Respect, Protect and Fulfill: Legislating for Women’s Rights in the Context of HIV/AIDS

Volume Two: Family and Property Issues
This draft legislation resource consists of eight modules in two volumes:

**Volume One: Sexual and Domestic Violence**
1. Rape and Sexual Assault
2. Domestic Violence

**Volume Two: Family and Property Issues**
1. Marriage
2. Domestic Partnerships
3. Property in Marriage
4. Divorce
5. Inheritance

Both volumes, as well as each separate module, are available on the website of the Canadian HIV/AIDS Legal Network at www.aidslaw.ca/womensrights.
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Volume Two: Family and Property Issues

Canadian HIV/AIDS Legal Network
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Respect, Protect and Fulfill: Legislating for Women’s Rights in the Context of HIV/AIDS
Volume Two: Family and Property Issues

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About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education and community mobilization. The Legal Network is one of the world’s leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

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If you are using Respect, Protect and Fulfill in your work for women’s rights or if relevant law reforms are being considered in your country, please contact the Canadian HIV/AIDS Legal Network at: womensrights@aidslaw.ca

The Legal Network may be able to offer technical support or collaboration in undertaking national law reform advocacy to protect women’s rights in the areas of sexual and domestic violence, and family and property issues. Please send inquiries to: womensrights@aidslaw.ca
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Volume Two: Family and Property Issues

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About this publication

Legislation can be instrumental in impeding or promoting initiatives to address the HIV/AIDS epidemic. The widespread legal, social, economic and political ramifications of the epidemic make it necessary to review and reform a broad range of laws. Within a context of entrenched gender discrimination, the devastating impacts of HIV/AIDS, widespread poverty and increasing competition for resources such as property and land, legislative solutions to the denial of women’s rights are urgently needed. Law reform is not a complete solution to the HIV epidemic among women, but it is a necessary and often neglected step.

This project draws together international human rights law and illustrative examples from various jurisdictions as the basis for a legal framework to respect, protect and promote women’s rights in the context of HIV/AIDS. Respect, Protect and Fulfill is intended as a tool to assist advocates and policy-makers as they approach the task of reforming or developing laws to meet the legal challenges posed by the HIV epidemic. It is not intended for any one country or set of countries. The project focuses on sub-Saharan Africa but it is designed to be adaptable to the needs of countries in other regions.

Comprehensive consultations were conducted during the drafting of this publication. Draft versions of the text were reviewed by various experts, including representatives of women’s legal clinics, AIDS service organizations and organizations of people living with HIV, research and policy institutions, and human rights organizations. Three consultation meetings were held in December 2006, October 2007 and January 2008; and the draft text was circulated electronically to a number of persons and organizations for further input. The final document, therefore, has benefited from the feedback of a wide range of experts in the fields of HIV/AIDS, human rights and women’s rights.

How to use this publication

Respect, Protect and Fulfill consists of eight modules in two volumes, as follows:

Volume One: Sexual and Domestic Violence
   (1) Rape and Sexual Assault
   (2) Domestic Violence

Volume Two: Family and Property Issues
   (1) Marriage
   (2) Domestic Partnerships
   (3) Property in Marriage
   (4) Divorce
   (5) Inheritance
   (6) Implementation Provisions

There is considerable overlap and intersection among all of these issues; readers are thus encouraged to consult all eight modules. In addition, each module is drafted on the
assumption that the country adopting it has implemented similar legislation on the issues set out in the other modules. Accordingly, provisions are cross-referenced to one another. In adapting the legislative provisions to a particular jurisdiction, appropriate revisions and amendments will need to be made.

The issues addressed in these modules also necessarily intersect with other issues and the rights of other groups, such as the rights of children and indigenous communities. It is beyond the scope of this project to include provisions specific to all of these issues and groups, but it is important to explicitly note their importance and interdependence. It is our hope that this work on women’s rights can be used alongside other human rights-based resources in the development of a comprehensive legislative response to HIV/AIDS.

Each module features a prefatory note, proposed legislative text, and commentaries supporting the provisions in the proposed legislative text. The prefatory notes and commentaries present the rationale for reforming or enacting laws and policies in the areas covered by the modules, and discuss the relevant international and regional human rights conventions. On certain issues, two or more options for legislative texts are provided to allow countries to develop laws that are most suitable to their local contexts. As well, some of the provisions have been labelled as “optional.” These provisions may or may not be applicable, depending on the situation in a particular country. Where square brackets appear in a draft article — for example, “[monetary amount],” “[relevant state ministry]” or “[period of time]” — the relevant information needs to be added in order to adapt the provision to a specific country. (This is often used for currencies, amounts of fines, time periods, the titles of government departments or officials, and the titles of other legislation, all of which vary from country to country.)

This publication is heavily footnoted. The notes provide additional information on the issues being addressed, as well as full references. If the same source is cited more than once in a module, the second and subsequent references to that source are abbreviated and contain the word “supra.”

The modules included in this publication are not intended to comprise a stand-alone bill or act, but rather to be the foundation for progressive, rights-protecting laws on each issue. Some of the issues discussed in the modules have been addressed in legislation only recently or inadequately. Therefore, while all of the proposed provisions are based on the best available evidence and human rights principles, some have yet to be tested. Furthermore, depending on the legislation currently in force in a given country, provisions adapted from this publication may be most appropriately placed within various other pieces of legislation; or sets of provisions could be enacted as specific bills, or expanded to include other technical provisions necessary for the legislation to function within the jurisdiction’s legal framework.
Volume Two Introduction

Women and HIV/AIDS

Over 25 years into the epidemic, it is now widely recognized that laws and policies must affirm and protect women’s rights in order to mount an effective response to HIV/AIDS. Governments have repeatedly declared their commitment to respect, protect and fulfill women’s rights and have acknowledged the linkages between HIV and gender inequality. To this end, the United Nations and other international agencies have developed various programs to respond to the gender dimensions of the epidemic and work towards gender equality. Yet women’s legal, economic and social subordination continues to catastrophically increase their risk of HIV infection and constrain their access to HIV testing, treatment, care and support.

Violations of women’s human rights in marriage, domestic partnerships, divorce, property and inheritance are decisively linked to the HIV epidemic. As will be demonstrated in the modules that follow, discriminatory laws and practices with respect to family and property issues can put women at direct risk of HIV infection — for example, in the case of widow inheritance. Discriminatory laws and practices can also legitimize gender inequality, contour women’s experiences within their families, communities and society, and limit their range of options and opportunities. These render women more vulnerable to HIV infection. For example, as a result of discriminatory laws and practices and inadequate legal protections, women lack access to productive resources, their livelihoods and economic independence are undermined, their

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1 See, for example, the Declaration of Commitment on HIV/AIDS issued by heads of state and government representatives at the U.N. General Assembly Special Session on HIV/AIDS in 2001, which stresses “that gender equality and the empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS.”

2 For example, a U.N. Secretary General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa was established in 2003; The Global Coalition on Women and Aids was launched by UNAIDS in 2004; see http://womenandaids.unaids.org; and UNAIDS developed the UNAIDS Action Framework: Addressing Women, Girls, Gender Equality and HIV in 2009.

3 See, for example, Committee on the Elimination of Discrimination Against Women (CEDAW Committee), “Concluding Observations: Namibia,” U.N. Doc. A/52/38/Rev.1, 1997, para. 79, where the Committee states that “HIV and AIDS [a]re increasing at an alarming rate, especially among women, as a result of their low social and economic status.” According to UNAIDS and the World Health Organization (WHO), in sub-Saharan Africa almost 61 percent of adults living with HIV in 2007 were women. See UNAIDS and WHO, AIDS Epidemic Update, December 2007, p. 8. Furthermore, young women and girls aged 15–24 who have only recently become sexually active are more than twice as likely to be infected than males in the same age group. The gap is larger still in Southern Africa where in Zambia and Zimbabwe, girls and young women make up close to eighty percent of all young people aged 15–24 who are living with HIV. See UNAIDS, Facing the Future Together: Report of the Secretary General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa, July 2004, p. 9, online: http://womenandaids.unaids.org/regional/docs/Report%20of%20SG%27s%20Task%20Force.pdf.

4 For a discussion of the linkages between widow inheritance and HIV, see the commentary on widow inheritance in Module 1 “Marriage.”
ability to control their sexuality and reproduction is limited, and their ability to maintain adequate housing is destroyed. Without adequate legal and social structures to facilitate women’s access to redress for these violations, many women are relegated to positions of disempowerment and dependence. All of these factors can contribute to situations where women are unable to leave unwanted or abusive relationships or to negotiate safer sex; or where they engage in transactional sex to obtain money, goods, school fees or lodging — to cite just three examples.5

Gender inequality has amplified the impact of the HIV epidemic on women, by both increasing their vulnerability to HIV infection and restricting their ability to mitigate the impacts of the disease on themselves and their families. As the U.N. Secretary-General’s Task Force on HIV/AIDS in Southern Africa has emphasized,

Poverty, gender inequality and HIV/AIDS are linked in a vicious circle. Poverty can lead to risk-taking behaviour, for example when a woman or girl has unprotected sex to ensure she gets (more) money or goods. In turn, HIV/AIDS deepens poverty and gender inequality as it burdens women and girls with care responsibilities, taking them away from productive, income-producing activities.6

The imperative to act is clear. The multiple and intersecting vulnerabilities of women to HIV/AIDS underscore the urgent need to strengthen the legal framework that regulates women’s human rights. In the words of Carol Bellamy, former Executive Director of UNICEF,

Pervasive gender inequality, and the violations of the rights of women that accompany it, is one of the most important forces propelling the spread of HIV amongst women…. If we fail to transform the status of women, the catastrophe of HIV/AIDS will deepen, and the ability of women to cope, already critically stressed, may totally disintegrate.7

The need to harmonize laws in order to protect women’s rights

Within any country, a complicated collection of various international laws, constitutional protections, customary laws, statutory provisions, regulations and other forms of subsidiary law, judicial decisions, government policies and traditional practices comprise the legal terrain that structures women’s rights with respect to property and family law

5 See, for example, the commentaries on marriage payment and polygamy in Module 1 “Marriage.”
6 UNAIDS, Facing the Future Together, p. 10 [see note 3].
7 UNAIDS, Facing the Future Together: Report of the Secretary General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa, July, 2004, at p. 6, online: www.ungei.org/resources/1612_1023.html. [Authors’ Note: Although this publication bears the same name as the publication cited in notes 3 and 6 above, it is actually a different document.]
issues. Gains made on one front may be undermined by existing rules in another, or limited in effect because of contradictory rules and processes in other laws. It is therefore imperative to prioritize the harmonization of laws and policies in efforts to legislate for women’s rights.

For example, as is discussed further in the modules that comprise this volume, across sub-Saharan Africa, laws from both civil and customary systems operate against women’s capacity to marry with their free and full consent, divorce, or own and deal with property, particularly land. In some countries, despite legal guarantees of women’s equal rights in the Constitution and other legislation, “marital powers” award husbands full legal power over their wives and over all family property, denying women the right to administer property, sign contracts or obtain credit and, ultimately, the right to economic independence. Similarly, where constitutional and statutory law defer to customary law, it may be difficult or impossible for women to inherit or divorce.

Where the applicable statutes, customs and regulations conflict, courts play a critical role with respect to determining women’s rights. Constitutional challenges can ultimately lead to the overturning of statutes or customary laws that discriminate against women. The process, however, can be slow and piecemeal, leaving women’s constitutionally guaranteed rights unfulfilled until a successful case on each relevant issue is litigated. Litigation also requires significant resources, both personal and financial, which are often not available to women or the non-governmental organizations (NGOs) that might intervene on their behalf.

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8 Marital powers, discussed in greater detail in Module 1 “Marriage,” are codified in Swaziland and Senegal. In 2004, Botswana passed the Abolition of Marital Power Act, which removed any restrictions the marital power placed on the legal capacity of a wife and abolished the common law position of the husband as head of the family.

9 Inheritance is addressed in Module 5 “Inheritance,” and divorce in Module 4 “Divorce.” Examples include Zimbabwe, where the Constitution exempts inheritance issues and areas governed by customary law from the equality provisions in art. 23(3)(a) and (b) of the Constitution’s bill of rights (Constitution of Zimbabwe, 2000); Ethiopia where, although art. 35 of the Constitution guarantees that women shall enjoy the same rights as men with respect to property and inheritance, art. 34 states that the Constitution shall not “preclude the right of parties to voluntarily submit their dispute for adjudication in accordance with religious or customary laws” (Constitution of The Federal Democratic Republic of Ethiopia, 1994); and Sierra Leone, whose constitution prohibits discrimination, but not with respect to marriage or divorce. Under customary law in Sierra Leone, a husband can leave his wife for a host of reasons, while the only grounds for divorce available to a woman are “non-maintenance,” “unhelpfulness to wife’s parents” and “impotence.” See CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Initial, Second, Third, Fourth and Fifth Periodic Report of States Parties: Sierra Leone,” CEDAW/C/SLE/5, 14 December 2006, p. 81.

