN 436, 2d sched., *supra* note 2, R. 5.

124. *Id.*

125. Interview with WLAC Treasurer and Board Member, in Dar es Salaam, Tanzania (Mar. 23, 2002); Interview with Director of Law and Human Rights Center (LHRC), in Dar es Salaam, Tanzania (Mar. 25, 2002).

126. Probate and Administration of Estates Act, *supra* note 27, § 2(1).

127. *Id.* § 87(1).

128. At the time of publication, this comes out to under \$1 U.S.

129. Probate and Administration of Estates Act, *supra* note 27, § 87(1).

130. *Id.* § 33(1).

131. *Id.* § 33(2).

As one Tanzanian recounted:

My sister's husband died in the crossfire of a police chase. One of her brothers-in-law was appointed administrator After mourning rituals, my sister came back to Dar es Salaam. Her husband had operated a bar and some projects. When she returned she ordered the employees to start up the business again. The administrator then closed all the enterprises My sister complained of the administrator's actions and said he didn't provide for the maintenance of her children. The clan elders said the woman's side can't choose [the method of] administration, so it has to stand.¹³²

Tanzania's Office of the Administrator General does little to remedy this situation. The Administrator General Office can distribute estates in cases where there are no candidates for administration or where there is a disagreement.¹³³ However, its involvement and resources are extremely limited, and it cannot provide an adequate response to Tanzanians' inheritance problems.

The Office does not accept all estates in need of administration, but rather chooses certain estates based on their size and location. As officials explained, the estate must be large enough to be "worth administering. In the case of a two acre coconut farm, we advise them to have a relative or local official administer the estate. We are basing the decision on the size of the estate. If it is small, we can give advice, but it is too expensive to administer."¹³⁴ This selection process eliminates the majority of Tanzanians because most Tanzanians do not own significant amounts of property.¹³⁵ Additionally, the Office of the Administrator General is limited by geography. One official stated that "[t]here are not enough resources. The administrative officers have to stay close to Dar es Salaam because we can't afford to travel."¹³⁶

Moreover, the process of appointing the Administrator General as administrator is long and tedious. "It can take up to two or three months just to get the information [about the estate] from the family. Then, the petitioning process after getting this information can take up to six months, sometimes more."¹³⁷ Even Tanzanians who are confident that the estate qualifies for administration by the

132. Interview with WLAC Attorney, in Dar es Salaam, Tanzania (Mar. 28, 2002). Tanzanians thus recommend having the widow serve as administrator. *Id.*; see also Interview with Resident Magistrate, in Dar es Salaam, Tanzania (Mar. 25, 2002) ("[T]he wife would be a very good administrator . . . since she took part in getting the property, and she will take care of the children. If you give [the administration] to the uncle, he will not take care of the woman and children.").

133. Administrator-General (Powers and Functions) Act, TANZ. LAWS [CAP 27, R.E. 2002]; Interview with Assistant Administrator General and Principal Probate Officer, *supra* note 34.

134. *Id.*

135. According to the Assistant Administrator General, the Office took only "ten to fifteen new cases per year." *Id.*

136. *Id.*

137. *Id.*

Office may decide not to pursue this option if they want the heirs to receive their property in a timely manner.

B. IN PRACTICE, THE ADMINISTRATION OF ESTATES FURTHER EXACERBATES
DISCRIMINATION IN THE LAW

Practical realities additionally exacerbate the impact of discriminatory rules governing the administration of estates. These problems include misconceptions as to the administrator's responsibilities, delays in administration, and interference by local decision-making bodies.

Misunderstandings of the administrator's role vastly magnify discrimination in the appointment of an administrator. The Law Reform Commission pointed to the common misconception that the administrator selected is the sole beneficiary of the decedent's estate.¹³⁸ As the chairman of the University Legal Aid Committee explained, "Confusion arises because people do not distinguish administrator from beneficiary."¹³⁹ Because women are rarely chosen as administrators, the result is that a man who is selected as administrator will simply take all of the property for himself. Women rarely protest this injustice because they lack resources and knowledge of their legal rights.¹⁴⁰

Furthermore, delays in the administration of property work to the detriment of women. After the court receives an application from someone who wants to be appointed administrator, there is a ninety-day waiting period. During this time, the name of the applicant is publicized so that other people may lodge a caveat against the application.¹⁴¹ This waiting period would appear to protect women, who have to go through a mourning period before they can participate in public activities. However, Tanzanians cited the long waiting period as a problem for women.¹⁴² It may prevent property from being distributed in a timely manner, thus depriving women of an immediate means of support.¹⁴³ Furthermore, it allows the relatives to "property grab" in the early stages after a man's death with

138. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 57; *see also id.* (highlighting the "gross misconception among the chosen administrators, who believe that when letters of Administration are given to them, then the deceased property belongs to them.").

139. Interview with Chairman of the University of Dar es Salaam's Legal Aid Committee, in Dar es Salaam, Tanzania (Mar. 27, 2002); *see also* Interview with Resident Magistrate, in Dar es Salaam, Tanzania (Mar. 25, 2002) ("Administrators assume they are the owners.").

140. Interview with Deputy Mayor, in Dar es Salaam, Tanzania (Mar. 27, 2002) (referring to the need to raise women's awareness and combat their negative attitude towards courts); Interview with Attorney at the Ministry of Community Development, Women's Affairs and Children, *supra* note 63; Interview with Director of Primary Courts, *supra* note 65 ("[T]he women themselves are not aware of their rights."). Moreover, women may fear physical harm from those against whom they bring suit. Interview with WLAC Paralegal, in Kibaha, Tanzania (Mar. 24, 2002).

141. Interview with WLAC Attorney, *supra* note 65; Interview with WLAC Treasurer and Board Member, *supra* note 125; Interview with Senior Resident Magistrate, in Dar es Salaam, Tanzania (Mar. 26, 2002); Interview with Primary Court Magistrate, *supra* note 115.

142. Interview with Director of LHRC, *supra* note 125.

143. Interview with Primary Court Magistrate, *supra* note 115.

no immediate recourse for those whose property is taken.¹⁴⁴ Additionally, the waiting period offers little protection to Muslim widows, who must mourn for 120 days.¹⁴⁵ By the time a Muslim widow has completed her mourning period, she has missed her chance to lodge a caveat.¹⁴⁶

Finally, local bodies may control the administration of property, further excluding women from the process. Many cases in villages never make it to the court system at all. Instead, a local body such as a family, clan, or religious council meets after a man's death and selects an administrator.¹⁴⁷ In most cases, the local body fails to report its decision to the court, either because it is unaware of the need or the court is too far away.¹⁴⁸ These local bodies are composed entirely of men because social norms dictate that a woman may attend a local meeting but may not participate.¹⁴⁹ Indeed, "women are not supposed to speak in front of men."¹⁵⁰ Not surprisingly, male administrators are selected, due to the pervasive belief that they are more qualified.¹⁵¹ Moreover, legal protections for women's inheritance are ignored. As one High Court Judge explained, "In rural areas, it is not possible for women to own property People would laugh if a woman wanted cattle."¹⁵²

IV. EXPLOITATIVE PRACTICES AND THE SOCIAL CONTEXT IN TANZANIA AGGRAVATE THE EFFECT OF DISCRIMINATORY INHERITANCE LAWS

The effect of Tanzania's discriminatory inheritance laws is further aggravated by prevalent exploitative practices and the social context in Tanzania. Tanzania's

144. Interview with WLAC Paralegal, *supra* note 140; LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 55 ("Undue delay in the administration of [the] deceased's estate may cause property grabbing.").

145. Interview with WLAC Treasurer and Board Member, *supra* note 125; Interview with Director of LHRC, *supra* note 125.

146. Even when a woman manages to lodge a caveat, the person who originally applied for appointment is allowed three chances to show up in court for the hearing. Relatives of the deceased may, therefore, avoid attending the hearing in order to prolong the period during which they enjoy property grabbed from the estate. They may also be waiting for the widow to die, especially if she is HIV-positive. Interview with Widow, in Dar es Salaam, Tanzania (Mar. 26, 2002); Interview with WLAC Attorney, *supra* note 65; Interview with Law Professor, *supra* note 90.

147. E-mail from WLAC's Executive Director to Tamar Ezer, Georgetown International Women's Human Rights Clinic (Mar. 28, 2006) (on file with Journal). The local councils almost never meet when a woman dies because women own very little property and because there is a presumption that a woman's property really belongs to her husband. *Id.*; *see also* Interview with WLAC Paralegal, *supra* note 140 ("In most cases, property is distributed without going to court.").

148. Interview with Director of LHRC, *supra* note 125.

149. Interview with WLAC Paralegal, *supra* note 140; Interview with Human Rights Advocate and Former WLAC Attorney (Mar. 11, 2005); Interview with WLAC Treasurer and Board Member, *supra* note 125.

150. Interview with WLAC Treasurer and Board Member, *supra* note 125.

151. E-mail from WLAC's Executive Director to Tamar Ezer, Georgetown International Women's Human Rights Clinic (Mar. 28, 2006) (on file with Journal).

152. Interview with High Court Judge, *supra* note 116. An attorney with the Ministry of Community Development, Women's Affairs and Children noted that in villages, awareness of women's rights issues just isn't there. Interview with Attorney at the Ministry of Community Development, Women's Affairs and Children, *supra* note 63. She tied this unresponsiveness to a lack of women leaders. *Id.*

laws fail to address and, in fact, encourage abuse by the husband's relatives. Relatives grab property from bereaved families, take children away from their mothers, and accuse widows of witchcraft, evicting them from the family home. All of this abuse is met with police indifference. The hardship of unequal inheritance laws is further magnified by polygamy, which necessitates sharing meager inheritance, and AIDS, which has increased the number and vulnerability of widows and orphans.

A. TANZANIA'S INHERITANCE LAWS FAIL TO DEAL WITH, AND IN FACT ENCOURAGE, PROPERTY GRABBING BY RELATIVES

By denying women inheritance, the current regime enables property grabbing by the husband's relatives.¹⁵³ In *Ndeamtzo v. Malasi*, the judge described how customary inheritance law:

has left a loophole for undeserving clansmen to use to their benefit. Lazy clan members anxiously await the death of their prosperous clansman who happens to have no male issue and as soon as death occurs they immediately grab the estate and mercilessly confuse the dead man's household, putting the widow and daughters into terrible confusion, fear, and misery.¹⁵⁴

Property grabbing is encouraged by the attitude that widows are not really a part of the husband's family and thus have no right to inherit.¹⁵⁵ A WLAC client related how after her husband's death, the family came into her home and took everything. They counted the silverware and accused her of trying to steal it. They verbally abused her, saying that she was not a part of her husband's family and that she would marry a new man.¹⁵⁶ A paralegal likewise described a widow whose in-laws "took each and every thing, even her clothes."¹⁵⁷ Relatives may even accuse the widow of hiding property she never owned. As an attorney recounted, "[R]elatives will come back and ask the wife, 'where is the music system we saw here?' even if it was borrowed."¹⁵⁸

Property grabbing exists in most regions of Tanzania.¹⁵⁹ Although rural or uneducated women may be particularly targeted,¹⁶⁰ it cuts across all levels of society. For example, one woman who worked as a banker lost two houses,

153. This may occur before or during administration, and may even occur before the person dies if death seems imminent. E-mail from WLAC's Executive Director to Tamar Ezer, Georgetown International Women's Human Rights Clinic (Mar. 28, 2006) (on file with Journal).

154. *Ndeamtzo v. Malasi*, [1968] HCD 127, 98-99 (Tanz. High Ct. 1968).

155. Magoke-Mhoja, *supra* note 9, at 261.

156. E-mail from WLAC's Executive Director to Tamar Ezer, Georgetown International Women's Human Rights Clinic (Mar. 28, 2006) (on file with Journal).

157. Interview with WLAC Paralegal, *supra* note 140.

158. Interview with WLAC Attorney, *supra* note 65.

159. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 44.

160. Interview with Resident Magistrate, *supra* note 139.

several cars, and all of her and her husband's personal belongings, even though she had contributed considerable amounts of money to purchase and maintain the property.¹⁶¹

In many cases, property grabbing occurs when the widow leaves her home to attend the burial ceremony of her husband. A law professor recounted this typical story:

A woman lost her husband. Her husband died because of an accident—his death was abrupt. There was no will, so she had to take the body to the husband's family land. Upon burial the widow was left there to finish customary procedures. While she was there, her sisters-in-law came to Dar es Salaam and, in her absence and without her consent or knowledge, opened the house and took all the belongings within and distributed the property. When the wife came back to Dar es Salaam, she found an empty house.¹⁶²

Bereaved families stand to lose not only personal property, but also their homes. Relatives may force the widow to leave the home and prevent her from returning by locking the house or by threatening her physically.¹⁶³ As Tanzania's Law Reform Commission reported, at times, the widow is "kicked out from the matrimonial home by relatives of the deceased under the pretext of safeguarding clan interests, particularly so in cases where a widow refuses to be inherited by one of the deceased's relatives."¹⁶⁴ Even when the widow attempts to stay, "relatives of the deceased husband interfere with the property and harass the widow until she quits the matrimonial home."¹⁶⁵

B. AS TANZANIA'S LAWS CONNECT INHERITANCE TO CHILDREN, RELATIVES MAY TRY TO TAKE THE CHILDREN AWAY FROM THE WIDOW IN ORDER TO ACCESS THEIR PROPERTY

In their hunger for property, the deceased's relatives may even take away the widow's children in order to access the children's property.¹⁶⁶ Widows must then

161. Interview with Widow, *supra* note 146.

162. Interview with WLAC Attorney, *supra* note 65; *see also* Interview with Director of LHRC, *supra* note 125 (describing a widow who returned from her mourning period in the countryside to find her house locked and brother-in-law unfairly administering the estate).