10 The South African Constitutional Court considered the merits of relying on constitutional challenges to rectify discriminatory customs in the Bhe case, but ultimately concluded that it had “serious doubts that leaving the vexed position of customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates”: Bhe v. Magistrate Khayelitsha & Ors., 2005 (1) BCLR, para. 113.

11 As noted in one study on women and property rights, “The efficacy of judicial activism as a means of implementing women’s human rights is dependent on a civil society that has the human, legal and economic resources to challenge laws, policies and practices”: I. Ikdahl et al, Human Rights, Formalisation
lengthy court battle in order to protect their rights may not be desirable or possible. Furthermore, courts may have difficulty in identifying, understanding and appreciating the customary law norms and human rights norms that they are asked to rule on. There is no guarantee that they will rule in favour of equality when faced with contrary customary practices. For all of these reasons, it is desirable to harmonize laws in order to protect women’s rights in the context of HIV, reducing disputes and uncertainties in the process.

Harmonization also relates to international human rights treaties and their domestic application. All human rights need to be imbued with a gender perspective, and their interdependence must be recognized. Women will never be empowered in the area of marriage, for example, if violations in the areas of property and inheritance persist. Similarly, women’s right to the highest attainable standard of health will never be fully achieved if women’s rights to non-discrimination and an adequate standard of living are violated. Moreover, the relevance and significance of human rights guarantees to women can only be understood when viewed through a gender perspective and applied to women’s specific experiences. Women’s rights violations will never be remedied if they are not understood as violations in the first place.

Finally it should be emphasized that in a comprehensive legal response to the HIV epidemic, reform in the areas of family, property and inheritance law needs to be accompanied by reform in other areas. For example, changes are needed with respect to land reform and land titling policies in order for women’s rights to inheritance and property to be meaningful. Similarly, legislation and practices related to child custody and the administrative structures that process registrations of births, deaths and marital status will affect the impact of reforms to marriage, domestic partnership, divorce and inheritance legislation.


12 For example, a Court of Appeal in Nigeria refused to reject as repugnant a custom whereby a wife is owned, along with her property, by her husband: Onwuchekwe v. Onwuchekwe, [1991] 5 NWLR 197, p. 739. In Zimbabwe, in 1999, the Supreme Court upheld customary law which required the appointment of male heirs: Magaya v. Magaya, (1999) Zimbabwe Law Report, Case No. 100, Supreme Court of Zimbabwe, Harare. In 2000, however, the Supreme Court in Nigeria affirmed a Court of Appeal decision that a female child can inherit from her deceased father’s estate without a nrachi ceremony being performed (a custom that enables a man to keep one daughter perpetually unmarried so that she is able to inherit his property). The Court held that the custom in question was repugnant to natural justice, equity and good conscience: Muojekwu v. Ejikeme [2000] 5 NWLR 657, p. 402.

13 For example, advocates may overlook the human rights violations associated with the longstanding practice of premarital virginity testing, since it is directed primarily at girls and young women. However, it is a violation of girls’ rights to privacy, bodily integrity and non-discrimination. See the commentary on mandatory premarital virginity testing in Module 1 “Marriage.” Another example is legal security of tenure, an element of the right to housing, which may require legal protection against domestic violence and the right to inherit in order to be meaningful for women. Similarly, adequate location, another element of the right to housing, may require safe access to transportation services, childcare and health facilities, among others things. Without a gender analysis of the right to housing, such violations may not be evident as violations: L. Farha, Sources 5: Women and Housing Rights, Centre on Housing Rights and Evictions (COHRE), 2005, p. 25.
Customary laws and women’s rights issues

Customary laws have evolved over many years, impacted by a wide range of influences and serving a variety of purposes. There are an enormous variety and complexity of customary laws in operation throughout sub-Saharan Africa. Issues related to family and property are especially likely to be governed by deeply entrenched traditional and customary norms, some aspects of which may not promote women’s health or human rights.14

Given the diversity and ongoing evolution of customary laws, it is difficult to draw any broad conclusions. Practices that today are seen as unimportant or even discriminatory may have been socially appropriate and may have served important functions at one time. Moreover, the interpretation and application of customary rules can vary greatly over time and from place to place. One of the purposes underlying customary laws of succession, for example, was to protect the family and the community as a whole from the burden of looking after the deceased’s dependants. By entrusting one person with the responsibility of seeing to the welfare of the deceased’s dependants, social and economic protection was offered in return for the right to control family property.15

However, many customary rules (or practices justified on the grounds that they are based on customary or religious laws) violate basic principles of equality reflected in international, regional and domestic human rights laws.16 Where customary laws have not kept pace with changing social and economic conditions, the original rationale underlying a custom may be lost, and the discriminatory aspect of the law may become

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14 See, generally, A. Whitehead and D. Tsikata, “Policy discourses on women’s land rights in sub-Saharan Africa: the implications of the re-turn to the customary,” Journal of Agrarian Change 3(1–2) (2003): 67–112. For example, Tanzania, Customary Law (Declaration) Order of 1963 codifies one interpretation of a traditional notion that wives are not members of family for land-holding purposes and, therefore, are excluded from inheriting their husband’s property: Tanzania Women Lawyers’ Association (TAWLA), Legal Research Committee, Customary Law (Declaration) Order of 1963 (Tanzania): Review of Gender Discriminative Laws in Tanzania: Final Draft, 2003, p. 20. In the context of marriage, a number of customary laws permit marriage under the age of 18. For example, in Ghana, customary law holds that children can marry as soon as they reach puberty: Marriage of Mohammedens Ordinance of 1907. In Tanzania, customary law permits the marriage of girls at puberty with their fathers’ consent: Local Customary Law (Declaration) Order, Government Notice No. 279 of 1963, First Schedule, Laws of Persons in Judicature and Application of Laws Act [translated from Swahili into English] [hereinafter, Local Customary Law].


16 For example, in northern Nigeria, the personal law code of the Sharia applies, under which male heirs inherit twice as much as female heirs. A widow receives one-quarter of the estate if there are no heirs, and one-eighth of the estate if there are heirs. In polygamous unions, one-eighth of the estate is shared among all wives, which is often not sufficient for the women’s continued survival: COHRE, Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women, 2004, p. 79. In the context of divorce, Tanzanian customary law stipulates that a husband’s adultery is never considered a ground for divorce, while an act of adultery by a wife is a sufficient ground: s. 106 of Tanzania, Local Customary Law.
more apparent and unjustifiable. For example, with the development of private property regimes, the application of customary laws which originated in a context of collective land ownership now often operate to exclude women from ownership and inheritance. As a result, women have lost the rights of use and occupancy they once enjoyed.

Failures of customary law to meet evolving social conditions have some of their gravest consequences in the context of the HIV epidemic. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has stated that it is “alarmed at the rising trends in HIV/AIDS infection rates of women and the direct linkage between harmful traditional practices and the spread of HIV/AIDS.” In the context of marriage, for example, the practice of widow inheritance, which originally arose as a social institution designed for men to take responsibility for their dead male relative’s children and his household, may now expose women to unprotected and unwanted sex and thus to the risk of HIV infection. In the context of inheritance, as AIDS-related deaths affect more family members, the search for a male heir may result in increasingly distant relatives inheriting or administering estates. These distant relatives may also be less inclined to assume maintenance and support obligations, or to see to the best interests of the deceased’s dependants.

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17 See, for example, the Bhe case, in which the South African Constitutional Court noted that the negative effect of the rule of primogeniture (which is the right of the first born son to inherit the entire estate) had intensified with contemporary changes in social structures. In traditional settings, the customary law of inheritance was meant to ensure “fairness in the context of entitlements, duties and responsibilities … [and] to preserve the cohesion and stability of the extended family unit and ultimately the entire community.” However, modern social conditions, including increasing urbanization and the rise of the nuclear family, could make it impossible or intolerable for women to live with the heir, as they would be expected to under the customary rule of primogeniture and, hence, could lead to women unfairly losing access to property. See Bhe v. Magistrate Khayelitsha & Ors. 2005 (1) BCLR 1, paras. 8, 75–79 and 83.

18 While women and men in sub-Saharan Africa have rarely had identical claims to land because of their differentiated positions within kinship systems, Whitehead and Tsikata state that “the key question remains what happens to men’s and women’s historically constituted land interests with economic transformation, especially where land has become scarce as new economic uses for land have developed.… Although there are examples where women do maintain their land access in these contestations, the weight of evidence suggests that economic changes have resulted in women’s diminished access to land” [references omitted]: A. Whitehead and D. Tsikata, “Policy discourses on women’s land rights in sub-Saharan Africa: the implications of the return to the customary,” Journal of Agrarian Change 3 (2002): 67–112, at 78–79.


21 See, for example, COHRE, Bringing Equality Home (supra), p. 44. Among Tswana people (who live mostly in Botswana and South Africa), most property, including cattle, goes to a deceased’s eldest son, on the premise that if it were given to daughters or wives, it would be lost to the family upon a subsequent marriage. The family home is given to the youngest son, on the premise that he will look after his aging mother. It has been observed that in the context of HIV/AIDS, many families may have lost all male members, and, as a result, the land and cattle may be passed on to a distant relative: COHRE, Bringing Equality Home (supra), p. 45.
While legislative prohibitions are no panacea for changing firmly entrenched customs, law does have a role to play. Law plays a normative role in defining legitimate behaviour in a society. Therefore, prohibitions of certain customary practices, to the extent that they violate women’s human rights, may be an important step towards changing the way these customs are viewed. In some cases, prohibitions may also be a requirement of international law — for example, in the case of forced marriage.

If a legal regime that departs too radically from the accustomed practice is imposed upon customary communities, there is a possibility that the law will be ignored, circumvented or result in greater rights violations for the communities it is intended to protect. One response is to ensure, wherever possible, that statutory reforms take into account customary norms and structures and, in the process, strengthen women’s rights within those systems, while ensuring that rules and practices that perpetuate gender inequalities are eliminated. This may involve, for example, empowering customary courts to

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22 As noted by the South African Law Commission, “In areas where the influence of the state is weak, informal institutions will continue to flourish in the way they always have”: South African Law Commission, Project 90, Discussion Paper 74, The Harmonization of the Common Law and Indigenous Law: Customary Marriages, 1997, p. 33.

23 S. Burris, I. Kawachi and A. Sarat, “Integrating law and social epidemiology,” Journal of Law, Medicine and Ethics 30 (2002): 510–521, at 517 provides, “Law is crucial in constructing certain behaviours as ‘normal’ rather than discriminatory. Like any truly effective system of regulation, this one works through social processes to facilitate the internalization of rules that millions of people follow every day without legal interference or coercion.”


25 For example, outlawing polygamy may leave women in existing polygamous marriages in a legal vacuum, and also have the unwanted effect of encouraging informal “second house” relationships, which give less protection to women and children within marriage and upon separation. Rather than banning polygamy, a number of countries have launched awareness-raising campaigns to promote monogamous marriage and to discourage the practice of polygamy. See Legal Assistance Centre of Namibia, Proposals for Law Reform on the Recognition of Customary Marriages, 1999, p. 89; CEDAW Committee, “Concluding Observations: Burkina Faso,” 33rd Session, U.N. Doc. A/60/38, 22 July 2005, para. 326.

preside over issues formerly limited to civil courts, or requiring customary leaders to oversee the fulfillment of minimum statutory protections for women.\hspace{1em}^{27}

In light of these considerations, this publication attempts to allow for the application of customary or religious law insofar as it does not conflict with mandatory provisions of statutory law and non-discrimination principles of international human rights law. Given the diversity of customary laws across sub-Saharan Africa, the legislative provisions proposed in this document need to be adapted to the particular customs and customary laws of each jurisdiction.

**The challenges of legislating for women’s rights**

Law reform in the areas of family and property poses numerous and unique challenges. Traditional attitudes and assumptions about appropriate gender roles and the division of responsibilities within families and communities must be overcome in order to enact equal rights protections for all persons with respect to marriage, domestic partnerships, divorce, property and inheritance. Courts, registrars’ offices, police departments, and various administrative offices must be educated about, and uphold, human rights. Moreover, the complex interactions between laws, customs and practices must be addressed, and subjects which may be considered taboo or private (including, for example, polygamy, widow inheritance, property disinheritance and sex) must be debated in public.

Furthermore, for law reform to attain its transformative potential, the gulf between the laws and the communities they are intended to protect must be bridged in such a way that communities, and the women within them, are empowered to apply the law in their everyday lives. Even the most progressive legislation will fail to result in real change on the ground if people are not convinced that new laws are fair, if they are not aware of them, or if the means of rights enforcement are inaccessible.\hspace{1em}^{28}

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\hspace{1em}^{27}As the South African Law Commission has suggested, customary courts may in fact show greater flexibility, and better protect women’s rights, in their application of customary principles than civil courts. In its view, “One would expect judges in higher courts to be more sensitive to individual rights, but ironically they are hesitant to depart from the strictly patriarchal, ‘traditional’ version of customary law in the official code. Instead, women are more likely to receive a sympathetic hearing in chiefly courts, notwithstanding the fact that these tribunals are controlled by traditional rulers. The explanation is not necessarily that these courts are deliberately trying to advance the cause of women. Rather, it seems that they respond more immediately to shifts in local attitudes and practice than higher courts”: South African Law Commission, \textit{Project 90, Discussion Paper 74} (supra), p. 36.

\hspace{1em}^{28}For example, COHRE reports: “Research conducted by the Rwanda Initiative for Sustainable Development (RISD) revealed that there is some opposition to the provision that both sons and daughters should inherit in the same proportion. Families expressed concern that their small lots would not be enough to sustain both sons and daughters. Many men thought it unfair that women should receive anything from their marital families, because they would then receive two plots of land to use: one from the marital family and one from their new husband when they remarried. Even some women agreed that females should not be entitled to an equal share of land and property — for the same reason, i.e. that
Therefore, to be effective on the ground, law reform and the enactment of new statutes must include timely consultation with stakeholders who will be affected by, or will implement, the legislation. This is essential in order to ensure that the realities of women’s lives are accurately reflected in an appropriate legislative response. The law reform process must also be supported by education and awareness-raising programs, service provision initiatives to empower women and eradicate poverty, implementation and monitoring efforts, and the necessary resource allocations for all of these activities. Likewise, law reform advocacy must occur in tandem with widespread public awareness campaigns to educate the public about the linkages between human rights, HIV/AIDS and legislative change.\footnote{For example, Namibia noted in its CEDAW report the clear need for public education campaigns that focus on the legal consequences of marriage:}\footnote{For example, Namibia noted in its CEDAW report the clear need for public education campaigns that focus on the legal consequences of marriage: For both women and men in Namibia, the right to enter into marriage freely is qualified by a lack of information about the legal consequences of marriage. Without a clear understanding of the ramifications of the different marital property regimes or the effects of an antenuptial agreement, it is difficult for women or men to make an informed choice. This is a problem which can best be addressed by public education campaigns. See Namibia, \textit{CEDAW Country Report}, CEDAW/C/Nam/1, 1997, p. 172. Zambia’s public education program to discourage bride price has also apparently seen early success. See Zambia, \textit{Combined Third and Fourth CEDAW Report}, CEDAW/C/ZAM/3–4, 1999, p. 65.}  

Governments should specifically invest in strategies to educate judges, magistrates, police and customary leaders to underscore linkages between HIV/AIDS, gender equality, gender-based violence, poverty and human rights. Community-based education initiatives and engagement opportunities should be designed to facilitate input from different communities and encourage ownership over law reform processes on the part of those most impacted by the laws, including grassroots women.\footnote{See, for example, the approach to women, land and housing of the Huairou Commission, online: www.huairou.org/campaigns/land/index.html.}

Despite these challenges, law reform is an essential component in the struggle for women’s human rights. Appropriate legislation can create an enabling environment for the realization of gender equality. With the commitment and advocacy of women, civil society groups, traditional leaders, parliamentarians and others, legislating for women’s human rights can stem the harms caused by the HIV/AIDS epidemic and holds great promise for women’s empowerment.
Module 1: Marriage

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Prefatory Note

Women, marriage and HIV/AIDS

In sub-Saharan Africa and around the world, many women’s greatest risk of contracting HIV is through sexual intercourse with their husbands.1 According to the United Nations Population Fund, more than four-fifths of new HIV infections in women worldwide occur in marriage or long-term relationships with primary partners.2 In sub-Saharan Africa, an estimated 60–80 percent of HIV-positive women have been infected by their husbands.3 Studies in Africa indicate that young married women are at higher risk of infection than their unmarried counterparts.4 One hypothesis is that in many relationships men are contracting HIV outside marriage and transmitting the virus to their wives, a risk that may be heightened for women in polygamous unions.5

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3 Ibid. See also, L. Carpenter et al, “Rates of HIV-1 transmission” (supra).


Gender inequalities in the context of marriage play a complex role in driving the epidemic among women. Social and economic power imbalances make it difficult for many married women to discuss safer sex with their husbands, to refuse sex or to leave abusive relationships. They may fear violence, rejection or abandonment. Particularly within an environment where fertility is of paramount importance and there is significant pressure to bear children, married women may believe that they do not have any right to refuse sex. In addition, the prevalence of domestic violence in marriage puts married women at risk of HIV infection.

Discriminatory provisions in marriage laws, as well as longstanding practices and customs, contribute to the risk of HIV infection among married women. Even where statutory laws feature provisions reinforcing women’s equality, the inaccessibility of administrative structures (for example, offices for marriage registration) or the exclusion of certain communities from the application of those statutory law provisions (for example, minimum age of marriage provisions) directly and indirectly render women vulnerable to the risk of HIV infection. However, these risks can be avoided. By reforming laws and practices around marriage, as well as ensuring the regulation of marriage as it is practiced in all communities, legislators can take an important step in the fight against HIV and in advancing women’s rights.

**Women, marriage and human rights**

Because their legal, social and economic subordination renders women vulnerable to HIV infection, protecting and promoting the human rights of women is critical to an effective response to the HIV epidemic. In legislating in the area of marriage, countries must

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6 For example, a survey of women in Swaziland found that married women were twice as likely to report that they lacked control over whether and when to have sex, and whether or not to have unprotected sex, when compared with their unmarried counterparts. See Physicians for Human Rights, *Epidemic of Inequality: Women’s Rights and HIV/AIDS in Botswana & Swaziland*, 2007, pp. 100–101.


9 Research in South Africa indicates that women with violent or controlling male partners are at increased risk of HIV infection. Domestic violence diminishes women’s ability to negotiate safer sex. In addition, coerced or nonconsensual sex increases the risk of HIV transmission because abrasions and tearing during sexual intercourse are worsened when the vagina or anus is dry and force is used: K. Dunkle et al, “Gender-based violence, relationship power, and risk of HIV infection in women attending antenatal clinics in South Africa,” *The Lancet* 363(9419) (2004): 1415–1421; and HRW, *Deadly Delay: South Africa’s Efforts to Prevent HIV in Survivors of Sexual Violence*, Vol. 16, No. 3(A), 2004, p.11, online via: www.hrw.org.

10 See, for example, commentaries on minimum age of marriage, widow inheritance and polygamy below.
necessarily have regard to their obligations under applicable international law. The *International Covenant on Civil and Political Rights* (ICCPR) requires states parties to take appropriate steps to “ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”\(^{11}\) The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) obligates states parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”\(^{12}\) This obligation includes ensuring that women and men have the same rights to enter into marriage with their free and full consent and to choose a spouse, the same rights and responsibilities during marriage and at its dissolution, and the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property.\(^{13}\) Correspondingly, the *International Guidelines on HIV/AIDS and Human Rights* call for the review and reform of laws to ensure women’s equality in marital relations, so as to reduce women’s vulnerability to HIV infection and to the impact of HIV and AIDS.\(^{14}\)

Some regional treaties also provide specific obligations with respect to women’s rights in marriage. For example, the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (Protocol on the Rights of Women in Africa) provides that women and men enjoy equal rights and are regarded as equal partners in marriage. Moreover, the Protocol says that states shall enact appropriate legislation to guarantee, amongst other things, that no marriage shall take place without the free and full consent of both parties, that the minimum age of marriage for women is 18 years, that monogamy is encouraged as the preferred form of marriage, and that all marriages are recorded and registered.\(^{15}\)

With respect to marriage, women’s human rights may be violated in various ways, from the denial of their right to refuse a marriage to the denial of their sexual autonomy and reproductive rights. This, in turn, undermines their ability to refuse unwanted sex and to negotiate safer sex, as well as their ability to determine the number and spacing of their own children. Under international law, the normative content of the right to the highest attainable standard of physical and mental health contains the right of every person to


\(^{12}\) CEDAW, art. 16. See also, ICCPR, art. 26; Protocol on the Rights of Women in Africa, art. 8; African Charter, art. 3.

\(^{13}\) CEDAW, art. 16.


\(^{15}\) Protocol on the Rights of Women in Africa, art. 6 (“Marriage”).
control one’s health and body, which includes the right to make autonomous decisions over one’s sexuality without interference. As the Special Rapporteur on the Right to Health has underlined,

Discrimination based on gender hinders women’s ability to protect themselves from HIV infection and to respond to the consequences of HIV infection. The vulnerability of women and girls to HIV and AIDS is compounded by other human rights issues including ... harmful traditional or customary practices affecting the health of women and children (such as early and forced marriage); and lack of legal capacity and equality in areas such as marriage and divorce.

Numerous other human rights are relevant to women’s rights in marriage. A woman’s right to freedom of association is violated when she is forced into marriage and when she is unable to leave an unwanted marriage. Women’s bodily integrity and rights to equality, to the highest attainable standard of health and to freedom from cruel, inhuman or degrading treatment or punishment are further violated in marriages involving domestic violence. Requiring women to enter or remain in abusive relationships against their will violates their right to life, their right to freedom from cruel, inhuman or degrading treatment or punishment, their right to be free from slavery and servitude, their right to liberty and security of the person, and their right to be protected from violence. In countries where a man gains legal control over a woman and her property upon marriage, a woman’s right to own property (as well as her right to

18 ICCPR, art. 22; African Charter, art. 10.
19 Protocol on the Rights of Women in Africa, art. 3 and 4. In particular, art. 3 requires states parties to adopt and implement appropriate measures “to prohibit any exploitation or degradation of women,” and to protect women “from all forms of violence, particularly sexual and verbal violence.” See also ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.
20 ICCPR, art. 6; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 4.
21 ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.
22 ICCPR, art. 8; African Charter, art. 5.
23 ICCPR, art. 9–10; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 6.
24 Women’s right to be free from sexual violence is explained in General Recommendation No. 19 of the CEDAW Committee at 24(b): “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”: CEDAW Committee, “General Recommendation 19: Violence Against Women,” U.N. Doc. A/47/38, 1993.
be free from slavery and servitude, and her right to liberty and security of the person) are violated.25

### A. Recognition of All Forms of Marriage

#### NOTE:
The following articles ensure that all marriages are regulated and that all forms of marriage are consistent with human rights norms.

#### Article 1. Forms of marriage

(1) A marriage which is contracted:

   (a) in civil form, as set out in Article 15 below;
   (b) according to the rites of a religious community, where one or both parties are members, as set out in Article 16 below; or
   (c) according to the rules of customary law, where one or both parties are members of a community which follows customary law, as set out in Article 17 below;26

and which is in accordance with all essential conditions of marriage set out in Articles 4–12 of this Act is valid.27

#### Article 2. Recognition of foreign marriages

(1) A marriage contracted in another country in accordance with the laws of that country shall be valid as long as it accords with the essential conditions of marriage set out in Articles 4–12 of this Act.28

#### Article 3. Recognition of existing marriages

(1) A marriage that is a valid marriage at civil, customary or religious law prior to this Act coming into force and existing at the time this Act comes into force is for all purposes recognized as a marriage.

(2) For further clarity, a polygamous marriage that is valid at customary or religious law at the time this Act comes into force is for all purposes recognized as a marriage.29

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25 CEDAW, art. 15(2) and 16(1)(h); African Charter, art. 14.
26 This wording is derived in part from Tanzania, *Law of Marriage Act of 1971*, s. 25.
27 Ibid.
28 For further provisions on this issue, see s. 10(2) of Uganda, *Domestic Relations Bill of 2003*; art. 5 of Ethiopia, *Revised Family Code of 2000*; s. 36 of Tanzania, *Law of Marriage Act of 1971*. 
Commentary: Articles 1–3

In some countries, several different types of marriages are practiced, including religious marriages and customary marriages according to the traditional practices of various communities. 30 While each form of marriage presents its own set of benefits and challenges for the realization of women’s human rights, the recognition of all forms of marriage protects nations’ religious and cultural pluralism, individuals’ right to religious freedom and correlative right to be married in the manner they wish, and the right to non-discrimination and equal protection of the law. 31 However, as the U.N. Human Rights Committee has noted, the right to religious and cultural freedom does “not authorize any State, group or person to violate the right to the equal enjoyment by women of any [International Covenant on Civil and Political] rights.” 32 Therefore, the recognition of all forms of marriage also facilitates the protection of vulnerable parties to marriage through the oversight and regulation of potentially harmful practices. In countries where only civil law marriages are regulated, women who marry according to custom may not enjoy the protections that a legally sanctioned marriage may offer. 33 Articles 1 and 2 ensure that all forms of marriage are recognized and regulated in a manner consistent with human rights.