163. Interview with Widow, *supra* note 146; *see also* Monica Mhoja-Magoke, *Land and Property Rights: Rights of Widows—A Case Study of Inheritance Customary Laws in Tanzania*, in *EMPOWERING WIDOWS IN DEVELOPMENT* 18-19 (2001). The widow may have to go to court to reenter her house, and oftentimes when the court opens the house, she will find that all her property is already gone. Interview with WLAC Paralegal, *supra* note 140.

164. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 41. One widow recounted how her in-laws decided to rent out the family home to make money and to transfer the furniture to her husband's younger brother. This was after the widow already lost a plot of land in Dodoma and another house in Dar es Salaam. Interview with Widow, *supra* note 146.

165. *Id.* at 42.

166. Interview with WLAC Treasurer and Board Member, *supra* note 125 ("Property grabbing sometimes involves the grabbing of children because the grabber thinks they can get the children's share

resort to court action to stay with their children. A paralegal unit in Mwanza assisted a widow whose children were taken by her sister-in-law,¹⁶⁷ and WLAC represented a widow whose father-in-law and brother-in-law grabbed the children along with other property in the house.¹⁶⁸ Thus, while a widow is grieving over her lost husband, she must also contend with destitution and perhaps even the loss of her home and family.

C. WIDOWS ARE ACCUSED OF CAUSING THEIR HUSBAND'S DEATH THROUGH
WITCHCRAFT AND, THEREFORE, EVICTED FROM THE FAMILY HOME AND DENIED
ALL ACCESS TO PROPERTY

Additionally, the husband's relatives accuse widows of causing their husband's death through witchcraft.¹⁶⁹ The relatives then evict the widows from the family home and deny them all access to property. As the Director of Primary Courts related, "In our culture when a husband dies, the woman is always accused of killing the husband."¹⁷⁰ This phenomenon is fueled by the pervasive belief that the widow is an outsider with questionable loyalties.¹⁷¹ An accusation of witchcraft may also arise from fears and misunderstandings surrounding HIV/AIDS. Not knowing how the disease is spread, the husband's family may believe that the widow has bewitched him and caused his illness.¹⁷² Even educated women in positions of power are susceptible to witchcraft accusations. A judicial officer recalled a magistrate accused of witchcraft by her husband's relatives. The widow was locked out of her home, and "[e]ven though she was sick, she had to sleep outside . . . under a tree."¹⁷³ The situation of all Tanzanian widows, educated or not, is necessarily precarious.

D. CONSIDERING INHERITANCE DISPUTES A FAMILY MATTER, POLICE OFFICERS
RARELY BECOME INVOLVED TO ASSIST WOMEN

Women who are victims of property grabbing and eviction from the family home, are generally unable to obtain assistance from the police. The police have considerable discretion as to whether to pursue a complaint based on an inheritance dispute, and this discretion allows the individual preferences and

of the property."); Interview with Assistant Administrator General and Principal Probate Officer, *supra* note 34 ("People take children of the deceased man in order to receive the children's share.").

167. WLAC 2000 ANNUAL REPORT, *supra* note 3, at 21.

168. E-mail from WLAC's Executive Director to Tamar Ezer, Georgetown International Women's Human Rights Clinic (Mar. 28, 2006) (on file with Journal).

169. Witchcraft is an offense recognized by Tanzanian law. Witchcraft Act, TANZ. LAWS [CAP 18, R.E. 2002].

170. Interview with Director of Primary Courts, *supra* note 65.

171. *Id.*

172. Interview with Law Professor, *supra* note 90; Magoke-Mhoja, *supra* note 9, at 261.

173. Interview with Judicial Officer, in Dar es Salaam, Tanzania (Mar. 25, 2002); *see also* Interview with WLAC Paralegal, *supra* note 140 (recounting a widow chased out of the matrimonial home by her husband's relatives because they believed she bewitched her husband and caused his death).

gender biases of officers to determine their involvement. As a Parliament Member elaborated:

We have a problem with the police's attitude towards women. The police believe that the property in the house belongs to the man Women's cases are handled badly and the police often judge the cases themselves and decide not to take action.¹⁷⁴

Furthermore, Tanzanian police often regard inheritance disputes as family matters outside their concern or jurisdiction.¹⁷⁵ A youth counselor related the story of a girl whose parents had died and uncle took over all the property. She turned to the police for help but to no avail: "The police didn't do anything. They only found her a place to stay [T]hey don't pay much attention to problems like this."¹⁷⁶ There is support, however, within the police department for the criminalization of property grabbing. As one high-ranking police official stated, "Our law lags behind in a number of areas. If there was a law empowering police to make the administration of certain procedures of family law a police matter, we would follow the law."¹⁷⁷ Tanzania must criminalize property grabbing and implement police training to guarantee its enforcement.

E. IN CASES OF POLYGAMY, AFTER A HUSBAND'S DEATH, THERE IS INCREASED TENSION AND DECREASED ACCESS TO ALREADY LIMITED ECONOMIC RESOURCES

The widespread existence of polygamy in Tanzania further works to deny women property.¹⁷⁸ As previously mentioned, a man is allowed up to four wives under Islamic law in Tanzania, and men may take an unlimited number of wives under customary law. According to an advocate at one women's legal aid clinic, forty percent of the inheritance cases he handles involve polygamy.¹⁷⁹ In these cases, to the extent that a widow inherits any property at all, her share of the deceased husband's estate must be shared among the co-wives. Furthermore, as a widow's property rights are closely tied to those of her children, polygamy makes her situation more tenuous. If a woman in a polygamous marriage has only daughters, most of the property will go to the sons of other women.¹⁸⁰ Polygamy

174. Interview with Parliament Member, *supra* note 48.

175. Interview with Police Commissioner, in Dar es Salaam, Tanzania (Mar. 28, 2002) (characterizing property grabbing as "entirely a civil matter between parties. Police have little to do with it."); Interview with Director of LHRC, *supra* note 125 ("Police don't get involved because it's a family issue.").

176. Interview with Youth Counselor at WAMATA (a Swahili acronym translated to mean "People's Groups in the Fight for AIDS"), in Dar es Salaam, Tanzania (Mar. 26, 2002).

177. Interview with Police Commissioner, *supra* note 175.

178. An estimated twenty-nine percent of married women in Tanzania are in polygamous unions. WOMEN OF THE WORLD: ANGLOPHONE AFRICA, PROGRESS REPORT, *supra* note 101, at 116. Polygamy is especially common in rural areas, where some men have up to ten wives. Interview with Resident Magistrate, *supra* note 139.

179. Interview with WLAC Attorney, *supra* note 65.

180. GN 436, 2d sched., *supra* note 2, R. 19.

also adds to increased tension as family members struggle over limited financial resources. One widow related her experience of when her polygamous husband died:

My husband died in 1995 and since I have faced many problems. Nine days after my husband died his relatives chased me away from my home The children of my husband's other wife chased me. He had another wife, but after he married me, he chased the first wife away. She had two children with my husband, both boys. They were adults when my husband died. The boys never lived with my husband and me.¹⁸¹

Until the government can prevent polygamy by legislative means,¹⁸² it should take special care to protect women and children in polygamous marriages by assuring them an adequate share of the deceased's estate.

F. THE HIGH DEATH TOLL IN TANZANIA DUE TO AIDS HAS MAGNIFIED THE DISCRIMINATORY EFFECTS OF INHERITANCE LAWS, AND ECONOMICALLY DISEMPOWERED WOMEN ARE INCREASINGLY VULNERABLE TO THE DISEASE

The AIDS epidemic in Tanzania has exacerbated the discriminatory effects of Tanzania's inheritance laws and the vulnerability of women and children. According to a 2003 estimate, 8.8% of Tanzanians are infected with the HIV/AIDS virus.¹⁸³ AIDS has dramatically magnified the discriminatory effects of inheritance laws as it has increased the number of widows and orphans in Tanzania.¹⁸⁴ Furthermore, disempowered and financially dependent women are

181. Interview with Widow, *supra* note 146. A magistrate likewise highlighted the conflict caused by polygamy: "Polygamy complicates [the issues] a lot because in Africa the widow tries to provide for her own children and discriminates against children of the other wives." Interview with Resident Magistrate, *supra* note 139.

182. The CEDAW Committee expressly urged, "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited." CEDAW General Rec. 21, *supra* note 6, at 253, para. 14. The Human Rights Committee likewise declared, "Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist." Human Rights Committee, General Comment 28, Equality of rights between men and women, 68th sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 183, para. 24, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003) [hereinafter HRC General Comment 28].

183. CIA, THE WORLD FACTBOOK: TANZANIA, <http://www.cia.gov/cia/publications/factbook/geos/tz.html>. In 2000, Tanzania reported that well over one million people were infected with HIV. Revised Initial Report to CRC, *supra* note 13, at 17, para. 28.

184. A New York Times article described the situation in sub-Saharan Africa, where widows are denied inheritance and the husband's relatives "are cashing in on AIDS. Women are left with nothing but the disease." Sharon Lafraniere, *AIDS and Custom Leave African Families Nothing*, N.Y. TIMES, Feb. 18, 2005, at A1. This is the case as custom entitles the husband's family to inherit most, in not all, the property he leaves behind, leaving his widow and children destitute. Consequently, "[i]n an era when

more vulnerable to the disease since they may be forced to participate in the practices of widow inheritance, polygamy, and prostitution to survive.¹⁸⁵ Impoverished households also have reduced capacity to cope with the disease should members become infected.¹⁸⁶

Widows and children orphaned by AIDS are particularly vulnerable to abuse by relatives. As discussed above, the family of an AIDS victim may hold the widow responsible for his death and retaliate by evicting her from the home and taking all the property.¹⁸⁷ Moreover, widows who have had contact with AIDS are stigmatized and harassed, and families may take advantage of the widows' sickness. One widow described that due to discrimination on the basis of AIDS, she had to leave the marital home, which was then rented out by the husband's relatives. Neither she nor her children received any of the proceeds.¹⁸⁸ Feeling powerless, she feared that pursuing the matter in court would harm her health and cause her to die more quickly.¹⁸⁹ Children who lose both parents, are especially victimized by property grabbing.¹⁹⁰ An Orphanage Director reported, "Often the family neglects children whose parents died of AIDS. A lot of times these children become street kids."¹⁹¹

V. DISCRIMINATORY INHERITANCE LAWS VIOLATE THE RIGHTS OF WOMEN TO EQUALITY, PROPERTY, AN ADEQUATE STANDARD OF LIVING, FAMILY, AND DIGNITY

Tanzania's discriminatory inheritance laws violate the fundamental rights of Tanzanian women, contravening both Tanzania's Constitution and international obligations. Tanzania's Constitution accords special protection to human rights. It guarantees that "[e]very person in the United Republic has the right . . . to

AIDS is claiming about 2.3 million lives a year in sub-Saharan Africa . . . disease and stubborn tradition have combined in a terrible synergy, robbing countless mothers and children not only of their loved ones but of everything they own." *Id.*

185. See RICHARD S. STRICKLAND, INT'L CTR. FOR RESEARCH ON WOMEN, TO HAVE AND TO HOLD: WOMEN'S PROPERTY AND INHERITANCE RIGHTS IN THE CONTEXT OF HIV/AIDS IN SUB-SAHARAN AFRICA 5 (2004); Lawrence K. Altman, *Female Cases of H.I.V. Found Rising Worldwide*, N.Y. TIMES, Nov. 24, 2004, at A11; Laurie Garrett, *Polygamy, Poverty, and Oppression of Women Are Fueling AIDS Epidemic in Africa*, SEATTLE TIMES, July 10, 2000, at A3.

186. STRICKLAND, *supra* note 185, at 11. In the context of Swaziland's AIDS epidemic, one journalist described how discriminatory inheritance customs are "especially ruinous for women." James Hall, *Swaziland: For Women, Constitution is a Curate's Egg*, INT'L PRESS SERVICE, Feb. 22, 2005, available at <http://www.aegis.com/news/ips/2005/IP050220.html>. "Women who lose their husbands to AIDS—and who might themselves be HIV-positive—can ill-afford to sacrifice an inheritance that may go some way towards compensating for the loss of a breadwinner, or subsidizing the purchase of anti-retroviral drugs." *Id.*

187. Magoke-Mhoja, *supra* note 9, at 261; Interview with Law Professor, *supra* note 90.

188. Interview with Widow, *supra* note 146.

189. *Id.*

190. Interview with WLAC Paralegal, *supra* note 140 (recounting a case when after both parents died of AIDS, "everybody was interested in property grabbing and the children were left with nothing."); Interview with Orphanage Director, in Kibaha, Tanzania (Mar. 24, 2002) (describing three children, who "were chased out of the house and the *chamba* [a small farm] by an uncle who wanted to sell it").