Although some of the legislative provisions included in this publication specifically apply to heterosexual unions (for example, the provision on widow inheritance), same-sex marriages are not generally precluded. 34 Same-sex marriages have been legalized in a

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29 This wording is derived from s. 2 of South Africa, Recognition of Customary Marriages Act of 1998. For a discussion on polygamous marriage, see the commentary on Articles 9 and 10 below.

30 For example, in South Africa, marriages by “African rites” were subject to customary law, and civil and Christian marriages were generally subject to the common law: South African Law Commission, Project 90, Discussion Paper 74, The Harmonization of the Common Law and Indigenous Law: Customary Marriages, 1997, p. 27.

31 See art. 18 and 27 of the ICCPR, and art. 8 of the African Charter. The U.N. Human Rights Committee has also stated that “the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages,” but that that marriage should not be “incompatible with the Covenant”: U.N. Human Rights committee, “General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23),” U.N. Doc. HRI/GEN/1/Rev.1 at 28, 39th Session, 1990, para. 4.


33 Recognizing this, a number of countries in sub-Saharan Africa regulate customary marriage through the establishment of a minimum set of essential requirements for marriage. See, for example, South Africa, Recognition of Customary Marriages Act of 1998; Zimbabwe, Customary Marriages Act of 2001; Ethiopia, Revised Family Code of 2000. The CEDAW Committee has also urged a number of countries to “harmonize civil, religious and customary law with article 16 of the Convention” (referring to “marriage and family life”). See, for example, CEDAW Committee, “Concluding Comments: Ghana,” 36th session, CEDAW/C/GHA/CO/5, 25 August 2006, para. 36; CEDAW Committee, “Concluding Comments: Kenya,” 39th session, CEDAW/C/KEN/CO/6, 10 August 2007, para. 44.

34 Ethnographic studies reveal that many African societies have practiced, and some continue to practice, “woman-to-woman” marriage, or marriage involving a “female husband,” whereby a woman marries another woman and assumes control over her and her offspring in order to have children, or to increase her lineage and social status, to secure rights over land, and for domestic help. According to Carrier and
number of countries. Civil unions between same-sex couples, which offer some of the benefits and obligations associated with marriage, are available in numerous other countries. In South Africa, same-sex marriage was legalized in 2006 after its Constitutional Court held that the failure of the common law and the national Marriage Act to provide same-sex couples with the same status, entitlements and responsibilities accorded to heterosexual couples through marriage constituted an unjustifiable violation of the right of same-sex couples to equal protection of the law and not to be discriminated against unfairly. Under international law, the U.N. Human Rights Committee has held that existing protections against discrimination in Articles 2 and 26 of the ICCPR include sexual orientation as a protected status.


At the time of writing, same-sex marriages had been legalized in the Netherlands, Norway, Canada, Belgium, Spain, South Africa and some states within the United States of America.

For example, civil unions have been legalized in many countries in Western Europe including Belgium, France, Germany, the Netherlands and Switzerland.


See Toonen v. Australia, U.N. Doc CCPR/C/50/D/488/1992 (4 April 1994) and Young v. Australia, U.N. Doc CCPR/C/78/D/941/2000 (12 August 2003), in which the Committee held that Australia, in denying pension rights to the surviving same-sex partner of a war veteran, violated art. 26 of the ICCPR. See also, U.N. Human Rights Committee, “Communication No. 1361/2005: Colombia,” 14/05/2007/CCPR/C/89/D/1361/2005 (Jurisprudence), in which the Committee concluded that a distinction in Colombian law between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, constituted a violation of art. 26 of the ICCPR by denying a man’s right to his male life partner’s pension on the basis of his sexual orientation. At the time of this writing, all African countries had ratified the ICCPR, with the exception of Comoros and Guinea Bissau.
B. Essential Conditions of Marriage

NOTE: A minimum age for marriage protects girls from the harmful consequences of early marriage and ensures that all marriages occur only with the “free and full consent” of both parties.  

Article 4. Minimum age for marriage

(1) The minimum age for a person to marry is 18 years.

(2) Proof of age must be provided to the marriage officiator at the time of marriage, and may be established by:

(a) a valid birth certificate; or
(b) if no valid birth certificate exists, by medical records, school records or a certificate of identity and age issued by the [relevant state authority].

(3) Any person who willingly causes the marriage of a person under the age of 18 by requesting or contracting such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Commentary: Article 4
In a number of jurisdictions, marriage is permissible before the age of 18, and in many cases, the age of consent is different for men than for women. Customary and religious

39 “Free and full consent” is mandated by art. 16(2) of the Universal Declaration of Human Rights.
40 A number of countries in sub-Saharan Africa have already established a minimum age of at least 18 for both men and women to consent to marriage, though many permit exceptions to the minimum age with parental or guardian consent or for customary or religious marriages. See, for example, Nigeria (s. 18 of the Marriage Act of 1990 requires parental consent for marriages under 21); Djibouti (art. 13 of the Code de la Famille of 2001 requires both spouses to be 18 in order to contract a marriage, but allows for younger marriage with the consent of parents or grandparents); Botswana (s. 15 of the Marriage Act of 2001 sets the marriage age for both men and women at 18 with parental consent and 21 without such consent, though it does not apply to customary or religious marriages); Namibia (s. 26 of the Marriage Act of 1961, as amended by s. 24 of the Married Persons Equality Act of 1996, establishes 18 as the minimum age of marriage, but allows those who are younger to marry with the government’s written permission); Malawi (art. 22(7) of Malawi’s Constitution Act of 1994 allows persons between the ages of fifteen and eighteen years to marry only “with the consent of their parents or guardians”). S. 14 of Uganda’s long-debated Domestic Relations Bill of 2003 also prescribes a minimum age of 18 for marriage without exceptions for parental or guardian consent.
Marriages are often also not subject to the minimum age requirement. But early marriage typically has negative consequences for girls: they are less likely to receive an education, they are more likely to have health problems arising from early pregnancies, and they are particularly vulnerable to abuse and social isolation. In addition, early marriage has been shown in some settings to be linked to increased rates of HIV among women and girls. It has been noted that in developing countries, sexually active adolescent girls who are married have higher rates of HIV infection than sexually active girls who are not married. In a survey of adolescent girls in 21 developing countries, 80 percent of unprotected sexual encounters occurred in marriage.

Married girls’ vulnerability to HIV may be linked to a number of factors. Numerous studies have suggested that married adolescent girls are more likely than their unmarried counterparts to have an HIV-positive partner, which has been attributed to the greater likelihood of married adolescent girls having older partners, who are more likely to be HIV-positive. Biological factors may also increase girls’ risk of HIV infection because they are more vulnerable to vaginal tearing and other injuries as a result of intercourse.

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42 For example, Tanzania’s Law of Marriage Act permits marriage for girls at age 15, while boys are not permitted to marry until the age of 18: s. 13 of Law of Marriage Act of 1971. Kenya’s law governing Hindu marriages permits marriages for girls at age 16, while boys are not permitted to marry until the age of 18: s. 3(c) of Hindu Marriage and Divorce Act of 1960, c. 157. Madagascar permits marriage for girls at age 14, while boys are not permitted to marry until the age of 17: art. 3 of Madagascar’s Family Code of 1963. Burkina Faso permits marriage for girls at age 17 and for men at age 20: art. 238 of Burkina Faso’s Individual and Family Code of 1990.

43 For example, in Kenya, neither Islamic nor customary law specify a minimum age for marriage: Kenya, Mohammedan Marriage and Divorce Registration Act of 1906 and African Christian Marriage and Divorce Act of 1931. In Tanzania, customary law permits the marriage of girls at puberty with their fathers’ consent, and Islamic law permits the marriage of boys and girls at puberty with their fathers’ or paternal grandparents’ consent: Local Customary Law (Declaration) Order, Government Notice No. 279 of 1963, First Schedule, Laws of Persons in Judicature and Application of Laws Act [translated from Swahili into English] [hereinafter, Local Customary Law]; Statements of Islamic Law, Government Notice 222 of 1967 in Islamic Law (Restatement) Act. In Ghana, customary law holds that children can marry as soon as they reach puberty: Marriage of Mohammedens Ordinance of 1907. S. 15 of Botswana’s Marriage Act of 2001 sets the marriage age for both men and women at 18, with parental consent, and at 21 without such consent, but it does not apply to customary or religious marriages.


45 International Women’s Health Coalition, Child Marriage: Girls 14 and Younger at Risk, 2008, online via: www.iwhc.org/resources/youngadolescents. Among girls who are sexually active and do not wish to get pregnant, married girls are more than 10 times more likely to have had unprotected sex in the previous week: International Women’s Health Coalition, IWHC Factsheet: Child Marriage, 2005, online via: www.iwhc.org.

46 A study by Clark indicates that in Kisumu, Kenya and Ndola, Zambia, approximately 30 percent of male partners of married adolescent girls were infected with HIV, while only 9–14 percent of the partners of unmarried girls were HIV-positive: S. Clark, “Early marriage and HIV risks in sub-Saharan Africa,” p. 156. See also, C. Mgbako, J. Fenrich and T.E. Higgins, We Will Still Live: Confronting Stigma and Discrimination Against Women Living with HIV/AIDS in Malawi, Leitner Center for International Law and Justice, 2007, p. 12.
(particularly if non-consensual). Young brides’ vulnerability to HIV is further increased if they have less negotiating power to refuse sex, to demand condom use or to decide when to have children. With limited capacity to enter the paid labour force and earn an independent income, as well as diminished access to productive resources and education, young wives may have less ability to leave husbands if they wish to.

Furthermore, young wives often experience a sudden decline in their social networks upon marriage, which leaves them with few, if any, friends or peers. Social isolation may be a predisposing risk factor for HIV because it curtails the social contacts and networks that play a vital role in transmitting HIV prevention information and supporting behaviour change. In most countries, married adolescent girls are less likely to have heard of HIV compared to single, sexually active girls and they are even less likely to know how to avoid HIV infection.

There is an emerging consensus in international law that 18 is the appropriate age of consent for marriage. The Convention on the Rights of the Child defines a child as a person under the age of 18, while the African Charter on the Rights and Welfare of the Child provides that child betrothal and child marriage shall be prohibited and that action shall be taken by states parties to ensure that the minimum age of marriage is 18. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) considers that the minimum age for marriage should be 18 years for both a man and a woman. Moreover, the International Guidelines on HIV/AIDS and Human Rights call for the elimination of “early marriage.”

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48 See, for example, Leitner Center for International Law and Justice, We Will Still Live (supra), p. 12.


54 African Charter on the Rights and Welfare of the Child, art. 21(2).


NOTE:
Forced marriage violates women’s right to refuse marriage. The following provisions ensure that the consent of both intending spouses is freely provided before a valid marriage takes place.

Article 5. Consent of spouses required

(1) A valid marriage shall take place only when the intending spouses have given their free and full consent to the marriage and to the form of marriage.

(2) The consent of individuals other than the intending spouses is not a requirement, nor shall it be sufficient, for a valid marriage (optional additional text where polygamy is not prohibited: with the exception of the spousal consent requirement for a subsequent polygamous marriage, as set out in Articles 9B and 10A of this Act).\(^{57}\)

(3) Consent is vitiated as a result of:

   (a) coercion, such as when consent is given by an intending spouse to protect himself or herself or another person from serious danger or threat of danger, economic blackmail or loss of livelihood;\(^{58}\)
   (b) fraud;
   (c) error as to the identity of the spouse;
   (d) one or both parties being mentally incapable of understanding the nature and effect of marriage or of the marriage ceremony;
   (e) one or both parties being mistaken as to the nature of the ceremony; or
   (f) one or both parties being intoxicated or otherwise incapacitated so as not to appreciate the full nature of the ceremony.

(4) Any person who willingly causes the marriage of a person without his or her free and full consent by requesting or contracting such a marriage, or by providing money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Article 6. Presence of both spouses at time of marriage

(1) A valid marriage shall take place only when both of the intending spouses are present in person and affirm their consent to the marriage at the time and place of its solemnization.

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\(^{57}\) For further clarity, the text in the brackets should be retained only if Articles 9B and 10B of this Act are adopted.

\(^{58}\) This language is drawn from art. 14 of Ethiopia, Revised Family Code of 2000.
(2) Notwithstanding the provisions of Section (1), the [relevant state authority] may allow an intending spouse to consent to marriage through a representative in exceptional circumstances where requiring the presence of both intending spouses would impose undue hardship and the [relevant state authority] is satisfied that written consent, signed by two witnesses, was freely given by the person being represented.59

**Article 7. Prohibition of betrothal**60

(1) For the purposes of this Act, a betrothal is the pledging of one person for marriage by another person by entering into an agreement on behalf of that person to be married without his or her free and full consent.