191. Interview with Orphanage Director, *supra* note 190.

enjoy fundamental human rights”¹⁹² and that “human rights are respected and cherished.”¹⁹³ Moreover, the Constitution explicitly incorporates the Universal Declaration of Human Rights (UDHR),¹⁹⁴ the foundational human rights document. The Constitution instructs all state agencies “to direct their policies and programs towards ensuring . . . that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.”¹⁹⁵ As the Tanzanian High Court explained, the UDHR is “part of [the] Constitution by virtue of art. 9(1)(f).”¹⁹⁶

Tanzania has further bound itself to various international human rights conventions. It has acceded to or ratified without reservation the International Covenant on Civil and Political Rights (ICCPR),¹⁹⁷ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁹⁸ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁹⁹ the Convention on the Rights of the Child (CRC),²⁰⁰ the African Charter on Human and Peoples’ Rights (“African Charter”),²⁰¹ and the African Charter on the Rights

192. TANZ. CONST. art. 29(1).

193. *Id.* art. 9(a).

194. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.umn.edu/humanrts/instreetree/b1udhr.htm> [hereinafter UDHR].

195. TANZ. CONST. art. 9(1)(f).

196. *Ephraim v. Pastory*, [1990] LRC (Const.) 757, 763 (Tanz. High Ct. 1990); see also *Mohamed v. Makamo*, Civil Appeal No. 45, at 4 (Tanz. High Ct. 2001) (noting that compliance with the UDHR is “expressly provided by our Constitution”). Tanzania itself reported that “the introduction of a Bill of Rights in the Constitution of the United Republic of Tanzania of 1984 [served] to incorporate provisions of various human rights instruments including the Universal Declaration of Human Rights.” Revised Initial Report to CRC, *supra* note 13, at 21, para. 61.

197. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, acceded to by Tanzania Jun. 11, 1976, available at <http://www.umn.edu/humanrts/instreetree/b3ccpr.htm> [hereinafter ICCPR]; see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf> (reporting the dates of ratification or accession to the ICCPR, ICESCR, CEDAW, and CRC).

198. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, acceded to by Tanzania June 11, 1976, available at <http://www.umn.edu/humanrts/instreetree/b2escr.htm> [hereinafter ICESCR].

199. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46), at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Tanzania Aug. 20, 1985, available at <http://www.umn.edu/humanrts/instreetree/e1cedaw.htm> [hereinafter CEDAW].

200. Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49), at 167, art. 1, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, ratified by Tanzania June 10, 1991, available at <http://www.umn.edu/humanrts/instreetree/k2crc.htm> [hereinafter CRC].

201. African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Tanzania Feb. 18, 1984, available at <http://www.umn.edu/humanrts/instreetree/z1afchar.htm> [hereinafter African Charter].

and Welfare of the Child (“African Charter on the Rights of the Child”).²⁰² Tanzania has also signed on to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“African Women’s Protocol”), which entered into force in November 2005.²⁰³ This treaty deals specifically with the rights of women in Africa.²⁰⁴ Thus, under its own Constitution and its international obligations, Tanzania is obliged to protect the rights to equality, property, an adequate standard of living, family, and dignity for all its citizens.²⁰⁵

A. BY DENYING WOMEN INHERITANCE BASED SOLELY ON THEIR GENDER,
TANZANIA’S INHERITANCE REGIME VIOLATES THE RIGHT TO EQUALITY

As Tanzania’s Law Reform Commission asserted, the existing inheritance regime violates “the principle of equality,” “the cornerstone” of Tanzanian policy.²⁰⁶ Under current laws, Tanzanian women are either denied inheritance or allocated restricted and unequal shares based solely on their gender. This discrimination violates the right to equality enshrined both in the Tanzanian Constitution and international law. Tanzania’s Constitution guarantees citizens’ “right to equal protection”²⁰⁷ and “equality before the law”²⁰⁸ and prohibits the enactment of “any provision that is discriminatory either of itself or in its effect.”²⁰⁹ In 2000, Article 13(5)’s definition of discrimination was amended specifically to preclude differences in treatment based on gender.²¹⁰ International law similarly protects the right to equality: “Women and men are equal before the law and shall have the right to equal protection and benefit of the law.”²¹¹ Courts

202. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, ratified by Tanzania Mar. 16, 2003, available at <http://www.umn.edu/humanrts/africa/afchild.htm> [hereinafter African Charter on the Rights of the Child].

203. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6 (2003), entered into force Nov. 25, 2005, signed by Tanzania Nov. 5, 2003, available at <http://www1.umn.edu/humanrts/africa/protocol-women2003.html> [hereinafter African Women’s Protocol]; see also University of Minnesota, Human Rights Library, *Ratification of International Human Rights Treaties—Tanzania*, <http://www1.umn.edu/humanrts/research/ratification-tanzania.html> (providing dates of Tanzania’s ratification of the African Charter and the African Charter on the Rights of the Child, and Tanzania’s date of signature to the African Women’s Protocol).

204. The African Charter requires consideration of this convention. Under Article 18(3), states must “ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” African Charter, *supra* note 201, art. 18(3).

205. In *Ephraim v. Pastory*, the Court referred to the “principles enunciated” in these Conventions as “a standard below which any civilised nation will be ashamed to fall.” *Ephraim v. Pastory*, [1990] LRC (Const.) 757, 763 (Tanz. High Ct. 1990).

206. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 13.

207. TANZ. CONST. art. 29(2).

208. *Id.* art. 13(1).

209. *Id.* art. 13(2).

210. *Id.* art. 13(5). This amendment was in response to comments by the CEDAW Committee urging this explicit inclusion “as a matter of priority.” CEDAW Committee, Report of 18th and 19th Sessions, at 67, U.N. GAOR, 53rd Sess., Supp. No. 38, U.N. Doc. A/53/38/Rev.1 (May 14, 1998) [hereinafter CEDAW, 18th and 19th Sessions Report].

211. African Women’s Protocol, *supra* note 203, art. 8; see also ICCPR, *supra* note 197, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the

in Tanzania and around the world have recognized that discriminatory inheritance laws violate this basic equality principle.²¹²

Under international law, the right to equality explicitly encompasses inheritance rights at the dissolution of marriage. For instance, the ICCPR guarantees “equality of rights and responsibilities of spouses as to marriage . . . and at its dissolution.”²¹³ The Human Rights Committee elaborated on this, explaining, “Women should . . . have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.”²¹⁴

Denying women inheritance because of their gender has no rational basis.²¹⁵

law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex.”); African Charter, *supra* note 201, arts. 3, 18(3) (“Every individual shall be equal before the law [and] [e]very individual shall be entitled to equal protection of the law.”) Furthermore, “[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”); CEDAW, *supra* note 199, arts. 2(e), 15(1) (States must “take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise” and “shall accord to women equality with men before the law.”).

212. *Ephraim v. Pastory*, [1990] LRC (Const.) 757, 763 (Tanz. High Ct. 1990) (finding that restricting women’s inheritance of clan land “flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.”); *Ndeamto v. Malasi*, [1968] HCD 127, 99 (Tanz. High Ct. 1968) (“[D]aughters, like sons . . . should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality.”). Discriminatory inheritance laws have further been struck down by the Constitutional Court of South Africa, the Court of Appeals of Nigeria, the High Court of Zambia, and the Supreme Courts of South Korea, Nepal, and India. *Bhe v. Khayelitsha*, paras. 61-60, 2004 (1) BCLR 1 (CC) (S. Afr.) (“The exclusion of women from inheritance on the grounds of gender is . . . a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.”); *Ukeje v. Ukeje*, [2001] 27 W.R.N. 142, 160 (Ct. App. Lagos Division, Nigeria) (declaring “Igbo native law and custom which disentitles a female . . . from sharing in her deceased father’s estate” void for unconstitutionally discriminating against women); *Muojekwu v. Ejikeme*, [2000] 5 N.W.L.R. 402 (Ct. App. Enugu Division, Nigeria); *Mojekwu v. Mojekwu*, [1997] 7 N.W.L.R. 28 (Ct. App. Enugu Division, Nigeria); THE INTERNATIONAL SOCIETY OF FAMILY LAW, THE INTERNATIONAL SURVEY OF FAMILY LAW 467 (Andrew Bainham ed., 2001) (discussing the Zambian High Court decision of *Gabula v. Mwanza*); *World Briefing, Asia, South Korea: Ruling Expands Women’s Rights*, N.Y. TIMES, July 22, 2005, at A6 (discussing the South Korean Supreme Court’s decision); FAO LEGAL OFFICE, LAW AND SUSTAINABLE DEVELOPMENT SINCE RIO: LEGAL TRENDS IN AGRICULTURE AND NATURAL RESOURCE MANAGEMENT (FAO LEGISLATIVE STUDIES) 250 (2002), available at <http://www.fao.org/DOCREP/005/Y3872E/y3872e0a.htm>; (discussing *Dhungana v. Nepal*, 4 S.Ct. Bull. 1 (Nepal), and *Kishwar v. Bihar*, (1996) 5 S.C.C. 125 (India)).

213. ICCPR, *supra* note 197, art. 23(4); see also CEDAW, *supra* note 199, art. 16(1)(c) (“States Parties . . . shall ensure, on a basis of equality of men and women . . . the same rights and responsibilities during marriage and at its dissolution.”); UDHR, *supra* note 194, art. 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.”).

214. HRC General Comment 28, *supra* note 182, at 184, para. 26.

215. Moreover, it is not sufficient that Tanzanians can write a will to avoid these discriminatory laws. As the South African Constitutional Court explained, requiring Africans to make a will “if they wish to extricate themselves” from a discriminatory intestate succession regime is inadequate since “[o]nly those with sufficient resources, knowledge, education or opportunity to make an informed choice will be able to benefit.” *Bhe v. Khayelitsha*, para. 66, 2004 (1) BCLR 1 (CC) (S. Afr.). Similarly, in striking down a statute enabling the husband to unilaterally dispose of joint property unless the wife takes certain steps to protect her interests, the United States Supreme Court held that “the absence of an insurmountable barrier

Tanzania's Law Reform Commission highlighted the irrationality of unequal allocation of inheritance to children: "The males are accorded bigger shares when compared to female counterparts irrespective of their age and ability to care for the family."²¹⁶ Previously, parents may have feared that daughters would marry and leave the family and they would have to rely on sons for support.²¹⁷ However, as the Law Reform Commission reported, this "apprehension is no longer tenable."²¹⁸ In fact, "nowadays daughters . . . be they married or unmarried, appear to play a more leading role in caring for their aging parents than is the case with sons."²¹⁹ Likewise, prohibiting only daughters from holding an absolute title to land is irrational because sons do not necessarily keep property within the family. With urbanization, greater geographic mobility, and economic changes, men are "increasingly selling land to non-clan members."²²⁰ Just as Justice Ngcobo of the South African Constitutional Court concluded with regards to South Africa's discriminatory inheritance scheme, "[W]hatever the role the rule of male primogeniture may have played in traditional society, it can no longer be justified in the present day and age."²²¹

Tanzania's inheritance laws are especially absurd in light of social changes in Tanzania today. Women are often responsible for the creation of the very wealth and property they are denied. As the Law Reform Commission explained:

With the changing socio-economic situation, from closed subsistence economy to a monetary and commercial one, and the ever increasingly aggressive participation by women in the creation of wealth in their families . . . many parents and married men and prospective husbands, have come to realize the injustice committed to wives and daughters in denying them a share out of the matrimonial property acquired during the marriage through joint efforts of the spouses.²²²

will not redeem an otherwise unconstitutionally discriminatory law." *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (internal quotations omitted).

216. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 29.

217. *Id.* at 8. Of course, enabling the widow to inherit in her own right would also allow her to be less dependent on her children for support.

218. *Id.*

219. *Id.*; see also Interview with Parliament Member, *supra* note 48 ("[P]eople now trust their girls more than their boys The girls are closer to the family."); LAW REFORM COMMISSION REPORT ON CHILDREN, *supra* note 9, para. 368 (Under "modern trends," "[t]he daughter is no less an active member of the family."); *Bhe v. Khayelitsha*, para. 190, 2004 (1) BCLR 1 (CC) (S. Afr.) ("Indeed there are instances where . . . women have assumed the role of the head of the family.").

220. Butegwa, *supra* note 74, at 500.

221. *Bhe*, (1) BCLR 1 (CC), para. 190.

222. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 6. Justice Ngcobo of South Africa's Constitutional Court similarly explained:

In the modern economy women fend for themselves and help their husbands accumulate property during the course of their marriage. . . . As more and more women begin working outside, earning money and acquiring property, the gap between their legal status under customary law and their economic status in society widens. . . . Application of the traditional

In Tanzania, women make up 80% of the agricultural labor force and 49% of the total work force.²²³ Women's contribution to the acquisition of property must be recognized. To do otherwise would be a "serious violation" of women's equality.²²⁴

Moreover, weakening tribal ties due to urbanization and intermarriage across tribal lines erode support for dependent women and enable abuse by relatives. As Tanzania's Law Reform Commission noted, "We no longer have such close tribal communities. Tanzanians are now migrating from tribe to tribe, and, tribal, religious mixed marriages are on the increase. And so is urbanization."²²⁵ South Africa's Constitutional Court described a similar state of affairs:

The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities.²²⁶

Not only do relatives fail to care for women, but they commonly engage in property grabbing and evict widows from their homes. Denied property in their own right, women are particularly vulnerable to exploitation.

The situation is especially problematic with religious intermarriage. Under Islamic law, a non-Muslim widow cannot inherit from her Muslim husband.²²⁷ This rule also applies to jointly acquired property during the marriage. As one widow recalled, when her in-laws took all of her household property, which she contributed to buying, they explained: "[B]ecause I am a Christian and they are Muslims, I will not inherit anything from them."²²⁸ The Law Reform Commis-

concepts of customary law of succession to women in a modern context is unjust and discriminatory.

Bhe, (1) BCLR 1 (CC), para. 189 (quoting Benno J. Ndulu, *Widows under Zambian Customary Law and the Response of the Court*, COMP. & INT'L L. J. OF S. AFR. 90, 99-100 (1995)).

223. WOMEN OF THE WORLD: ANGLOPHONE AFRICA, PROGRESS REPORT, *supra* note 101, at 116; *see also* Interview with Director of Primary Courts, *supra* note 65 (explaining that in rural areas women are the ones working to sustain the family: "The person who is sweating is the woman.").

224. *Bhe*, (1) BCLR 1 (CC), para. 73.

225. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 10.

226. *Bhe*, (1) BCLR 1 (CC), para. 80. Thus, "[t]oday widows must support themselves by their own efforts." *Id.* para. 189 (quoting Ndulu, *supra* note 222).

227. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 11 ("[U]nder Islamic rules of inheritance where a non-Moslem woman is married to a Moslem man, on the death of the husband, the wife . . . is denied any right to inherit . . ."); *id.* at 31 ("Under Islamic law, a non-moslem is not entitled to inherit the estate of a deceased moslem even where . . . a moslem is married to a non-moslem wife."); Interview with Muslim Leader, in Dar es Salaam, Tanzania (Mar. 27, 2002).

228. Interview with Widow, in Kibaha, Tanzania (Mar. 24, 2002).

sion thus found existing inheritance laws inadequate in light of women's "involvement in economic ventures" and the "intermixture of Tanzania people" through urbanization and marriages outside tribal and religious affiliations.²²⁹

B. DEPRIVED OF INHERITANCE, TANZANIAN WOMEN ARE DENIED THEIR RIGHT TO PROPERTY

By depriving women of inheritance, Tanzania's inheritance regime violates their right to property. Women's right to property is protected by Tanzanian and international law. Tanzania's Constitution recognizes that "every person is entitled to own property,"²³⁰ and CEDAW requires that states provide "[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."²³¹ Under Tanzania's Law of Marriage Act (LMA), men and women are granted the same rights to "acquire, hold and dispose of property."²³² Moreover, the Land and Village Land Acts, passed in 1999, have identical provisions protecting "[t]he right of every woman to acquire, hold, use and deal with land . . . to the same extent and subject to the same restriction . . . as the right of any man."²³³

As all these laws recognize, not only can women own and acquire property, but they also have the right to manage it. Thus, under CEDAW, states must "accord to women, in civil matters, a legal capacity identical to that of men" and, "[i]n particular . . . equal rights to conclude contracts and to administer property."²³⁴ The LMA likewise confers on women "full capacity as a legal person, capable of entering into contracts; of suing and being sued; owning all kinds of property in her own name."²³⁵ Tanzania's inheritance laws, which favor male administra-

229. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 25.

230. TANZ. CONST. art. 24(1).

231. CEDAW, *supra* note 199, art. 16(1)(h); *see also* UDHR, *supra* note 194, art. 17(1) ("Everyone has the right to own property . . ."); African Charter, *supra* note 201, art. 14 ("The right to property shall be guaranteed."); African Women's Protocol, *supra* note 203, art. 6(j) ("During her marriage a woman shall have the right to acquire her own property and to administer and manage it freely."); HRC General Comment 28, *supra* note 182, at 182, para. 19 ("[T]he capacity of women to own property, to enter into a contract or to exercise any other civil rights may not be restricted on the basis of marital status or any other discriminatory ground."); *id.* at 184, para. 25 ("States parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of . . . property.").

232. LMA, *supra* note 14, § 56.

233. Land Act, *supra* note 14, § 3(2); Village Land Act, *supra* note 14, § 3(2). The Land Act protects the interests of married women in land by establishing a presumption that spouses hold land as occupiers in common: "Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labour to the productivity, upkeep and improvement of the land, the spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common . . ." Land Act, *supra* note 14, § 161(2).

234. CEDAW, *supra* note 199, art. 15(2).

235. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 6; *see also* LMA, *supra* note 14, arts. 56, 65-66.

tors²³⁶ and enforce women's dependence on male relatives, directly violate this principle. Under customary law, a woman can be chosen to administer the estate only in the rare circumstances when the decedent has no remaining male relatives.²³⁷ This discriminatory scheme violates women's fundamental human rights. As the Law Reform Commission recognized, Tanzania's inheritance laws contravene both Tanzania's Constitution and the LMA, which "recognizes equality of rights to acquisition, ownership and disposition of property irrespective of gender."²³⁸

Considering a couple's jointly acquired property to belong solely to the husband violates the wife's right to property. An attorney described the predominant "mindset" that "women aren't supposed to be inheriting anything and that it all belonged to the husband."²³⁹ As the Law Reform Commission explained, "The wife is thereby notionally taken to have no property interest in such wealth for which she might have greatly laboured in its acquisition."²⁴⁰ As one widow recounted:

I was very well off before my husband died. I ran a restaurant business. However, after the death of my husband, since I was childless, his children who I had brought up, evicted me from the matrimonial home . . . I wasn't even allowed to enter the restaurant. This restaurant, which I jointly built with my husband, is no longer in my control. As I no longer have a means of earning an income, I am now begging from relatives.²⁴¹

Tanzania's LMA, in fact, acknowledges women's ownership in this jointly acquired property in the case of divorce. The LMA recognizes the concept of matrimonial property, attained by parties "during the marriage by their joint efforts,"²⁴² and instructs courts to divide these assets upon divorce according to "the extent of the contributions made by each party."²⁴³ With the LMA's passage

236. GN 436, 2d sched., *supra* note 2, R. 5 ("The administrator of the deceased's property is the eldest brother of the deceased, or his father, and if there is no brother or father, can be any other male relative chosen with the help of the clan council. If there is no male relative, his sister is the administrator."); Probate and Administration of Estates Act, *supra* note 27, § 87 ("[T]he person who may administer such an estate shall be the nearest male relative of such deceased.").

237. GN 436, 2d sched., *supra* note 2, R. 5.

238. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 30.

239. Interview with WLAC Attorney, *supra* note 65.

240. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 7. The Law Reform Commission further explained that this concept

[n]o doubt . . . proceeds from the old notion prevalent among patrilineal communities . . . that on payment of bride-wealth by the husband upon marriage, the wife is thereby purchased and becomes the 'property' of the husband, and therefore even the fruits of her labour belong to the husband as well.

Id.

241. Monica E. Mhoja, *Legal Status of Widows*, in EXPOSED TO SOCIAL INSECURITY: VULNERABLE WOMEN AND GIRLS IN TANZANIA 27 (Friedreich Ebert Stiftung ed., 1995).

242. LMA, *supra* note 14, § 114(1).

243. *Id.* § 114(2)(b); *see also* Mohamed v. Makamo, Civil Appeal No. 45 (Tanz. High Ct. 2001) (reversing a District Court judgment granting the wife upon divorce only five percent of matrimonial

in 1971, Tanzanian women have suffered the absurdity of being economically better off when their marriages are dissolved by divorce rather than by the deaths of their husbands.²⁴⁴ The Law Reform Commission highlighted this incongruity of recognizing “the wife’s property interest over wealth acquired with her husband through their joint efforts . . . only when such marriage ceases by divorce and not by death.”²⁴⁵ Thus, Tanzania’s inheritance laws punish women who remain with their husbands for life.

Women’s limited ability to inherit handicaps them economically. As Tanzania reported to the CEDAW Committee, “Due to women’s unclear rights to inheritance and to property ownership, they have always been denied . . . access to bank loans, mortgages and other financial and credit facilities which require collateral.”²⁴⁶ Thus, Tanzania’s discriminatory inheritance regime perpetuates women’s disempowerment and dependence.

C. THE DENIAL OF INHERITANCE RIGHTS SUBJECTS WOMEN TO POVERTY, VIOLATING THEIR RIGHT TO AN ADEQUATE STANDARD OF LIVING

*Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage . . . or on the death of a relative, is discriminatory and will have a serious impact on a woman’s practical ability to support herself or her family and to live in dignity as an independent person.*²⁴⁷

Deprived of inheritance, women are pushed into poverty. The operation of

properties for failing to take account of her contributions and ordering an equal division); *Mohamed v. Sefu*, [1983] TLR 32 (Tanz. Ct. App.) (holding that “it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets”); *Chakupewa v. Mpenzi*, [1999] EA 32, 39 (Tanz. High Ct.) (holding that “contribution to the acquisition of matrimonial property . . . includes intangible considerations such as [a wife’s] love; the comfort and consolation she give her husband.”); LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 6 (noting that a married woman is “entitled, upon divorce, to an equal share out of the matrimonial property jointly acquired with her husband during marriage.”) (emphasis omitted). This comment is directly in line with Article 7(d) of the African Women’s Protocol, which mandates, “[I]n case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.” African Women’s Protocol, *supra* note 203, art. 7(d).

244. A divorced wife actually fares better under customary law itself. She can keep “all her belongings,” including “items she brought from her natal household” and “gifts given to her.” GN 279, 1st sched., *supra* note 50, R.77.

245. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 7 (emphasis omitted); *see also id.* at 41; Interview with Assistant Administrator General and Principal Probate Officer, *supra* note 34 (“What a woman can get on divorce is more than what she can get on the death of her husband. It’s a strange tension.”).

246. CEDAW, Initial Report, *supra* note 35, para. 2.27.

247. CEDAW General Rec. 21, *supra* note 6, para. 28.

Tanzania's inheritance regime thus violates women's right to an adequate standard of living. The CEDAW Committee recognized the link between property rights and living standards, explaining "the right to own, manage, enjoy and dispose of property . . . will be critical to [a woman's] ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family."²⁴⁸ Under international law, "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 . . . widowhood"²⁴⁹ As recognized, it is particularly important to provide protection for this right upon widowhood. Tanzania's inheritance laws, however, impoverish widows. They deny women a means of subsistence, placing women's survival at the mercy of men.

Both customary and Islamic law are based on the problematic assumption that women cannot and should not support themselves financially. Women are treated as dependents, and their inheritance is either limited by their gender or denied altogether. Consequently, they are forced to rely on their children for economic support. As a magistrate articulated, "Most Muslims will be satisfied because their children inherit; a widow might inherit through her children."²⁵⁰ A member of the Muslim Council agreed, "Better to leave [the husband's] property to the children because they can support [the widow]."²⁵¹ A member of the Law Reform Commission similarly explained that, if "a woman has children, she is always very safe. The problem is where she has no children."²⁵² Customary law explicitly turns the mother into her children's dependent: "The widow has no share of the inheritance if the deceased left relatives of his clan; her share is to be cared for by her children, just as she cared for them."²⁵³ Respecting women's right to an adequate standard of living would allow them to be economically self-sufficient and not force them to depend on the generosity of others for assistance.

Not only does this forced dependency violate women's dignity, as discussed below, but men do not always effectively carry out their obligations. Many sons fail to support their widowed mothers.²⁵⁴ As the Law Reform Commission

248. *Id.*, para. 26.

249. UDHR, *supra* note 194, art. 25(1) (emphasis added); *see also* ICESCR, *supra* note 198, art. 11(1) ("State parties recognize the right of everyone to an adequate standard of living for himself and his family"); CRC, *supra* note 200, art. 27(1) ("States parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."); African Women's Protocol, *supra* note 203, arts. 15, 16 ("States Parties shall ensure that women have the right to nutritious and adequate food [and] [w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment.").