(2) Any marriage arranged through the betrothal of an adult or child shall be of no effect.61

**Commentary: Articles 5–7**

Forced marriage occurs when the intending spouses have not provided their free and full consent to the marriage. The CEDAW Committee has noted that “there are countries which, on the basis of custom, religious beliefs, or the ethnic origins of particular groups of people, permit forced marriage or remarriages. Other countries allow a woman’s marriage to be arranged for payment or preferment.”62

Numerous international conventions require the consent of both parties to marriage. The *Universal Declaration of Human Rights*, the CEDAW, the ICCPR, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (Marriage Convention) all stipulate that both potential spouses should freely and fully consent to the marriage.63 The *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (Supplementary Slavery Convention) considers any marriage that is forced upon a girl or woman by her family or

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59 This article is based on art. 12 of Ethiopia’s, *Revised Family Code* of 2000.

60 Because betrothal is associated with a distinct historical tradition in many parts of the world, it is featured in a separate Article. However, it is technically captured by Article 5, since the underlying harm is marriage without an individual’s free and full consent. Therefore, the punishment for betrothal is already reflected in Article 5(4) and courts should refer to this provision in criminal proceedings.

61 See art. 21(2) of the *African Charter on the Rights and Welfare of the Child*. Art. 16(2) of the CEDAW states that “the betrothal and the marriage of a child shall have no legal effect.”

62 CEDAW Committee, “General Recommendation No. 21” (supra), para. 15.

63 *Universal Declaration of Human Rights*, U.N. General Assembly, GA Resolution 217A(III), 10 December 1948, art. 16; CEDAW, art. 16; ICCPR, art. 23; ICESCR, art. 10; *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (Marriage Convention), U.N. General Assembly, GA Res 1763A (XVII), 9 December 1964, art. 1.
guardians to be a practice similar to slavery. In addition to being a violation of human rights, forced marriage has been associated with child marriage and widow inheritance (and the associated increased risk of HIV infection). Therefore, Article 5 requires both parties to the marriage to provide their free and full consent, and enumerates circumstances in which their consent may be vitiated.

The involvement of family may be a critical and even determinative factor in the marriage decision, but the requirement for spousal consent should not be superseded by the wishes of others, including parents or guardians. Article 5(2) protects against cases where the primacy of parental consent may lead to the betrothal of their children without their knowledge or against their wishes. Requiring both spouses to be present at the time of marriage — Article 6(1) — further facilitates the expression of consent by enabling marriage officiators to ascertain such consent during the marriage ceremony.

**NOTE:**
Widow inheritance, a practice by which a widow marries the brother of her deceased husband or another male relative, may expose women to unprotected and unwanted sex and thus to the risk of HIV infection. This provision makes widow inheritance an offence.

### Article 8. Prohibition of widow inheritance

(1) For the purposes of this Act, widow inheritance means a custom by which a relative of a deceased husband marries (or becomes the de facto spouse of) the deceased husband’s wife.

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64 *Supplementary Convention on the Abolition of Slavery, the Slade Trade and Institutions and Practices Similar to Slavery* (Supplementary Slavery Convention), 226 U.N.T.S. 3, 30 April 1957, art. 1(c).

65 See the relevant commentaries to these issues.


67 For example, art. 7 of Djibouti’, *Code de la Famille of 2001* requires the consent of both spouses as well as the “tutor” of the prospective bride in order to conclude a valid marriage (“Le mariage n’est formé que par le consentement des deux époux et du tuteur de la femme.”)

68 Considering widow inheritance as a form of marriage may not capture the nature of the union among some groups in sub-Saharan Africa. Among the Luo people in Kenya, for example, the union is not a marriage because the relative of the deceased man who marries the widow retains his own wife and family, or, if he is single, is still expected to marry and have children of his own. In some cultures, a widow continues to be considered the wife of the deceased and therefore cannot technically remarry. See K. E. Agot, *Widow Inheritance and HIV/AIDS Interventions in Sub-Saharan Africa: Contrasting Conceptualizations of “Risk” and “Spaces of Vulnerability,”* Ph. D. Geography Thesis, University of Washington, 2001 [unpublished].
(2) Widow inheritance is prohibited. 69

(3) Notwithstanding Section (2), a man may marry his relative’s widow where both intending parties, with their free and full consent, contract any form of marriage conforming to all essential conditions of marriage set out in Articles 4–12 of this Act. 70

(4) Any person who willingly causes the marriage of a person through the practice of widow inheritance, by requesting or contracting such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

**Commentary: Article 8**

Widow inheritance originally arose as a social institution designed for men to take responsibility for their dead male relative’s children and his household. 71 Given today’s extreme economic and cultural pressures the practice persists, limiting the choices many widows have following the death of their husbands. 72 In countries where women’s rights to own property or inherit from their deceased husbands are restricted, widow inheritance may be the only way for them to remain connected to their children, their community, and the land and home they were living in. 73

However, widow inheritance may reflect the view of women as chattel, especially insofar as the entitlement of the widow’s new husband may be linked to the fact that his family had previously paid money to the widow’s family as a precondition to marriage. 74

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70 This is derived from s. 16 of Uganda, *Domestic Relations Bill of 2003*.


74 For example, s. 65 of Tanzania, Local Customary Law, provides that if a widow agrees to be inherited, “[t]he bridewealth that was paid by the deceased’s husband is considered as if it was paid by that relative.” See also, the Kenyan case *Okeyo v. Ogwayi*, Civil Suit No. 66 of 2001, Senior Resident Magistrate’s Court at Homa Bay, 13 June 2002, in which the plaintiff Janet Okeyo’s father-in-law had her arrested following her husband’s death on the ground that because he had paid dowry for her, she should be living with her
Although there may be no formally stated consequences for refusing to be inherited, women may be harassed by the husband’s family or the community if she does. Refusing remarriage may become a barrier to receiving an inheritance, to receiving further assistance from family members or to participating in certain community activities or rituals. Widow inheritance has also been used as a pretext for in-laws to seize the deceased man’s property.

Widow inheritance may also result in unprotected and unwanted sex and, thus, the risk of HIV infection. A widow is at risk of infection when she is introduced into a sexual network consisting of her new husband, his wife or wives, and their extra-marital relationships. A growing awareness of the inherent risk of HIV transmission in widow inheritance has encouraged some communities to modify their customs so as to replace sex with symbolic rituals. Furthermore, a number of jurisdictions have opted to ban widow inheritance after community consultations and education on the risks of HIV transmission.

children in the marital home. He also claimed that a relative of the deceased had inherited Okeyo. The Court held that forcing Okeyo to return to the marital home would violate her statutory rights of free association and movement, that since Okeyo did not choose to be inherited by a relative of the deceased, there was no proper marriage, and that any customary law requiring her return was repugnant to the written law.

75 See I. Luginaah et al, “Challenges of a pandemic” (supra), pp. 1222 and 1225; and K. E. Agot, Widow Inheritance and HIV/AIDS Interventions in Sub-Saharan Africa: Contrasting Conceptualizations of “Risk” and “Spaces of Vulnerability.”


79 For example, some communities have adopted alternative, non-sexual rituals which have their roots in indigenous practices: J. Malungo, “Sexual cleansing (kusalazya) and levirate marriage (kunjilila mung’anda) in the era of AIDS: changes in perceptions and practices in Zambia,” Social Science & Medicine 53
Widow inheritance violates a number of international conventions protecting the right to marry by choice and requiring states to eliminate customs and practices that discriminate against women.\(^{80}\) In particular, the Protocol on the Rights of Women in Africa stipulates that widows are not to be subjected to inhuman, humiliating or degrading treatment, and that they have the right to remarry the person of their choice.\(^{81}\)

**NOTE:**
Polygamous marriage contravenes women’s right to equality with men and may increase women’s risk of HIV infection. The following provisions provide options to either prohibit polygamy outright, or to regulate polygamy (so that women in polygamous marriages are not denied legal protection within marriage and upon divorce).

<table>
<thead>
<tr>
<th>Article 9. Polygamous marriage</th>
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<td>[Two options for Article 9 are provided below — 9A and 9B. One or the other should be selected, but not both.]</td>
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**Option 1: Article 9A. Prohibition of polygamous marriages**

1. A person shall not contract a marriage of any form if he or she is already married under any legally recognized form of marriage.

2. Any person who willingly causes a polygamous marriage by requesting or contracting such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction,

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\(^{80}\) For example, art. 2 of the CEDAW requires all states parties “to take appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” See also CEDAW Committee, “Concluding Comments: Malawi,” 35\(^{th}\) Session, CEDAW/C/MWI/CO/5, 3 February 2006, para. 16, where the Committee urges the introduction of measures to “modify or eliminate customs and cultural and harmful traditional practices that discriminate against women,” such as “discriminatory widowhood inheritance practices.” Art. 2(1)(b) of the Protocol on the Rights of Women in Africa requires states to prohibit “all discrimination particularly those harmful practices which endanger the health and general well-being of women,” while art. 2(2) requires states to eliminate “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.”

\(^{81}\) Protocol on the Rights of Women in Africa, art. 20(a) and (c).
to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.  

**Commentary: Article 9A**

Polygamy operates to create concurrent sexual partnerships within marriage between the husband and each of his wives, in addition to any sexual relationships the spouses have outside of marriage. Sexual transmission of HIV can occur where the virus is introduced through a spouse’s extra-marital sexual contacts or where a new wife who is already HIV-positive enters the polygamous union.

Although it has been suggested that polygamous unions may provide a closed sexual network with greater sexual exclusivity, thereby reducing the risk of HIV introduction, the evidence has not borne out this proposition. Several studies demonstrate that women in polygamous relationships are more likely to be infected with HIV than those in monogamous relationships. One study found that despite their trepidation about their

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82 In Canada, s. 293 of the *Criminal Code* criminalizes polygamy, and those who are convicted of the practice are liable to imprisonment for a term not exceeding five years.


husbands having sex with other women, including women living with HIV, a fear of violence and abandonment compelled many women to remain in sexual relationships with polygamous husbands. In addition, the practice of polygamy has been consistently associated with other HIV risk factors, such as early marriage and concurrent herpes simplex 2 infection.

Furthermore, polygamy often has negative financial consequences for women due to the necessity of sharing their husband’s income with co-wives. The lack of adequate financial support that may arise from the conclusion of a second or further marriage may drive women to extramarital relations to gain access to needed resources, putting them at further risk of HIV. Some empirical research indicates that in polygamous relationships where not all wives may have HIV, financial resources may be diverted away from children whose mothers are living with HIV. In addition, according to a report by the International Center for Research on Women, “polygamy is often cited as [a] source of confusion over distribution of property at times of death or dissolution of marriage, and increasingly is being cited as a complicating factor in the spread of HIV/AIDS.”

Both the CEDAW Committee and the U.N. Human Rights Committee have strongly criticized polygamous marriage. The CEDAW Committee has stated,

Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal

86 HRW, Just Die Quietly (supra), p. 32.
or customary law. This violates the constitutional rights of women, and breaches the provisions of Article 5(a) of the Convention.\(^\text{92}\)

**Option 2: Article 9B. Polygamous marriage only with agreement of both spouses**

(1) For the purposes of this Act, a customary or religious marriage is polygamous where one or both spouses are married to a third party or third parties at the time of marriage.

(2) A customary or religious marriage is potentially polygamous where:

(a) neither party is married to a third party at the time of marriage; and

(b) both parties to the marriage freely and fully consent at the time of marriage to the subsequent marriage of either spouse or both spouses, which shall be demonstrated by the completion and submission of a prescribed consent form to the Registrar General prior to the marriage.

**Subsequent marriages under Option 2 (Article 9B):**

**Article 10. Subsequent marriages**

\([\text{Article 10 should only be used if Option 2 above — Article 9B — is selected. Two options for Article 10 are provided below — 10A and 10B. One or the other should be selected, but not both.}]\)

**Option 1: Article 10A. Affirmation of consent required for subsequent marriage**

(1) A spouse in a polygamous or potentially polygamous marriage must affirm the consent of any current spouse(s) at least [period of time] prior to entering into any subsequent customary or religious marriage, proof of which shall be demonstrated by the completion and submission of a prescribed consent form to the Registrar General.

(2) For further clarity, a spouse in a polygamous or potentially polygamous marriage may not enter into any subsequent customary or religious marriage without affirming the consent of any current spouse(s) at least [period of time] before the subsequent marriage.

(3) Any person who willingly causes a polygamous marriage in contravention of the conditions set forth in Articles 9B and 10A of this Act by requesting or contracting

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\(^{92}\) CEDAW Committee, “General Recommendation No. 21” (supra), para. 14.
such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

**Option 2: Article 10B. Court approval required for subsequent marriage**

(1) A spouse in a customary or religious marriage who intends to marry a subsequent spouse shall make an application to the [relevant state authority]93] showing that:

(a) the applicant’s marriage is polygamous or potentially polygamous as set out in *Article 9B* of this Act;
(b) the subsequent marriage is in accordance with the terms of existing marriage contracts, if any;
(c) the subsequent marriage will not prevent the applicant’s current spouse(s) or children from having at least the same level of maintenance as at the time of the application;
(d) the applicant has made provision for a separate matrimonial home for the subsequent spouse, except in exceptional circumstances where the parties, including the current spouse or spouses, have agreed to live together in the same home;
(e) any property will be distributed equitably during and in the event of termination of any of the marriages as set out in the [relevant marital property legislation], with due consideration to the specified choice of marital property regime governing the current and subsequent marriage; and
(f) the subsequent marriage will not impose any other undue hardship on the applicant’s current spouse(s) or children.