250. Interview with Resident Magistrate, *supra* note 139.

251. Interview with Muslim Leader, *supra* note 3.

252. Interview with Law Reform Commission Official, in Dar es Salaam, Tanzania (Mar. 25, 2002).

253. GN 436, 2d sched., *supra* note 2, R. 27.

254. Interview with High Court Judge, *supra* note 118; *see also* RWEBANGIRA, *supra* note 9, at 30 (citing *Francis v. Francis*, Katoma Primary Court, Civil Case No. 1 (1988), as an instance of sons

observed, “[E]xperience shows that the children could be hostile to their mother or wasteful of the estate left by their deceased father, thereby rendering the widow desperate and or destitute.”²⁵⁵ The situation is even worse when the widow has to rely on her brother-in-law or father-in-law for support. According to one High Court Judge, it is not uncommon for the deceased’s brother to be appointed administrator of the estate and then drive the widow out of the matrimonial home.²⁵⁶ The Chairman of the University Legal Aid Committee likewise recounted, “Sometimes the brother of the deceased will be the administrator. Once he gets access to the property, he disappears.”²⁵⁷ The system of intestate succession in Tanzania thereby plunges women into poverty, violating their right to an adequate standard of living.²⁵⁸

D. TANZANIA’S INHERITANCE LAWS VIOLATE THE RIGHT TO FAMILY BY INTERFERING WITH A WIDOW’S RELATIONSHIP WITH HER CHILDREN AND OBSTRUCTING HER REMARRIAGE

Tanzania’s inheritance laws violate the right to family by interfering with a widow’s relationship with her children and obstructing her remarriage. As the ICCPR establishes, “The family is the natural and group unit of society and is

mistreating their mothers, and *Bukiyo v. Daniel*, Bukoba Urban Primary Court, Civil Case No. 43 (1990), as an instance of stepsons doing so).

255. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 7.

256. Interview with High Court Judge, *supra* note 116.

257. Interview with Chairman of University’s Legal Aid Committee, *supra* note 139.

258. Deprived of an adequate standard of living, women are also denied other basic necessities. Tanzania’s inheritance laws also violate women’s right to health. ICESCR, *supra* note 198, art. 12(1) (“State parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); African Charter, *supra* note 201, art. 16(1) (“Every individual shall have the right to enjoy the best attainable state of physical and mental health.”); African Women’s Protocol, *supra* note 203, art. 14(1) (“States Parties shall ensure that the right to health of women . . . is respected and promoted.”); CEDAW, *supra* note 199, art. 12(1) (States must “[e]nsure, on a basis of equality of men and women, access to health care.”); CRC, *supra* note 200, art. 24(1) (“States Parties recognize the right to the child to the enjoyment of the highest attainable standard of health.”); African Charter on the Rights of the Child, *supra* note 202, art. 14(1) (“Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.”). Inadequate health care is especially problematic given the wide prevalence of AIDS.

Likewise, the education of Tanzanian girls suffers. TANZ. CONST. art. 11(2) (“Every person has the right to self education.”); *id.* at art. 11(3) (“The Government shall endeavour to ensure that there are equal and adequate opportunities to all persons to enable them to acquire education”); UDHR, *supra* note 194, art. 26(1) (“Everyone has the right to an education.”); ICESCR, *supra* note 198, art. 13(1) (“The States Parties . . . recognize the right of everyone to education.”); African Charter, *supra* note 201, art. 17(1) (“Every individual shall have the right to education.”); CEDAW, *supra* note 199, art. 10 (“States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education.”); African Women’s Protocol, *supra* note 203, art. 12(1)(a) (requiring states to “eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training.”); CRC, *supra* note 200, art. 28(1) (“States Parties recognize the right of the child to education.”); African Charter on the Rights of the Child, *supra* note 202, art. 11(1) (“Every child shall have the right to an education.”).

entitled to protection by society and the State.”²⁵⁹ However, Tanzania’s inheritance regime tears families apart. By tying inheritance to children, it encourages greedy relatives to take children away from their mothers in order to access their property. As one activist explained, relatives “adopt children not because they love them but because they love the property that is remaining with them.”²⁶⁰ The Director of Primary Courts told about an uncle who took the children away from their mother and then threw them out “because he had spent all the money given to them.”²⁶¹ For three months, the children “had been kept in a small room, sleeping on one bed, and eating one meal per day.”²⁶² Thus, the families’ most vulnerable members are denied protection in direct violation of the law.²⁶³ Even when families remain physically together, Tanzanian law undermines the widow’s authority by appointing a male guardian with decision-making power over her children.²⁶⁴ This violation of both women’s and children’s rights is so prevalent that the African Women’s Protocol explicitly provides: “[A] widow shall automatically become the guardian and custodian of her children, after the death of her husband”²⁶⁵

Tanzania’s inheritance laws also interfere with a widow’s right to remarry. Customary law sanctions widow inheritance,²⁶⁶ marrying her off to one of her husband’s relatives and disregarding her personal autonomy. Widows, who remarry a man of their choice—but one not related to their husband—lose any limited inheritance rights²⁶⁷ and can be kicked out of the matrimonial home and separated from their children.²⁶⁸ Again, the African Women’s Protocol directly addresses this issue: “[A] widow shall have the right to remarry, and in that event,

259. ICCPR, *supra* note 197, art. 23(1); *see also* TANZ. CONST. art. 16(1) (“Every person is entitled to respect and protection of . . . his family.”); ICESCR, *supra* note 198, art. 10 (“The widest possible protection and assistance should be accorded to the family.”); UDHR, *supra* note 194, art. 16(3) (“The family . . . is entitled to protection by society and the State.”); African Charter, *supra* note 201, art. 18(1) (“The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.”); African Charter on the Rights of the Child, *supra* note 202, art. 18(1) (“The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.”).

260. Interview with Tanzania Gender Networking Programme Activist, in Dar es Salaam, Tanzania (Mar. 11, 2005).

261. Interview with Director of Primary Courts, *supra* note 65.

262. *Id.*

263. ICESCR, *supra* note 198, art. 10(3) (“Special measures of protection and assistance should be taken on behalf of all children and young persons”); UDHR, *supra* note 194, art. 25(2) (“Motherhood and childhood are entitled to special care and assistance.”); ICCPR, *supra* note 197, art. 24(1) (“Every child shall have, without any discrimination . . . the right to such measures of protection as are required by his status as a minor”); CRC, *supra* note 200, art. 3(2) (“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being.”).

264. GN 436, 1st sched., *supra* note 43, R. 1(a), 2-27.

265. African Women’s Protocol, *supra* note 203, art. 20(b).

266. GN 279, 1st sched., *supra* note 50, R. 62, 64; GN 436, 1st sched., *supra* note 43, R. 7.

267. GN 279, 1st sched., *supra* note 50, R. 77.

268. *Id.* R. 68 (“If the widow, by her persistence, lives with a man who is not her deceased husband’s relative, the clan council has the right to warn her and if it is not heeded, the council may send her back to her father’s family and also take the children from her.”).

to marry the person of her choice.”²⁶⁹ “In case of remarriage, she shall retain . . . the right to continue to live in the matrimonial home.”²⁷⁰ Tanzania must move to ensure these basic protections for its families.

E. TREATING WOMEN AS CHILDREN OR PROPERTY, TANZANIA’S INHERITANCE REGIME ROBS WOMEN OF THEIR DIGNITY

Tanzania’s discriminatory inheritance laws violate women’s dignity by treating them as children or property. Dignity is a foundational right under both the Tanzanian Constitution and international law. In establishing that “human dignity and other human rights are respected and cherished,” the Constitution places special focus on dignity.²⁷¹ The Constitution further specifically directs that dignity be “preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.”²⁷² The first article of the UDHR sets out, “All human beings are born free and equal in dignity and rights,”²⁷³ a sentiment echoed by the preambles to the human rights conventions.²⁷⁴

Deprived of the means of survival, as the South African Constitutional Court noted, women are placed in a state of “perpetual minority,” “automatically under the control of male heirs.”²⁷⁵ Moreover, a wife is treated as her husband’s property and “even the fruits of her labour” do not belong to her,²⁷⁶ leaving her “without any share . . . of the wealth created through her joint effort” upon her

269. African Women’s Protocol, *supra* note 203, art. 20(c); *see also* UDHR, *supra* note 194, art. 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.”).

270. African Women’s Protocol, *supra* note 203, art. 21(1). These provisions also conflict with the LMA, which provides that “a woman whose husband has died shall be free . . . to reside wherever she may please; and . . . to remain unmarried or . . . to marry again any man of her choosing.” LMA, *supra* note 14, § 68.

271. TANZ. CONST. art. 9(a).

272. *Id.* art. 9(f).

273. UDHR, *supra* note 194, art. 1.

274. ICCPR, *supra* note 197, pmb. (“Recognizing that these rights derive from the inherent dignity of the human person . . .”); ICESCR, *supra* note 198, pmb. (“Recognizing that these rights derive from the inherent dignity of the human person . . .”); CEDAW, *supra* note 199, pmb. (“[T]he Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in equal rights of men and women.”); CRC, *supra* note 200, pmb. (“[I]n accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”); *see also* African Women’s Protocol, *supra* note 203, art. 3(1) (“Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”); African Charter, *supra* note 201, art. 5 (“Every individual shall have the right to respect of the dignity inherent in a human being and to recognition of his legal status.”).

275. *Bhe v. Khayelitsha*, para. 92, 2004 (1) BCLR 1 (CC) (S. Afr.). The South African Constitutional Court held that this implication “that women are not fit or competent to own and administer property” violates their “right . . . to human dignity.” *Id.*

276. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 7 (emphasis omitted).

husband's death.²⁷⁷ Rather, the widow becomes property herself to be inherited.²⁷⁸ As the Law Reform Commission admonished, "[W]omen, as human beings, are not and cannot be treated as chattels to be owned by husbands. To accept such [a] notion would, in fact, be tantamount to regarding wives as slaves."²⁷⁹ It is time to amend Tanzania's inheritance laws to finally accord Tanzanian women their fundamental "right to respect as a person."²⁸⁰

VI. NEITHER CULTURE NOR RELIGION CAN JUSTIFY TANZANIA'S DISCRIMINATORY INHERITANCE REGIME

Neither culture nor religion can justify these violations of women's fundamental rights. In fact, international law mandates the elimination of discrimination in both law and custom. CEDAW requires states to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of . . . customary and all other practices that are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."²⁸¹ The Human Rights Committee similarly admonished states to "ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality."²⁸² Accordingly, the CEDAW

277. *Id.* at 3 (emphasis omitted).

278. Article 16 of the ICCPR provides that "[e]veryone shall have the right to recognition everywhere as a person before the law." ICCPR, *supra* note 197, art. 16. The Human Rights Committee directly linked this provision to "the capacity of women to own property" and to a prohibition against widow inheritance. *See* HRC General Comment 28, *supra* note 182, at 182, para. 19. The Committee explained, "[W]omen may not be treated as objects to be given together with the property of the deceased husband to his family." *Id.*

279. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 7. In fact, widow inheritance has been included in the definition of slavery under Article 1(c)(iii) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, entered into force Apr. 30, 1957, acceded to by Tanzania Nov. 28, 1962, available at <http://www.umn.edu/humanrts/instreet/f3scas.htm> (mandating the abolition of the practice by which "[a] woman on the death of her husband is liable to be inherited by another person").

280. African Women's Protocol, *supra* note 203, art. 3(2). As the Human Rights Committee directed, states must take measures "to eradicate" discriminatory property "laws or practices that prevent women from being treated or from functioning as full legal persons." HRC General Comment 28, *supra* note 182, at 182, para. 19.

281. CEDAW, *supra* note 199, art. 5(a); *see also* African Women's Protocol, *supra* note 203, art. 2(2) (stating:

"States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices 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 women and men.").

282. HRC General Comment 28, *supra* note 182, at 179, para. 5. Thus, "culture and religion do not authorize any State, group or person to violate the right to equal enjoyment of women of any Covenant rights, including the right to equal protection of the law." *Id.* at 185, para. 32. The African Charter on the Rights of the Child similarly states, "Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged." African Charter on the Rights of the Child, *supra* note 202, art. 1(3). The African Charter only recognizes the "duty [to] preserve and strengthen positive African cultural

Committee expressed particular concern over Tanzania's "customary and religious laws" which bar women from inheriting and owning property, urging that "the laws of inheritance and succession be formulated so as to guarantee" women their fundamental rights.²⁸³

Religious freedom does not require the application of discriminatory Islamic law.²⁸⁴ As the Mauritius Supreme Court recognized in *Bhewa v. Mauritius*, the right to freedom of religion does not include the right to enforce discriminatory inheritance law on Muslim estates.²⁸⁵ Holding that the right to freedom of religion does not require the compulsory application of personal laws governing marriage, divorce, and inheritance, the Court explained:

The secular state is not anti-religious but recognizes freedom of religion in the sphere that belongs to it. As between the state and religion each, has its own sphere, the former, that of law-making for the public good and the latter that of religious teaching, observance and practice. To the extent that it sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law.²⁸⁶

The U.S. Supreme Court reached a similar conclusion in rejecting a Mormon's assertion that the legislature violated his constitutional right to freedom of religion by prohibiting polygamy. The Court held that while laws "cannot interfere with mere religious belief and opinions, they may with practices."²⁸⁷ To

values." African Charter, *supra* note 201, art. 29(7). As the Charter mandates the "elimination of every discrimination against women," inequality is not such a cultural value. African Charter, *supra* note 201, art. 18(3).

283. CEDAW, 18th and 19th Sessions Report, *supra* note 210, at 68, para. 236; *see also* United Republic of Tanzania, Third Periodic Report to HRC, at 7, para. 24, U.N. Doc. CCPR/C/83/Add.2 (Oct. 7, 1997) ("[S]ome laws and practices deprived women of their basic rights, i.e. in the field of inheritance and land rights. Some of the legislation has been strongly influenced by traditional or customary rights which are generally in favour of men at the expense of women.").

284. Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief enumerates the rights inherent in the freedom of religion: the right to worship, to establish institutions, to access materials for rites or customs, to write and disseminate publications, to teach, to solicit funds, to train and appoint leaders, to observe holy days, and to establish communications. *See* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, at 71, G.A. Res. 36/55, 36, U.N. GAOR Supp. (No. 51), U.N. Doc. A/36/684 (1981), *available at* <http://www.umn.edu/humanrts/instreet/d4deidrb.htm> [hereinafter Declaration on Religious Intolerance]. A right to religious law and to impose religious belief on others is not recognized. Moreover, as both the Clinic's Proposed Statute and the Revised Proposed Statute enable individuals to bequeath part of their estate by will, Muslims could still choose to have Islamic law govern this portion, thereby expressing their religious beliefs. Respecting individuals' indicated desires is much more protective of religious freedom than state enforced rules on all Muslims.

285. *Bhewa v. Mauritius*, [1991] LRC (Const.) 298 (Mauritius Sup. Ct. 1990).

286. *Id.* at 308.

287. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

hold otherwise would “make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”²⁸⁸ In this vein, Tanzania’s Law Reform Commission asserted, “The Commission believes that the laws of succession, though intimately bound with religion in the case of Muslims and others, are proper matters for state legislation.”²⁸⁹

Moreover, the right to religious freedom may be limited when its exercise would infringe on the fundamental rights of others. The Court in *Bhewa* held that even if freedom of religion encompassed the application of religious personal law it would be “reasonably . . . justifiable in a democratic society,” and in fact even necessary under Mauritius’s ICCPR obligations, to carve out exceptions “to ensure the largest measure of non-discrimination against women.”²⁹⁰ The ICCPR explicitly explains that “[f]reedom to manifest one’s religion or beliefs may be subject . . . to such limitations as are prescribed by law and are necessary to protect . . . the fundamental rights and freedoms of others.”²⁹¹ Tanzania’s Constitution likewise provides that constitutional “rights and freedoms . . . shall not be exercised in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.”²⁹² Thus, Tanzania can and must create laws to protect women’s dignity and equality even if such laws violate religious or cultural customs.

Tanzanian courts and statutes already recognize that culture and religion cannot be used as an excuse to trample over women’s rights. Tanzanian courts have refused to uphold discriminatory and abusive customs. For instance, in *Mallya v. Republic*, the Court rejected the use of customary law as a defense to rape, finding that the custom of forceful abduction and rape did not constitute a legitimate means of marriage.²⁹³ As the Court explained, “[s]uch customs are dehumanising and they contaminate human respect and dignity.”²⁹⁴ The LMA explicitly supersedes certain customary and Islamic laws in the private sphere of

288. *Id.* at 167.

289. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 17.

290. *Bhewa*, [1991] LRC (Const.) at 309.

291. ICCPR, *supra* note 197, art. 18; *see also* CRC, *supra* note 200, art. 14(3) (“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”); Declaration on Religious Intolerance, *supra* note 284, art. 1(3) (“Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”).

292. TANZ. CONST. art. 30(1). The Constitution further specifies that its provisions do not “prohibit the enactment of any legislation” “for the purpose of . . . ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals.” *Id.* art. 30(2).

293. *Mallya v. Republic*, [2001] TLR 88, 3 (Tanz. High Ct. 2001).

294. *Id.*; *see also* Jonathan v. Republic, [2001] TLR 53, 5 (Tanz. High Ct. 2001) (similarly holding that the custom of abducting and raping a girl did not constitute marriage and “in view of . . . domestic and international law . . . seriously offended the complainant’s fundamental right to choose her spouse and marry on her own volition.”).

the family. As the Judicature and Application of Law Act provides, “[T]he rules of customary law and the rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act.”²⁹⁵ Further, the Village Land Act declares that “[a]ny rule of customary law,” “to the extent to which it denies women . . . access to ownership, occupation or use of . . . land,” “shall be void and inoperative.”²⁹⁶ Tanzania’s inheritance laws should be amended in line with this updated legislation to abrogate discriminatory customs.

VII. TO COMPLY WITH THE CONSTITUTION AND INTERNATIONAL OBLIGATIONS,
THE TANZANIAN GOVERNMENT MUST FINALLY MOVE TO ENACT A UNIFORM
INTESTATE SUCCESSION ACT, PROTECTIVE OF THE RIGHTS OF WOMEN

The death of a husband or father generally means destitution for Tanzanian women. As the Law Reform Commission noted, “while Tanzania Mainland has led the way in the reform of Marriage laws in Sub-Saharan Africa, it has lagged behind in the reform of the laws of Succession.”²⁹⁷ Countries in Africa, Asia, Europe, and the Americas provide statutory recognition for the equal inheritance rights of men and women.²⁹⁸ Tanzania’s Constitution and international obligations require legislative action. As CEDAW directs, states must “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”²⁹⁹ Tanzania should thus adopt a uniform intestate succession act, which

295. JALA, *supra* note 27, § 11(4). The Islamic Restatement Act prohibits religious criminal laws, or any “provision purporting to declare any act or omission criminal.” Islamic Law (Restatement) Act, § 2(1), TANZ. LAWS [CAP 375 R.E. 2002].

296. Village Land Act, *supra* note 14, § 20(2).

297. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 12.

298. Ghana Intestate Succession Law, P.N.D.C.L. 111 (1985); Zambia Intestate Succession Act of 1989, available at <http://umpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN004849.pdf>; TOLLEY’S INTERNATIONAL SUCCESSION LAWS (David Way & Mark Bridges eds., 2004) (referencing equal succession laws in Singapore, Turkey, Canada, and Europe); EUROPEAN SUCCESSION LAW (David Hayton ed., 1998); INTERNATIONAL ENCYCLOPEDIA OF LAWS: FAMILY AND SUCCESSION LAW 263-68 (Kluwer Law International, 1997) (referencing equal succession laws in the United States); CARMEN D. DEERE & MAGDALENA LEON, EMPOWERING WOMEN: LAND AND PROPERTY RIGHTS IN LATIN AMERICA (2001).

299. CEDAW, *supra* note 199, art. 2(f); *see also* ICCPR, *supra* note 197, art. 2(2) (“[E]ach State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”); CRC, *supra* note 200, art. 3(2) (“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being . . . and, to this end, shall take all appropriate legislative and administrative measures.”); CRC, *supra* note 200, art. 4 (“States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention); African Charter, *supra* note 201, art. 1 (“[P]arties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”); African Charter on the Rights of the Child, *supra* note 202, art. 1(1) (“Member States . . . shall undertake . . . to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.”); African Women’s Protocol, *supra* note 203, art. 2(1) (“States Parties shall combat all forms of discrimination against women through appropriate legislative . . . measures.”).

would protect the surviving spouse's right to the matrimonial home, household belongings, and jointly acquired property and give her/him priority in administering the estate.³⁰⁰ Additionally, sons and daughters should inherit equally without regard to gender,³⁰¹ and widow inheritance, property grabbing, eviction from the family home, and the taking of children by relatives should all be treated as criminal offenses.

In 1968, a Tanzanian High Court judge declared, "What is the justification for treating sons differently from daughters?"³⁰² "It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour."³⁰³ Over three decades later, it is time to finally give effect to his words.

300. See Proposed Statutes, *infra* Appendixes A, B.

301. Under the Revised Proposed Statute, in the absence of a will, a widow or widower inherits 50% of the estate, and the children inherit the other 50%. See Revised Proposed Statute, *infra* Appendix B, § 20(1)(b).

302. Ndeamtzo v. Malasi, [1968] HCD 127, 99 (Tanz. High Ct. 1968).

303. *Id.*

APPENDIX A:
CLINIC PROPOSED SUCCESSION ACT 2002³⁰⁴

ARRANGEMENT OF SECTIONS

Section Title

1. Introduction
2. Definition of Estate
3. Minimum Spousal Share
4. Provisions for Multiple Spouses
5. Disposition by Will
6. Choice of Administrator
7. Duties of Administrator
8. Manner of Distribution
9. Protection of Minor Children
10. Property Grabbing
11. Treatment of Widows
12. Public Education

I. INTRODUCTION

- A. The devolution of the estate of any deceased person shall be governed by one uniform law of inheritance, regardless of such person's age, race, color, sex, religion, political or other opinion, national or social origin, place of origin, property, birth, tribe, custom, tradition, disability, health status, station in life, or other status.
- B. To the extent that any existing customary, Islamic, or statutory laws are inconsistent with provisions of this Act, they are hereby repealed. These include, but are not limited to those set forth in Schedule I to this Act.

II. DEFINITION OF ESTATE

- A. The estate of a deceased person shall include any and all property of the deceased in which the deceased had an ownership interest, to the extent of that interest, including but not limited to, personal chattels, livestock, agricultural land, nonagricultural land, clan land, family land, vehicles, agricultural equipment, business entities, bank accounts, employment benefits, and monetary investments.

III. MINIMUM SPOUSAL SHARE

- A. Any surviving spouse shall only be entitled to inherit if she or he and the

304. The Proposed Bill was drafted by Clinic students Nickolas Galli, Susan Gualtier, Kristine Pirnia, and Sukyong Suh with supervision and input as laid out in the author's note above.

decedent had a valid marriage as recognized pursuant to the Law of Marriage Act or the marriage meets the requirements of the following five-factor test:

1. The relationship in question has lasted longer than 2 years;
 2. The couple lived exclusively together under the same roof for the duration of at least 2 years immediately prior to the spouse's death;
 3. Neighbors recognize the couple as husband and wife;
 4. The couple went out in public together as husband and wife; and
 5. The decedent is not survived by another spouse or spouses with whom he or she had a valid marriage as recognized pursuant to the Law of Marriage Act.
- B. Where the intestate is survived either by one spouse or by more than one spouse, each spouse shall be absolutely entitled to the marital home and curtilage occupied by her and to the household chattels and vehicles of that home to the exclusion of other spouses, children, and family. This right is effective immediately upon the death of the decedent.
- C. Any surviving spouse is absolutely entitled to her or his share of all other personal or real property of the deceased in which she or he holds an ownership interest [because the property was jointly owned by both], as provided for in the Law of Marriage Act, the Land Act, the Village Land Act, and any other source of law.
- D. All other property that is not specified in III(B) and III(C) is deemed the remainder of the estate.
- E. In the absence of a surviving spouse, the matrimonial home, household chattels, and vehicles with respect to the decedent become part of the "remainder" of the estate as defined in subsection (D) of this section.

IV. PROVISIONS FOR MULTIPLE SPOUSES

- A. Where there is more than one surviving spouse, each surviving spouse shall receive a portion of the spousal share set forth in Section VIII(F)(1)-(3), (5) multiplied by the following ratio: number of years married divided by the total number of years married for all surviving spouses.
1. For example, if three wives survive the deceased, distribution will occur as follows:
 - Wife A was married to the deceased for 10 years;
 - Wife B was married to the deceased for 6 years;
 - Wife C was married to the deceased for 2 years;
 - Total number of years married for all spouses is 18 years.Wife A's portion is $10/18$ or $5/9$ of the share set forth in section VIII(F)(1)-(3), (5).
Wife B's portion is $6/18$ or $3/9$ of the share set forth in section VIII(F)(1)-(3), (5).

- Wife C's portion is $\frac{2}{18}$ or $\frac{1}{9}$ of the share set forth in section VIII(F)(1)-(3), (5).
- B. Section IV(A) shall operate unless this division would result in an injustice towards a spouse who has contributed disproportionately to the allocation by the formula above. The burden of proof that an injustice results is on the spouse challenging the application of the formula to the estate.

V. DISPOSITION BY WILL

- A. A maximum of $\frac{1}{3}$ of the remainder may be disposed of by will.
- B. Where a will is written to dispose of more than $\frac{1}{3}$ of the remainder, the entire will is null and void. Under these circumstances the estate will be distributed under the provisions of this Act.
- C. Where the value of the remainder is less than x , the decedent may not dispose of any portion of the remainder by will. The remainder will instead devolve in its entirety to the surviving spouse. In the absence of a surviving spouse, the remainder shall devolve in accordance with the provisions of Section VIII.
- D. Any part of the decedent's estate not effectively disposed of by will shall be distributed to the decedent's heirs as prescribed in Section VIII of this Act.