(2) Where the [relevant state authority] is satisfied that the applicant has complied with all the conditions set out in Section (1), the [relevant state authority] shall approve the application for a subsequent marriage to take place under this Act.

(3) Any determination under Section (2) may be appealed to a court of competent jurisdiction and the court may confirm, reverse or vary the decision.

(4) Any person who willingly causes a polygamous marriage in contravention of the conditions set forth in *Articles 9B and 10B* of this Act by requesting or contracting such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

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**Commentary: Article 10 (both options)**

Polygamy is firmly rooted in the religious and customary practices of many countries, and an outright ban on polygamy where the practice is widespread may not prevent people from entering into polygamous relationships. Criminal prohibitions against polygamy would, therefore, place women in illegal relationships where they may not be able to avail themselves of any legal or social protections such as spousal maintenance, child custody and support, inheritance, social security and health benefits. In some communities, prohibiting polygamy could have the unwanted effect of encouraging informal “second house” relationships, which provide no legal protection to women and children and may also result in the disinheriting of any children of the relationship.

Where a prohibition is politically and culturally unfeasible in the short-term, polygamy should be regulated. The Protocol on the Rights of Women in Africa provides that while “monogamy is encouraged as the preferred form of marriage,” states shall ensure “that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and respected.”

Article 9B provides that customary or religious marriages can become polygamous only if at the time of the marriage neither party is already married to another person and both spouses consent to the possibility of the subsequent marriage of either spouse or both spouses. To provide additional protection in case circumstances have changed since the consent to a subsequent marriage was first provided, Article 10 requires the affirmation

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95 See, for example, the Namibian case of *Makholiso and Others v. Makholiso and Others*, 1997 (4) SA 509 (Tk); Legal Assistance Centre of Namibia (LAC), *Proposals for Law Reform on the Recognition of Customary Marriages*, 1999, p. 89. In the 2008 High Court of South Africa case *Hassam v Jacobs NO and Others*, (5704/2004) [2008] ZAWCHC 37 (18 July 2008), the Court recognized that surviving spouses of polygamous marriages, who were not contemplated under intestate and maintenance legislation, were discriminated against in that respect, and declared that those laws also applied to spouses in polygamous marriages. Thus, the legal recognition of polygamous marriage helped secure financial support for the potentially destitute surviving spouse.


of spousal consent — Article 10A — or the oversight of a relevant authority for subsequent marriages — Article 10B.

The requirement of spousal consent facilitates women’s choice in determining the configuration of her marriage, which may help to ameliorate more harmful aspects of polygamy.\(^98\) While it has been suggested that a spousal consent requirement may be a meaningless provision (since a first wife who failed to give her consent might instead face divorce or domestic violence),\(^99\) to assume that there are no women who are able to consent may be too broad an assumption. Where feasible (i.e., the legal infrastructure governing marriage is more accessible), the second option requiring the oversight of the relevant authority — Article 10B — may better ensure that the subsequent marriage does not undermine the first wife’s wishes or compromise her standard of living.

**NOTE:**
Marriage payment potentially undermines women’s rights to consent to marriage and to divorce. The following provision stipulates that marriage payment shall not be a requirement for a valid marriage and prohibits the requirement to return marriage payment as a condition of divorce.

### Article 11. Marriage payment not a requirement

(1) Marriage payment means a payment (whether in cash or in kind) given by an intending spouse or the family of an intending spouse to the other intending spouse or the family of the other intending spouse to secure the marriage.

(2) For further clarity, a gift may constitute marriage payment if it is given by an intending spouse or the family of an intending spouse to the other intending spouse or the family of the other intending spouse to secure the marriage.

(3) In no case shall marriage payment be a requirement for contracting a valid marriage.

(4) For further clarity, the transfer of marriage payment shall not be deemed to affect the respective property rights of either spouse in any way.

(5) It is prohibited to demand the return of marriage payment as a requirement of divorce.\(^100\)

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\(^99\) South African Law Reform Commission, *Project 90* (supra), para. 6.1.17–6.1.19. In Algeria, for example, despite a requirement that a woman be informed of her husband’s intention to marry another wife, many men have circumvented this condition and turned to extramarital relationships or traditional or religious marriages: A. Mammeri, “Algerian women cite problems with implementation of new family code,” *Magharebia*, 15 February 2008.

\(^100\) See Module 4 “Divorce” for the criminal provision pertaining to marriage payment.
Commentary: Article 11

Marriage payment generally refers to the practice of bride price (also known in various situations as bride wealth, lobola or lobolo), in which a prospective groom pays money or valuables to his intended bride’s family as a precondition to marriage, which serves as compensation for the expense of raising a daughter and for the loss of her economic services. Marriage payment also encompasses the practice of dowry, which involves a sum of money paid by the bride and her family to the bridegroom, and is often regarded as the daughter’s inheritance share. While in some circumstances bride price may represent, or may have in the past represented, a symbol of respect and friendship between two joining families, today the practice is viewed as curtailing women’s decision-making about reproduction and in negotiating sexual relations. As such, marriage payment has been associated with exposing women to greater HIV risk behaviour.

According to customary practice, the payment of bride price entitles men to control their wives’ sexual and reproductive lives, including control over their wives’ child-bearing capacity. Bride price may also confer upon the husband a right to custody of the children upon marriage dissolution. Moreover, bride price has been cited as the rationale for widow inheritance. Various investigations and reports have linked both bride price and dowry to violence against women. Research has also linked bride price


102 The payment of dowry is not commonly practiced in Africa, but is carried out in Benin and Cameroon. A reverse form of dowry is also compulsory in Sharia, or Islamic law, where a dower (“mahr”) is expected to be paid to a prospective bride for the marriage contract to be considered valid: J. Goody and S. J. Tambiah, Bridewealth and Dowry, Cambridge Papers in Social Anthropology No. 7 (London: Cambridge University Press, 1973).


104 S. Coldham, “Customary marriage and the urban local courts in Zambia,” Journal of African Law 34(1) (1990): 67–75, at 73. See also, s. 52 of Tanzania, Local Customary Law, which stipulates that, in the case of divorce “without fault of either the wife or the husband,” bridewealth shall be refunded only “if they are childless.”


with restrictions on women’s ability to own land within a marriage or upon being widowed or divorced.\textsuperscript{108}

Bride price may result in discrimination against women upon marriage dissolution. Under some customary regimes, a woman’s father must return the bride price to her husband if she seeks a divorce.\textsuperscript{109} Where such customary practices are followed, wives cannot divorce their husbands without the consent of their fathers, whereas husbands are able to initiate divorce without obtaining anyone’s consent. According to some commentators, the necessity of the “[r]efund of bride price(wealth) has hitherto kept women in bad marriages.”\textsuperscript{110} Similarly, dowry has been linked to undermining women’s ability to escape abusive relationships, because women’s parents may be reluctant to allow their daughters to return home for fear of having to pay a second dowry.\textsuperscript{111} To improve the welfare of women, therefore, some legal experts have suggested eliminating and criminalizing the requirement to refund bride price in order to terminate a marriage.\textsuperscript{112}

The Supplementary Slavery Convention prohibits “any institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a

\textsuperscript{108} According to a case study from Uganda, the payment of bride price deemed the bride the property of her husband, leading to the common sentiment from men that “property cannot own property”: R. Giovarelli, “Customary law, household distribution of wealth, and women’s rights to land and property,” \textit{Seattle Journal for Social Justice} 4 (2006): 801–825, at 809 and 819. In Zambia, women have been denied ownership of income and property earned from employment on the grounds that women must bring some benefit to her husband and his relatives by working for him if lobola was paid on marriage: C. Himonga et al, “An outline of the legal status of women in Zambia,” in A. Armstrong et al (eds), \textit{The Legal Situation of Women in Southern Africa} (Harare, Zimbabwe: University of Zimbabwe Publications, 1990), pp. 156–157.


\textsuperscript{112} This was the view of the Ugandan Law Reform Commission. See CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women,” CEDAW/C/UGA/3, 3 July 2000, p. 69. The response in India has been to prohibit the practice of dowry: Law Commission of India, \textit{91st Report on Dowry Deaths and Law Reform}, 10 August 1983.
consideration in money or in kind.”\textsuperscript{113} Bride price may also violate the right to equality within marriage, and has been found to interfere with equality between men and women with respect to entering into marriage, freely choosing a spouse, and at the dissolution of a marriage.\textsuperscript{114} Where bride price entitles men to control their wives’ sexual and reproductive lives, it is also a violation of women’s right to control their fertility and to decide whether to have children, the number of children and the spacing of children.\textsuperscript{115} The CEDAW Committee has stated that bride price is the “transfer of productive and reproductive services to the man’s family,” a practice which “undermines women’s dignity and welfare.”\textsuperscript{116}

Prohibiting marriage payment may not reduce or eliminate its practice, since “[some] women still prefer parental consent and thus the payment of lobola before they enter into marriages.”\textsuperscript{117} Some researchers have also contended that the tradition of bride price benefits women by inducing men to “choose their brides carefully” and stay in marriages, given the financial investment they have made in their wives.\textsuperscript{118} Marriage payment holds cultural significance for many communities and may confer potential benefits for marriage stability. However, women’s human rights may be violated and their vulnerability to HIV heightened when the exchange of bride price or dowry violates their right to consent to marriage and hinders their ability to leave abusive or unwanted relationships. Article 11 regulates marriage payment by ensuring its exchange is neither a requirement of marriage nor of divorce, without correspondingly criminalizing a custom which is practiced across ethnic groups and which enjoys widespread support.

\textsuperscript{113} Supplementary Slavery Convention, art. 1(c)ii. Uganda recognized this aspect of bride price, noting that “forcing a woman to live under an intolerable and hostile family environment subjects her to servitude and slave-like conditions”: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Third Periodic Report of States Parties: Uganda” (supra), p. 68. In Mauritania, it has been reported that what used to be a cultural practice where only symbolic gifts were exchanged has turned into a business in which mainly poor urban families try to sell their daughters to wealthy families in marriage: “Mauritania: Child marriage tradition turns into trafficking,” IRIN Africa, 9 December 2008.

\textsuperscript{114} For example, Uganda stated in its CEDAW report of 2000 that “cases may arise whereby a spouse is chosen for a woman provided the man can pay the amount of bride price required…. This shows that women do not have a right to enter with their free and full consent.” The right to equality within marriage is further eroded where men feel that they have different rights during marriage from those of women because they have paid a bride price: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Third Periodic Report of States Parties: Uganda.”

\textsuperscript{115} See art. 14 of the Protocol on the Rights of Women in Africa.


NOTE:
Mandatory premarital testing for HIV and/or for virginity violate numerous human rights and have not been proven to reduce HIV transmission. The following provisions prohibit such testing.

Article 12. Prohibition of mandatory premarital testing for HIV or for virginity

(1) Mandatory premarital HIV testing is prohibited.

(2) Mandatory premarital virginity testing is prohibited.

(3) Any person who willingly causes a premarital HIV test or a premarital virginity test without the free and full consent of the individual being tested commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Commentary: Article 12
A number of jurisdictions have implemented mandatory premarital HIV screening legislation, and a number of faith-based organizations, including churches have instituted mandatory premarital HIV testing among couples seeking to be married.119 Where mandatory premarital HIV testing has been imposed, there is little evidence demonstrating its effectiveness as a tool of HIV prevention. In two states in the United States, for example, legislation was quickly abandoned after numerous individuals opted to marry in neighbouring states and few new HIV infections were being detected despite the high costs associated with the testing policy.120 In northern Ghana, where prospective spouses must bear the cost of the HIV test as a condition to a church-sanctioned marriage, the expense has hampered couples from marrying.121 Other factors undermining the perceived public health benefit of mandatory premarital HIV testing include the possibility of inaccurate or inconclusive results; the possibility of acquiring HIV after

119 Faith-based organizations in Ghana, Nigeria, Burundi, Kenya and Goma in the Democratic Republic of Congo have instituted mandatory premarital HIV testing among their congregations. The Nigerian government publicly endorses the practice, although there is no national legislation regarding premarital HIV testing: C. Uneke, M. Alo and O. Ogbu, “Mandatory pre-marital HIV testing in Nigeria: the public health and social implications,” AIDS Care 19(1) (2007): 116–121. States or provinces in India, Malaysia, China, Mexico and the U.S. have formally introduced mandatory premarital HIV testing policies and/or legislation, and Guinea’s HIV law requires mandatory premarital HIV testing: art. 28, La loi relative a la prévention, la prise en charge et le contrôle du VIH/SIDA of 2005.