VI. CHOICE OF ADMINISTRATOR

- A. No estate may be distributed without letters of administration. Any distribution executed without letters of administration or otherwise contrary to the provisions of this law shall be null and void.
- B. Where the deceased has died interstate, letters of administration shall be granted in accordance with the guidelines set forth in Section V(D) of the Probate and Administration Ordinance as amended by this section.
1. The spouse with the longest marriage is the administrator unless he or she is found incompetent according to Section VI(B)(ii) of the Probate and Administration Ordinance. If he or she is found incompetent, then the status of administrator will devolve according to the seniority of spouses as determined by the length of the marriage to the deceased. In the event that the deceased is not survived by a spouse, the eldest living child regardless of gender will be the administrator unless he or she is found incompetent according to Section VI(B)(ii) of the Probate and Administration Ordinance. If he or she is found incompetent, then the status of administrator will devolve according to the age of the children, with the next eldest child chosen regardless of gender. If the deceased is not survived by any of the above, then the administrator will be selected from the remaining beneficiaries as set forth in Section V(D)(33)(4) of the Probate and Administration Ordinance.
 2. A party contesting the court's grant of letters of administration must show by clear and convincing evidence that the recipient of the letters of

administration is incompetent to administer the deceased estate. In the event that the contesting party meets the burden of proof, the court will grant the letters of administration to the applicant with next highest priority.

3. The court shall not consider a person's gender in selecting the administrator of the estate.
 4. Any person interfering with a surviving spouse's plans to obtain a letter of administration or administer the deceased's estate is guilty of a crime, and is punishable by a fine of x and by a prison term not exceeding one year.
 5. Interfering with a surviving spouse's plans to obtain a letter of administration or administer the estate includes, but is not limited to, conduct such as harassment, intimidation, assault, kidnapping, vandalism, theft, and robbery that is directed against the surviving spouse, her children, and her property.
- C. Any local body, including clans, tribal organizations, and other informal networks, assisting in a decision as to who shall apply for letters of administration shall act in conformity with the guidelines set forth in this section and in Section V(D) of the Probate and Administration Act. Any person so chosen by that body to be administrator of an estate must apply for a letter of administration.

VII. DUTIES OF ADMINISTRATOR

- A. An administrator who knowingly or intentionally:
1. Does not distribute the estate in accordance with the provisions of this law; or
 2. Does not file a final accounting detailing how the decedent's estate was administered within the time required by the law
- Commits an illegal act and is punishable by a minimum fine of x and not exceeding x .
- B. Any beneficiary may file civil causes of action against the administrator and wrongful distributee(s) for the return of the property to which the beneficiary is entitled under this Act, for its value if it has been destroyed, and for damages resulting from the administrator's intentional, knowing, reckless, or negligent failure to distribute the deceased's estate in accordance with the provisions of this law.

VIII. MANNER OF DISTRIBUTION

- A. Within each class of heirs as set forth in subsection (F) of this section, each person shall receive an equal share without regard to gender, age, religion, tribe, custom, tradition, disability, race, color, political or other opinion,

national or social origin, place of origin, property, birth, health status, station in life, or other status.

- B. Each beneficiary shall receive a full ownership interest in any property he or she inherits, including but not limited to self-acquired land and family land, except clan land. A full ownership interest is any interest that may be sold, transferred, alienated, mortgaged, and otherwise encumbered.
- C. Each beneficiary's interest in clan land is a full ownership interest except with respect to the right to sell such land. Before soliciting offers of purchase from the public at large, beneficiaries have the duty to solicit an offer from the clan. Beneficiaries may reject this offer if it falls below the fair market value of the land as determined by a government assessor.
- D. Women have the same right to sell clan land as do men.
- E. Any surviving spouse maintains a full ownership right in any property she or he receives from a decedent's estate upon remarriage.
- F. The remainder shall devolve in the following manner:
 - 1. Where the deceased is survived by a spouse, children, and parent(s), the share of the spouse shall be 45%, that of the children shall be 45%, and that of the parent(s) shall be 10%.
 - 2. Where the deceased is survived by a spouse and children, but not by parent(s), the share of the spouse shall be 50% and that of the children shall be 50%.
 - 3. Where the deceased is survived by a spouse and parent(s), but not by children, the share of the spouse shall be 90% and that of the parent(s) shall be 10%.
 - 4. Where the deceased is survived by children and parent(s), but not by a spouse, the share of the children shall be 90%, and that of the parent(s) shall be 10%.
 - 5. Where the deceased is survived by a spouse, but not by children or parent(s), the spouse shall receive 75%, and 25% shall devolve upon any surviving grandchildren of the deceased. Where the deceased is not survived by grandchildren, the surviving spouse shall inherit the entire estate.
 - 6. Where the deceased is survived by children, but not by a spouse or parent(s), the children shall inherit the entire estate.
 - 7. Where the deceased is survived by parent(s), but not by a spouse or children, the share of the parent(s) shall be 50%, and 50% shall devolve upon any surviving grandchildren of the deceased. Where the deceased is not survived by grandchildren, the surviving parent(s) shall inherit the entire estate.
 - 8. Where the deceased is survived by grandchildren, but not by a spouse, children, or parent(s), then the grandchildren shall inherit the entire estate.
 - 9. Where the deceased is survived by neither spouse, children, parent(s), nor

grandchildren, 100% of the estate shall devolve in turn upon each of the following class of heirs. Each class shall inherit to the exclusion of others.

- a. Sisters and brothers.
 - b. Aunts and uncles.
 - c. Nieces and nephews.
 - d. First cousins.
10. If the deceased is not survived by any of the heirs listed above, the estate shall devolve to the state.
- G. Where, under Section VIII(F), children are entitled to inherit, but some of the children are alive and others have died leaving children of their own, the share of the dead child shall devolve upon his or her children.

IX. PROTECTION OF MINOR CHILDREN

- A. Where a beneficiary is a minor child, the administrator of the estate shall hold such beneficiary's share in trust until the minor child gains legal capacity.
- B. An exception to Section IX(A) occurs when a parent of a minor child survives and is not the administrator of the estate. In this case, each surviving spouse shall be guardian of his or her own minor children and shall hold his or her minor children's share of the estate in trust.

X. PROPERTY GRABBING

- A. No person shall, before the distribution of the deceased's estate, whether testate or intestate, eject a surviving spouse or child from the matrimonial home.
- B. Any person who, before the distribution of the deceased's estate, whether testate or intestate:
1. Unlawfully ejects a surviving spouse or child from the matrimonial home contrary to subsection (A) of this section; or
 2. Unlawfully deprives an entitled person of the use of:
 - a. Any part of the property of the entitled person; or
 - b. Any portion of the remainder which the entitled person stands to inherit under this law; or
 3. Removes, destroys or otherwise unlawfully interferes with the property of the deceased person; or
 4. Removes any children from the care and control of the surviving parent;
- Commits an illegal act and is punishable by a minimum fine of x and not exceeding x and/or to a term of imprisonment not exceeding one year.
- C. Any person ejected from his or her matrimonial home or who has his or her property removed, destroyed, or otherwise unlawfully interfered with may file a civil cause of action against the perpetrators of said conduct for the

return of the property, its value if it has been destroyed, and for damages.

XI. TREATMENT OF WIDOWS

- A. Widows are not property and cannot be inherited or otherwise coerced to remarry. Such coercion contravenes Section 16 of the Law of Marriage Act.
- B. A person is guilty of coercing a widow to remarry if such marriage was brought about without the free and full consent of the widow.
- C. A widow who brings a cause of action under this provision creates the rebuttable presumption that her marriage was coerced.
- D. Persons guilty of coercing a widow to remarry are punishable by up to 5 years in prison and x in fines.
- E. Coerced marriages are subject to annulment.

XII. PUBLIC EDUCATION

- A. The government shall ensure the implementation of this law by educating the public as to the rights it guarantees. The government must take measures that include, but are not limited to, the following:
 1. Train the police force to understand the information regarding the new criminal provisions of this Act and to perform its duties under this Act.
 2. Distribute a copy of this law to all courts in Tanzania in both Swahili and English.
 3. Use the media, posters, pamphlets, and other means to publicize the provisions of this law in both Swahili and English.
 4. Ensure that its officers at every level understand this law and further require them to educate their communities about the provisions of this law.
 5. Coordinate its public education efforts with NGOs and community organizations to raise women's awareness of their rights under this law.

SCHEDULE 1 – Repealed Provisions

1. Judicature and Application of Laws Ordinance § 9(1).
2. The Indian Succession Act.
3. Administration (Small Estates) §§ 19
4. Probate and Administration Act § 2(1), 88(1)(c).
5. Local Government Ordinance Rules 5, 7, 19, 20, 22, 23, 25-31, 44-51.
6. Laws of Inheritance, Government Notice 436, Sched. 1, Rules 27, 66, 69, 75-77, 93.

APPENDIX B:
REVISED PROPOSED SUCCESSION ACT 2002

ARRANGEMENT OF SECTIONS

Section Title

I. PRELIMINARY PROVISIONS

1. Short title and commencement.
2. Application.
3. Interpretation.

II. MINIMUM SPOUSAL SHARE

4. Survived spouses.
5. Multiple spouses.
6. Disposition by the will.
7. Determination of will.
8. Bequeath to a friend.

III. APPOINTMENTS AND DUTIES OF ADMINISTRATORS/ADMINISTRATRIX,
EXECUTOR/EXECUTRIX

9. Letters of Administration/Administratrix.
10. Appointment of Administrator/Administratrix.
11. Qualification of Administrator/Administratrix.
12. Grant of letters of Administration/Administratrix.
13. Offences by Administrators/Administratrix.
14. Offences by other persons.
15. Action against the Administrator/Administratrix, Executor/Executrix.

IV. DISTRIBUTION OF THE ESTATE

16. Fair distribution of estate.
17. Clan land.
18. Right to dispose.
19. Right upon remarriage.
20. Distribution of remainder.
21. Share of the minor.

V. MISCELLANEOUS PROVISIONS

22. Offences against spouse or children.
23. Offences against widow.
24. Attempted rape.
25. Conflict of law.
26. Existing laws.

SCHEDULE

A BILL*for***An Act to Provide for the Procedures and Obligations in the Administration of the Deceased's Estate and Other Related Matters.**

I. PRELIMINARY PROVISIONS

1. This Act shall be cited as the Succession Act, 2002 and shall come into force on such date as the Minister may by Order published in the Gazette appoint.
2. This Act shall apply in Tanzania Mainland.
3. In this Act unless the context otherwise requires –
 - “Administrator/Administratrix” means a person appointed by the court to administer the estate of the deceased person;
 - “beneficiary” includes –
 - (a) a surviving spouse, or a child or children of the deceased person, or
 - (b) other person entitled to inherit any property in the estate according to the provisions of this Act;
 - “blessing and cleansing widows” means anything negatively done to the widow/widower purposive to bless, cleanse or anointing her;
 - “child of the deceased” includes a biological child, a person adopted under any written law currently in force or under customary law related to adoption and recognized by law to be the child of such person;
 - “clan land” means the land which has been inherited successfully without interruption from the great grandfathers or grandmothers by members of the same clan;
 - “executor/executrix” means a person to whom the execution of the last will of a deceased person is by the testator's appointment confided;
 - “estate” means property owned by the deceased to include immovable and movable but not limited to personal effects, investments, cash in hands/banks and debts;
 - “family” means a surviving spouse and or children;
 - “full ownership interest” means any interest that may be sold, transferred, alienated, mortgaged and otherwise encumbered;
 - “heir” means a person who is entitled to be a beneficiary of the deceased's estate under this Act;
 - “household chattels” properties which were used solely by the family which include but not limited to domestic appliances, furniture's, furnishings, personal effects and vehicles that were used by the family;
 - “land” has the meaning ascribed to it by the Land Act;

- “marriage” includes religious, civil, customary and presumed marriages as recognized by the Law of Marriage Act 1971;
- “matrimonial home” has the meaning ascribed to it by the Law of Marriage Act of 1971;
- “minor” means a person under the age of 18 years;
- “parent” includes biological mother or father or any person recognised by law to be the mother or father of the deceased;
- “remainder” means the residue of an estate remaining after discharging a widow or widowers share and then settling of the claims of creditors;
- “spouse” means a husband or wife;
- “Will” means legal declaration of the intentions of a testator with respect to his/her property, which he/she desires to be carried into effect after his/her death.