120 Illinois adopted mandatory premarital HIV testing from 1988 to 1989, during which time the number of marriages performed in Illinois dropped by 14 percent and there was a marked increase in marriages performed in neighbouring states. Louisiana also adopted mandatory premarital HIV testing in 1988 but repealed the legislation after seven months: B. Turnock and C. Kelly, “Mandatory premarital testing for human immunodeficiency virus, the Illinois experience,” Journal of the American Medical Association 261 (1989): 3415–3418.

marriage; and the possibility of compromising the confidentiality of persons undergoing the HIV test (given the public nature of the results).

Mandatory premarital HIV testing violates individuals’ rights to privacy and to marry and found a family; reinforces discrimination against, and stigmatization of, people living with HIV; and is ultimately counterproductive to the aims of HIV prevention.122 The International Guidelines on HIV/AIDS and Human Rights also affirm that the right to marry is infringed by mandatory premarital testing for HIV/AIDS or the requirement of “AIDS-free certificates.”123

The practice of virginity testing has undergone a recent revival in some southern African countries, most notably in South Africa, by traditional leaders concerned with the HIV epidemic in their communities.124 Historically, virginity testing was practiced to ascertain the sexual purity of unmarried girls, with the result often dictating the amount of bride price paid or even being determinative of marriage. The recent revival in testing arises from the belief that testing will encourage abstinence and curtail HIV transmission among young people.125

While there have yet to be studies conducted on the overall impact of virginity testing on HIV transmission, some commentators have argued that virginity testing does not reduce girls’ vulnerability to HIV because they opt to engage in oral or anal sex instead of vaginal intercourse in order to “preserve” their virginity.126 Virginity testing is also a violation of girls’ right to privacy and bodily integrity and is a form of gender discrimination.127 Although the accuracy of the tests itself is questionable, girls who fail

124 Contemporary virginity testing may take place in settings ranging from the family home to community centres to large public sports stadiums, and may be carried out by family members of the intended husband or professional virginity “testers.” When carrying out testing, virginity testers do not apply a standard medically accepted test for virginity, but rather assess physical markers of virginity derived from folk constructs of health and illness. For example, some testers determine girls’ virginity by the presence of a “white lacy barrier” in the vaginal canal: E. George, “Like a virgin? Virginity testing as HIV/AIDS prevention: human rights universalism and cultural relativism revisited,” unpublished at the time of writing, 2007, p. 10.
127 Ibid.
the test may experience stigma, violence, and psychological and emotional trauma, and their perceived marital value may fall.\textsuperscript{128} The U.N. Committee on the Rights of the Child has condemned the practice of virginity testing and has proclaimed that virginity testing “threatens the health, affects the self-esteem, and violates the privacy of girls.”\textsuperscript{129} The South African Commission on Gender Equality similarly concluded that virginity testing undermines principles of equality, freedom and human dignity and declared that it did not support the practice.\textsuperscript{130}

\textbf{NOTE:}
Marriages that contravene Articles 4–12 are either void or voidable. The following provisions specify which marriages are void and which marriages are voidable.

\textbf{Article 13. Void marriage}

(1) A marriage that takes place after the commencement of this Act is void only in any of the following cases — i.e., where:

\textit{(Two options are provided below for Subsection (a). One or the other should be selected, but not both. The first option should be selected if Article 9A is being used. The second option should be selected if Article 9B is being used.)}

(a) either of the parties is, at the time of the marriage, lawfully married to some other person;\textsuperscript{131}

\textit{OR}

(a) either of the parties is, at the time of the marriage, in another marriage which is not polygamous or potentially polygamous;

(b) either of the parties is, at the time of the marriage, below the age of 16; or

(c) either of the parties did not consent to the marriage, which includes marriage by betrothal or by widow inheritance, or the consent of either party to the marriage was vitiated as set out in Article 5(3) of this Act.

(2) A void marriage is invalid from the date of the marriage ceremony.


\textsuperscript{131} This article is derived from s. 3 of Nigeria, \textit{Matrimonial Causes Act, Chapter 220, of 1990}. 
(3) Nothing in this Article shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity for a void marriage has not been granted.

(4) The fact that the marriage is void operates without prejudice to any property and maintenance entitlements that the parties to the marriage might have under the [relevant domestic partnership legislation], and does not affect any maintenance and inheritance entitlements minor or dependent children of the relationship might have under the [relevant divorce and inheritance legislation].

**Article 14. Voidable marriage**

(1) A marriage that takes place after the commencement of this Act shall be voidable on application by the parties to the marriage only in the following cases — i.e., where:

(a) marriage payment was paid as a requirement of the marriage;
(b) both parties were not personally present at the time and place of the solemnization, notwithstanding exceptions granted under Article 6(2);
(c) either of the parties was, at the time of the marriage, older than 16 but below the age of 18;
(d) premarital HIV testing or virginity testing was a requirement of the marriage;

*Optional additional sub-sections where polygamous marriage is permitted:*

(Two options are provided below for Subsection (e). One or the other should be selected, but not both. The first option should be selected if Article 10A is being used. The second option should be selected if Article 10B is being used.)

(e) either of the parties is lawfully married to some other person in a polygamous or potentially polygamous marriage and affirmation of spousal consent was not obtained; or

**OR**

(e) either of the parties is lawfully married to some other person in a polygamous or potentially polygamous marriage and court approval was not obtained; or

(f) either of the parties is lawfully married to some other person in a polygamous or potentially polygamous marriage and a court has not approved a written contract that will regulate the future marital property regime of the current and prospective marriage.

(2) A decree of nullity under this Act of a voidable marriage shall dissolve the marriage from and including the date on which the decree becomes absolute.132

(3) Where both a petition for a decree of nullity of a void marriage and a petition for a decree of nullity of a voidable marriage are before the [relevant court], the [relevant court] shall

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132 This article is derived from s. 38 of Nigeria, *Matrimonial Causes Act, Chapter 220, of 1990.*
(4) The fact that the marriage is voidable operates without prejudice to any property and maintenance entitlements that the parties to the marriage might have under the [relevant domestic partnership legislation], and does not affect any maintenance and inheritance entitlements the minor or dependent children of the relationship might have under the [relevant divorce and inheritance legislation].

**Commentary: Articles 13 and 14**

The remedy of nullity is concerned with whether a marriage legally exists and not whether a marriage should be dissolved due to its breakdown. There is a clear legal difference between a valid marriage which ends and a marriage which was flawed from its inception. Therefore, a marriage can be nullified either because it is so flawed from its inception that it never legally existed, which is termed a “void” marriage, or because it contained a deficiency or deficiencies from its inception that permits one or both parties to request that it be declared void from that date forward, which is termed a “voidable” marriage. Any interested person may take proceedings to declare a marriage void and, legally, no decree of nullity is necessary because the marriage does not legally exist. On the other hand, an application must be made to the court to nullify a voidable marriage. Until such time as a court determines that a marriage is in fact voidable and issues a decree of nullity, it is considered a legally valid marriage. In effect, there is no practical difference between a marriage that complies with all the legal requirements and a voidable marriage that no one ever challenges.

The grounds for void marriages tend to largely reflect public policy on marriage, including matters that concern the parties themselves but have wider ramifications for public policy and the social understanding of marriage. It is important to note, therefore, that the social context plays an important role in delineating whether a marriage should be deemed void or voidable. Article 13 renders a marriage void if any of the three essential conditions of marriage are contravened — i.e., where a spouse is under the age of 16; where the marriage is polygamous, or where the polygamy is unauthorized; or where either of the parties did not consent to the marriage.

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133 This article is derived from s. 29 of Nigeria, *Matrimonial Causes Act, Chapter 220, of 1990.*


135 This is exemplified by the changing minimum age of marriage. For example, in England and Canada, the minimum age was determined initially by ecclesiastical principles, with marriage conducted under that age as voidable. As the social context has changed and public policy has discouraged child marriages, the focus has changed to one of promoting stability of marriage, leading to increased minimum age and the voiding of child marriages: Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 10: Nullity of Marriage,* 2003, p. 3; S. Cretney, J. Masson and R. Bailey-Harris, *Principles of Family Law,* pp. 46–47.
Where either of the parties to the marriage is under the age of 16 or did not consent to the marriage, the marriage is rendered void (under Article 13) because of the numerous health and human rights concerns associated with child marriage and forced marriage (see discussion above). However, in Article 14, individuals who married under the age of 18 but over the age of 16 are provided with the option to declare the marriage voidable, so the risks of child marriage may be weighed against an older youth’s desire to remain married. With respect to polygamy, it may be most appropriate to render a polygamous marriage void in a country where polygamy is not widespread and is prohibited, in order to send a strong message that polygamy is not socially acceptable. Where polygamy is common, if a polygamous marriage were to be deemed void from its commencement, women in such relationships could be placed at greater disadvantage, with few legal rights other than those attached to domestic partnerships. In this context, it may be preferable for a potentially polygamous marriage, if conducted without the affirmation of spousal consent or court approval, to be voidable on the application of a spouse.

In order to discourage marriages which violate social norms or the human rights of intending spouses (but for which there is less consensus or evidence of the associated harms), contravention of the remaining essential conditions of marriage render a marriage voidable under Article 14. Accordingly, the parties to the marriage can choose whether to apply for a decree of nullity and have the marriage nullified from that point forward. This provides a degree of choice: whether to apply for a decree of nullity to avoid the social stigma of divorce, or to apply for divorce, which offers greater access to marital property and spousal support.

Marriages which otherwise satisfy the essential conditions of marriage should not be made void on purely procedural or administrative grounds, such as non-registration or a marriage performed by an unofficial marriage officiator. Especially in a context where, for example, marriage officiators are poorly regulated or the registration system may not be fully accessible to all, voiding marriages on purely procedural grounds could put women’s rights at further risk. Significantly, there is (deliberately) nothing in the language of Articles 13 and 14 that states that a spouse’s HIV-positive status is a ground for voiding a marriage. Voiding a marriage on the ground of a spouse’s HIV-positive status would reinforce stigmatization and discrimination against persons living with HIV. Further, legislation that voided a marriage because of a spouse’s HIV-positive status

136 Similarly, in Burkina Faso, a marriage that is entered into without the consent of one of the spouses shall be declared null and void: art. 281 of Burkina Faso, Individual and Family Code of 1990.

137 Law Reform Advisory Committee for Northern Ireland, Discussion Paper No. 10 (supra), pp. 8–9.

138 Law Reform Advisory Committee for Northern Ireland, Discussion Paper No. 10 (supra), pp. 2–3. In a number of countries, the annulment of a voidable marriage does not operate retrospectively, such that the marriage is treated as if it had existed up to the point at which the decree of nullity is granted. For example, the annulment of a voidable marriage does not operate retrospectively in England, Ireland and Nigeria: H. Hahlo, Nullity of Marriage in Canada (supra), p. 5; Nigeria, Matrimonial Causes Act, Chapter 220, of 1990.

139 See, for example, the commentary for Articles 19–21 in this module.
would leave vulnerable parties without the legal protections of marriage and might inhibit individuals from voluntarily seeking HIV testing.

C. Formalities of Marriage

NOTE:
The following provisions prescribe the formalities for civil, religious and customary marriages and set out the regulation of marriage officiators to promote compliance with the essential conditions of marriage.

**Article 15. Civil marriage**

(1) A marriage officiator for civil marriages is a person designated by the [relevant state authority] to perform civil marriages.

(2) Prior to the marriage, the civil marriage officiator shall be responsible for informing the intending spouses of the different marital property regimes available.

(3) A civil marriage shall be effected by a declaration by the intending spouses, before a civil marriage officiator and two witnesses, that they consent to be married and that the marriage is in accordance with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

**Article 16. Religious Marriage**

(1) A marriage officiator for religious marriages is a person designated by the [relevant religious/state authority] to perform religious marriages.

(2) Prior to the marriage, the religious marriage officiator shall be responsible for informing the intending spouses of the different marital property regimes available.

(3) A religious marriage shall be performed in the presence of a religious marriage officiator and the formalities for a religious marriage shall be prescribed by the religion concerned insofar as those formalities comply with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

(Optional section where polygamous marriage is permitted:)

(4) A religious marriage officiator presiding over a polygamous marriage is responsible for verifying that:

(a) the marriage is polygamous or potentially polygamous; and
(Two options for Subsection (b) are shown below. One or the other should be used, but not both. The first option should be selected if Article 10A is being used. The second option should be selected if Article 10B is being used.)

(b) affirmation of spousal consent for the subsequent marriage has been obtained

OR

(b) affirmation of court approval for the subsequent marriage has been obtained

as set out in Article 10.

Article 17. Customary Marriage

(1) A marriage officiator for customary marriages is a person designated by the [relevant customary/state authority\textsuperscript{140}] to perform customary marriages.