II. MINIMUM SPOUSAL SHARE

4. (1) Where the deceased is survived either by a spouse or spouses and children each spouse shall immediately upon the death of the deceased be entitled to –
- (a) the matrimonial home and household chattels to the exclusion of other spouses, children and family;
 - (b) his or her share of all other personal or real property of the deceased in which she or he holds an ownership or interest as the property was jointly owned by both as provided for in the Law of Marriage Act, 1971, the Land Act, the Village Land Act of 1999 or any other written laws.
- (2) Any other property not specified in subsection (1) shall be deemed to be the remainder of the estate.
- (3) Where there is no surviving spouse, the matrimonial home, household chattels and vehicles with respect to the deceased shall become part of the remainder of the estate.
5. (1) Where there is more than one surviving spouse each shall after removing or deducting the spouses shares, receive a portion of the spousal share.
- (2) Where the division under subsection (1) has resulted to injustice towards a spouse who has contributed disproportionately to the portion allocated after deducting her shares from the estate, the burden of proof shall be on the spouse challenging the share she received from the estate.
6. (1) Where there is a Will, the remainder of estate may be disposed of in accordance with the Will except that the testator shall not deny the lawful heirs the right to inherit unless there is strong reasons to do so.
- (2) Strong reasons under subsection (1) include but not limited to the fact that
- (a) the prospective heir committed adultery with the testator’s wife, husband, daughter or son;
 - (b) the prospective heir has attempted to murder or inflict grievous bodily harm to the testator;

- (c) the prospective heir has neglected to maintain the testator during his or her illness;
 - (d) the prospective heir has stolen valuable property from the testator.
- (3) Subject to this section, any part of the deceased's estate which is not effectively disposed of by Will shall be distributed to the deceased's heirs as prescribed under section 20 of this Act.
7. The testator may bequeath to a friend or any other person his or her personal properties used by the testator himself, except that such personal property shall not exceed the share of the legal heirs.
8. (1) Where a Will is written to dispose the deceased's estate in contravention of the provisions of section 6, 7 and any other which contravenes probate and administration ordinance, the entire Will shall be declared to be null and void under the provisions of this Act.

III. APPOINTMENTS AND DUTIES OF ADMINISTRATORS/ADMINISTRATRIX, EXECUTOR/EXECUTRIX

9. (1) No person shall distribute the estate without letters of administration.
(2) Any distribution of estate executed without letters of administration or otherwise contrary to the provisions of this law shall be declared null and void.
10. (1) Persons to be appointed as administrator/administratrix shall include –
(a) surviving spouse/spouses;
(b) the children of the deceased; or
(c) any other person acceptable to the heirs as competent person to be administrator.
(2) Where the deceased is not survived by any of persons specified under section (1), then the administrator shall be selected from the remaining beneficiaries as stipulated under section 33(4) of the Probate and Administration Ordinance.
11. (1) The spouse with the longest marriage shall be appointed as administrator/administratrix unless he is incompetent for the appointment.
(2) Where most senior spouse is found to be incompetent for appointment under subsection (1) then the status of administrator/administratrix shall devolve according to the seniority of spouses as determined by the duration of the marriage to the deceased.
(3) Where the deceased is not survived by the spouse, then the eldest living child of the deceased shall, regardless of gender be the administrator unless he is found incompetent under the provisions of the Probate and Administration Ordinance.
(4) Where a child under subsection (3) is found incompetent for appointment as administrator then the status of administrator shall devolve according to the age of children with the eldest child chosen regardless of sex.

- (5) Where the deceased is not survived by any child under subsection (4), then the administrator shall be appointed from the remaining beneficiaries as stipulated under the provisions of the Probate and Administration Ordinance.
12. (1) A party disputing to the courts grant of letter of administration shall be required to show evidence that the recipient of the letters of administration is incompetent to administer the deceased's estate.
- (2) Where the disputing party fails to provide evidence as required under sub-section (1), the court shall grant the letters of administration to the applicant regardless of his gender.
- (3) Where a deceased has left a will, the will shall be followed as per Probate and Administration Ordinance.
13. (1) Any administrator/Administratrix who –
- (a) fails to distribute the estate in accordance with the provisions of this law or who fails to file a final account of the distribution of estate commits an offence and shall on conviction be liable to a fine not exceeding 100,000/TSh or to imprisonment for a term not less than six months or to both such fine and imprisonment.
- (b) squanders the estate of the deceased person commits an offence and shall on conviction be liable to a fine of not less than 200,000/= or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.
- (2) A convicted person under this section shall in addition to penalties under subsection (1) be ordered by the court to make compensation for or restore the property squandered.
14. (1) Any person who –
- (a) interferes with an administrator's process of obtaining the letters of administration of the deceased's estate by harassing, intimidating, assaulting, kidnapping, vandalizing, stealing or doing any other act of the same nature commits an offence and on conviction shall be liable to a fine not less than 200,000/TSh or to imprisonment for term not exceeding two years;
- (b) interferes with a surviving spouse's plans to obtain letter of administration or to administer the deceased's estate commits an offence and on conviction shall be liable to a fine not less than 200,000/TSh or to imprisonment for a term not exceeding two years;
- (2) For the purpose of this section interference with a surviving spouse's plans to obtain a letter of administration to administer the estate includes, conduct such as harassment, intimidation, assault, kidnapping, vandalism, theft, and robbery which is directed against the surviving spouse, her children and her property.
15. Any beneficiary may, where the administrator has contravened the provisions of this Act, file an action against the administrator/administratrix for:

- (a) wrongful distribution of the estate;
- (b) the return of the property to which the beneficiary is entitled under this Act;
- (c) its value if it has been destroyed; and
- (d) damages resulting from the administrator's reckless or negligent failure to distribute the estate in accordance with the provisions of this Act.

IV. DISTRIBUTION OF THE ESTATE

16. Every heir shall receive an equal share regardless of his or her sex, age, religion, tribe, custom, tradition, disability, race, color, political or other opinion, national or social origin, place of origin, property, birth, health status, station in life, or other status provided that children with special requirements or needs such as education, health, physical disability or others as may be determined by the court shall receive additional shares.
17. (1) Every heir shall receive a full ownership interest in any property he or she inherits, notwithstanding interest of the deceased over clan land may pass to his heirs except that the said interest can not be sold, mortgaged or encumbered in any manner whatsoever with the consent of the clan members.
18. Women and men shall have equal rights to dispose clan land.
19. Any surviving spouse shall maintain a full ownership right in any property she or he receives from a deceased's estate upon remarriage.
20. (1) Subject to the provisions of this Act, where
 - (a) the deceased is survived by a widow or widower and children, the remainder shall be divided equally among heirs except where special attention is needed to one or more of the heirs;
 - (b) the deceased is survived by a widow or widower and children but not by parent(s), the share of the widow or widower shall be 50% and that of the children shall be 50%;
 - (c) the deceased is survived by widow or widower and parent(s) but not by children, the share of the spouse shall be 100%;
 - (d) the deceased is survived by children and parent(s) but not by a widow/widower, the share of the children shall be 100%;
 - (e) the deceased is survived by parent or parents, but not by a spouse or children, the share of the parent or parents shall be 50% and other 50% shall devolve upon any surviving grandchildren of the deceased;
- (2) Where, under subsection (1), children are entitled to inherit, but some of the children are alive and others have died leaving children of their own, the share of the dead child shall devolve upon his or her children;
- (3) Where the grandchildren do not survive the deceased, the parents shall inherit the entire estate and where the parents do not survive the deceased, the grandchildren shall inherit the entire estate.

- (4) Where the deceased is not survived by a widow or widower, children, parent or parents, nor grandchildren, 100% of the estate shall devolve equally in turn upon each of the following heirs;
- (i) Biological sisters and brothers;
 - (ii) Aunts and uncles;
 - (iii) Nieces and nephews;
 - (iv) First cousins;
 - (v) Any other descendant of the above category.
- (5) Where the deceased is not survived by any of the heirs stipulated under subsection (4), the estate shall devolve to the state.
21. (1) Where a beneficiary is a minor child, the administrator of the estate shall hold such beneficiary's share in trust until the minor child gains legal capacity.
- (2) Notwithstanding subsection (1) where a parent of a minor child survives and is not the administrator of the estate, each surviving spouse or guardian shall be guardian of his or her own minor children's share of the estate in trust.

V. MISCELLANEOUS PROVISIONS

22. (1) No person shall, before the distribution of the deceased's estate, whether testate or intestate, eject or evict a surviving spouse or child from the matrimonial home.
- (2) Any person who, before the distribution of the deceased's estate –
- (a) unlawfully evicts a surviving spouse or child from the matrimonial home or deprives an entitled person of the use of any part of the property or portion of the remainder which the entitled person stands to inherit under this law or;
 - (b) removes, destroys or otherwise unlawfully interferes with the property of the deceased person; or
 - (c) removes any children from the care and control of the surviving parent; or
 - (d) fraudulently misrepresents himself as having an interest on the deceased's estate
- commits an offence and on conviction shall be liable to imprisonment for a term not less than two years.
23. (1) No person shall inherit a widow or coerce such widow to remarry.
- (2) Any person who contravenes subsection (1) commits an offence and upon conviction shall be liable to a fine of 100,000/TSh or to imprisonment for a term of one year.
24. (1) Any person who forcefully purports to bless or cleanse a widow through forceful sexual intercourse commits an offence of rape contrary to the provisions of the Penal Code as amended by the Sexual Offences (Special

Provisions) Act, 1998.

(2) Any person who contravenes subsection (1) commits an offence of attempted rape contrary to the provisions of the Penal Code as amended by Sexual Offences (Special Provisions) Act, 1998.

(3) No person shall attempt or assist another person to attempt to rape a widow or to do such negative acts as “blessing or cleansing” to a widow.

25. Where there is a conflict between this Act and any other written law, this Act shall prevail.
26. The laws specified in the schedule shall be amended or repealed in the manner as may be required.

SCHEDULE

- | | |
|---|----------|
| 1. Judicature and Application of Laws Ordinance s.9(1). | Amended |
| 2. The Indian Succession Act of 1865. | Repealed |
| 3. Administration (Small Estates) Cap.30 | Repealed |
| 4. Local Customary Law (Declaration) Order G.N.436 (1963). | Repealed |
| 5. Law of Persons G.N.279 (1963). | Repealed |
| 6. Sexual Offences (Special Provisions) Act of 1998 (SOSPA) should be amended to include acts of “Blessings or Cleansing” as provided in Part V of this law Amended ss. (130, 131). | |

OBJECTS AND REASONS

The main purpose of this Bill is to introduce a new law facilitating the proper management of the deceased's estate or properties and the procedures there-of. The Bill also seeks to specifically protect widows and orphans from all types of possible harassment by the deceased's relatives.

The Bill among other things, is geared towards ensuring and promoting gender equality in all matters related to inheritance and administration of the deceased's estate.

The Bill further stipulates "blessing and cleansing" (section 24) as part of rape as provided in other laws of the United Republic of Tanzania.

Further more the Bill provides for the person who qualifies to be appointed as an administrator/administratrix for the deceased's estates.

The Bill is also aimed at repealing and amending some of the laws related to inheritance which are gender discriminatory and contrary to the Constitution of the United Republic of Tanzania and other International Conventions and Protocols on Human Rights.

Some of the laws that will be affected by the changes on this law are:

- The Indian Succession Act of 1865, Local Customary Law (Declaration) order G.N.436 of 1963, Administration (Small Estates) Cap.30 and the Law of Persons G.N.279 (1963). These laws are subject to repeal.
- Sexual Offences Special Provisions Act (SOSPA) of 1998, (part V, sections 130 and 131) and Judicature and Application of Laws Ordinance (JALO) Section 9. These laws are subject to amendment.

The proposed Act consists of five major parts. Part 1 contains preliminary provisions relating to the long and short titles and the definition of special terms used in the Act.

Part II sets out the provisions which cover the minimum spousal share. In particular the Act here seeks to provide for entitlement or rights of the survived spouses and children with regard to the matrimonial home, real property and house chattels upon the death of the deceased.

The Bill also gives rights to the testator to bequeath his/her properties to a friend or any other person. Likewise the Act provides shares for the multiple spouses and disposition of the will.

In Part III the Bill deals with the appointment and duties of the Administrator/Administratrix and Executor/Executrix. The part provides for the persons who qualify to be appointed as an administrator/administratrix for the deceased's estate (section 10). The provision has been related to the Probate and Administration Ordinance (CAP 445). The Bill also provides for the offences to the Administrator/Administratrix who mismanages or fails to distribute the deceased's estate in accordance to the provision of this Bill. Section 14 provides offences to the persons who interfere with an administrator's process of obtaining letters of administration of the deceased's estate as well as the offences to the persons who interfere with a surviving spouse's plans to obtain letter of administration.

Part IV covers the distribution of the deceased's estates. The Bill promotes gender equality whereby section 16 stipulates that every heir shall receive an equal share regardless of his/her sex, age, religion, tribe, race, color, etc.

The Bill further provides the equal disposal rights to men and women with regard to clan land. Furthermore the Bill provides for the distribution of the remainder and shares of the minor in terms of percentage.

Part V deals with the Miscellaneous Matters. This part covers the offences to persons who evict surviving spouse or child from the matrimonial home or removes, destroys or unlawfully interferes with the property of the deceased. It is an offence to inherit a widow or use coerciveness to remarry, blessing and

cleansing of widow through sexual intercourse. Such offences are termed as rape contrary to the provision of the Penal Code and Sexual Offences Special Provisions Act, 1998. Lastly, the Bill provides the schedule showing some of the laws which are to be affected by the coming of the new Law.