(2) Prior to the marriage, the customary marriage officiator shall be responsible for informing the intending spouses of the different marital property regimes available.

(3) A customary marriage shall be performed in the presence of a customary marriage officiator and the formalities for a customary marriage shall be prescribed by the custom of the community concerned insofar as those formalities comply with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

(Optional section where polygamous marriage is permitted:)

(4) A customary marriage officiator presiding over a polygamous marriage is responsible for verifying that:

(a) the marriage is polygamous or potentially polygamous; and

(Two options for Subsection (b) are shown below. One or the other should be used, but not both. The first option should be selected if Article 10A is being used. The second option should be selected if Article 10B is being used.)

(b) affirmation of spousal consent for the subsequent marriage has been obtained

OR

(b) affirmation of court approval for the subsequent marriage has been obtained

as set out in Article 10.

\textsuperscript{140} S. 5 of Namibia, \textit{Traditional Authorities Act of 2000} authorizes members of a “traditional community” to designate the chief or head of the traditional community, subject to the approval of the minister responsible for Regional and Local Government and the recognition of the President. S. 4 of South Africa, \textit{Traditional Courts Bill of 2008} permits the Minister to consult with the Premier of the province in question or with the President, to designate a “senior traditional leader” or a “king or queen” as “presiding officer of a traditional court,” in respect of which such senior traditional leader or such king or queen has jurisdiction.
Article 18. Marriage officiators

(1) All marriage officiators designated in terms of Articles 15–17 must, as soon as practicable after they have been so designated, but within a period of at least 12 months after such designation, attend a training course prescribed by the [relevant state authority] which shall educate marriage officiators regarding the provisions of this Act, with an emphasis on Articles 4–12, as well as regarding the different marital property regimes available under the [relevant marital property legislation].

(2) The [relevant state authority] may suspend or revoke any designation made under Articles 15–17 if the designated marriage officiator fails to attend the prescribed training course contemplated in Section (1) within 12 months without reasonable excuse. 141

(3) A marriage officiator who performs a marriage and:

   (a) knew or had reason to know that either of the parties to the marriage was under the age of 18 at the time of marriage;
   (b) knew or had reason to know that either of the parties to the marriage did not provide their free and full consent to the marriage, including by reason of betrothal or widow inheritance;

   (Three options for Subsection (c) are shown below. Only one of the three should be used. The first option should be selected if Article 9A is being used. The second option should be selected if Articles 9B and 10A are being used. The third option should be selected if Articles 9B and 10B are being used.)

   (c) knew or had reason to know that either of the parties to the marriage was married to a third party at the time of marriage;

   OR

   (c) knew or had reason to know that at the time of marriage the marriage was not polygamous or potentially polygamous, or that the marriage was polygamous or potentially polygamous but either of the parties to the marriage did not affirm spousal consent prior to the marriage;

   OR

   (c) knew or had reason to know that at the time of marriage the marriage was not polygamous or potentially polygamous, or the marriage was polygamous or potentially polygamous but either of the parties to the marriage did not obtain court approval prior to the marriage;

   (d) requires marriage payment as a condition of performing the marriage; or
   (e) requires a premarital HIV or virginity test as a condition of performing the marriage;

shall have his or her designation to perform marriages revoked.

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141 Art. 24(1) and (2) are derived from ss. 4(5) and 4(6) of South Africa, Traditional Courts Bill of 2008.
(4) The [relevant state authority] must establish and keep a prescribed register of all marriage officiators designated in terms of Articles 15–17, specifying those who have completed the prescribed training course contemplated in Section (1) and those whose designation has been suspended or revoked in terms of Sections (2) and (3).\textsuperscript{142}

(5) A person performing civil, religious or customary marriage who has not been designated by the [relevant authority] to perform said marriage commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount].

\textbf{Optional additional section:}

(6) A marriage performed in the presence of a marriage officiator who has not been designated by the [relevant authority] to perform marriages does not render the marriage void or voidable if it is otherwise in accordance with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

\textbf{Commentary: Articles 15–18}

Marriage officiators play a crucial role in ensuring the essential conditions of marriage have been met in the marriages over which they preside. To promote compliance with these conditions, Articles 15–18 require all marriage officiators to be designated by the relevant state, religious or customary authority and educated about the marriage law so they are well-equipped to identify violations of the essential conditions of marriage. Educating marriage officiators about the different marital property regimes allows them to explain and respond to questions about the regimes available to couples, thus enabling prospective spouses to make more informed choices about the material consequences of their relationship.

Regulation of marriage officiators also enables the state to revoke the authority of a marriage officiator to perform marriages where he or she knowingly participates in a violation of the essential conditions of marriage. In Article 18, an optional additional section is provided which stipulates that marriages performed by a marriage officiator who has not been designated to perform marriages should not be rendered void or voidable if it is otherwise in accordance with the essential conditions of marriage. This option may be appropriate where the regulation of marriage officiators (and in particular, customary marriage officiators) is fairly new, the infrastructure for regulation is still being developed, or designated marriage officiators may not be fully accessible to all.

\textbf{NOTE:}

All marriages, whether civil, customary or religious, should be registered in order to ensure that marital status is certain and easy to establish. The following provisions set out a process for registration.

\textsuperscript{142} Section 4 is adapted from Sections 4(7) and 4(8) of South Africa, \textit{Traditional Courts Bill of 2008}. 
Article 19. Duties of relevant state authority to create and maintain registration infrastructure

(1) The [relevant state authority] shall appoint a central Registrar General.

(2) The Registrar General shall establish and make public the information and supporting documentation necessary to register a valid marriage.

(3) The country shall be sub-divided into marriage districts to ensure that registration can be carried out locally.

(4) These districts should coincide with existing administrative districts to the greatest degree possible.

(5) A district registrar shall be appointed for each marriage district, who shall be responsible for appointing local registering officers in his or her respective marriage district.

(6) District registrars shall ensure that an official record of marriage registrations is accessible for viewing at reasonable hours.

(7) The district registrar or local registering officer shall be responsible for issuing to spouses within [number] days (option if Article 20A is being used) OR immediately (option if Article 20B is being used) after registration a certificate of registration bearing the identity of the spouses, the date of the marriage and the marital property regime elected.

(Optional additional section:)

(8) The [relevant state authority] shall establish mobile registration units to be deployed in rural areas to record new marriages as well as record late and delayed registrations.\(^{143}\)

(Optional additional section where polygamy is not prohibited:)

(9) The Registrar General shall be responsible for maintaining a record of potentially polygamous marriages comprised of individuals who have completed and submitted a prescribed consent form indicating their free and full consent to a subsequent marriage on the part of either spouse.

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\(^{143}\) This section is derived from s. 13(a) of the proposed *Age of Marriage Amendment Act of 2005* featured in T. Ezer et al, “Child marriage and guardianship in Tanzania” (supra), p. 428.
**Article 20. Registering a marriage**

*Two options for Article 20 are provided below — 20A and 20B. One or the other should be selected, but not both.*

**Option 1: Article 20A. Duty of officiator to register marriage**

1. When a marriage is contracted by a designated marriage officiator, it shall be the duty of that marriage officiator to register the marriage, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, with the district registrar or the local registering officer.

2. When a marriage has been contracted before the commencement of this Act, and is not registered in terms of any other law, it shall be the duty of both spouses to apply for registration, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, with the district registrar or the local registering officer within a period of [number] months after that commencement.

3. The district registrar or the local registering officer must, if satisfied that the spouses contracted a valid marriage, register the marriage and issue to the spouses a certificate of registration bearing the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, within [number] days after registration.

4. A certificate of registration of a valid marriage issued under this section or any other law providing for the registration of marriages constitutes proof of the existence of the marriage and of the particulars contained in the certificate.144

5. Failure of the marriage officiator to register the marriage with the district registrar or the local registering officer will result in a fine not exceeding [monetary amount].

*(Optional additional section:)*

6. When a marriage is contracted according to customary law and there is no customary marriage officiator present, it shall be the duty of both spouses to register the marriage, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, with the district registrar or the local registering officer within 30 days after the marriage.145

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144 The wording of this section is derived from s. 4 of South Africa, Recognition of Customary Marriages Act of 1998.

145 This section is derived from Tanzania, Law of Marriage Act of 1971, s. 43.
Option 2: Article 20B. Duty of spouses to register marriage

(1) Both spouses have the duty to ensure that their marriage is registered with the district registrar or the local registering officer.

(2) Either spouse may apply for the registration of his or her marriage and must furnish the district registrar or the local registering officer with the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted.

(3) Any marriage contracted before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of [number] months after that commencement.

(4) Any marriage contracted after the commencement of this Act must be registered within a period of [number] days after the conclusion of the marriage or within such longer period as the [relevant state authority] may from time to time prescribe.

(5) The district registrar or the local registering officer must, if satisfied that the spouses contracted a valid marriage, register the marriage, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, and immediately issue to the spouses a certificate of registration bearing the prescribed particulars.

(6) A certificate of registration of a valid marriage issued under this section or any other law providing for the registration of marriages constitutes proof of the existence of the marriage and of the particulars contained in the certificate.\(^{146}\)

Article 21. Consequences of non-registration

(1) Failure to register a marriage does not affect the validity of that marriage.\(^{147}\)

(2) If for any reason a marriage is not registered, any person who satisfies the [relevant court] that he or she has a sufficient interest in the matter may apply to the [relevant court] in the prescribed manner to enquire into the existence of the marriage.

(3) The [relevant court] may, at any time upon application made to that court and upon investigation instituted by that court, order the registration of a marriage by the district registrar, upon being satisfied that the essential conditions of marriage have been met and that a valid marriage exists or existed.

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\(^{146}\) The wording of this section is derived from s. 4 of South Africa, Recognition of Customary Marriages Act of 1998.

Commentary: Articles 19–21
Unregistered marriages may not be recognized as marriages for legal purposes and may render it difficult for people who are married to claim property or maintenance rights connected to marriage. This is of particular importance for customary marriages where the validity of a spousal relationship may be questioned because of the different practices and traditions that may exist under customary laws. Registration of marriage provides a marriage certificate, which can be used as evidence of a union. Registration of marriages also provides a means to oversee the fulfillment of the essential conditions.

Research has indicated that women may wish to register their marriages so that they can secure full legal protection within marriage, and that women who are able to register their marriages generally feel more secure and empowered. However, registration of customary marriages has posed particular difficulties in some jurisdictions, a fact reflected in low compliance with registration requirements. Because customary marriages in many African countries have only recently gained formal recognition, the registration regimes were tailored mostly to registration of civil or religious marriages, and there has been little to no registration of customary marriages to date. As has been noted by the Law Reform Commission of Tanzania, “Research has revealed that most of the problems that are blamed upon the institution of customary law marriages are in fact caused by ineffective control of the practice stemming from non-registration and poor administration of these marriages.”

The U.N. Human Rights Committee has expressed concern about unregistered marriages, noting “the deprivation of rights that women and children experience as a consequence, in particular with regard to inheritance and land ownership.” Accordingly, the Committee recommended “effective measures to encourage registration of customary marriages and to grant the spouses and children of registered customary marriages the

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148 For example, the wife of an unregistered customary marriage may have difficulty accessing property on the death of her husband, especially in communities where customary inheritance laws are discriminatory towards women: South African Law Reform Commission, Project 90 (supra), para. 4.5.1; LAC, Proposals for Law Reform (supra), paras. 9.21–9.23. While some judges in Zimbabwe have allowed individuals whose marriages are not registered to benefit from each other’s estates upon separation or death through the notion of unjust enrichment or “tacit universal partnership,” there is a lack of judicial consensus on the appropriateness of either of those two principles as a basis for effecting a division of assets between parties to an unregistered customary union: Law Development Commission of Zimbabwe, Division of Property on Dissolution of Unregistered Customary Unions, 2002.

149 South African Law Reform Commission, Project 90 (supra), para. 4.5.9; Centre on Housing Rights and Evictions (COHRE), Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women, 2004, p. 120.

150 See South African Law Reform Commission, Project 90 (supra); LAC, Proposals for Law Reform (supra).

same rights as those married under civil law.” As well, the CEDAW Committee has stated,

States Parties should … require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy, and the protection of the rights of children.

There is no consensus on the best practice to ensure registration of marriages. Some countries require marriages to be registered by the spouses, others by the marriage officiator. Of the two options featured in Article 20, requiring the marriage officiator, rather than the spouses, to register marriages may ultimately be more protective of women, as it removes the onus of registration from the couple, who may be constrained by finances or geography from registering themselves. Research in South Africa has indicated that where spouses have the responsibility to register their marriage, men are often reluctant to do so due to insufficient incentives.

Placing the onus of registration on both spouses may circumvent the lack of control that women currently have over the process of registration. Nevertheless, creating a legal obligation on spouses to register their marriage may cause difficulties where there is insufficient infrastructure for registration. A commonly identified problem with registration is that the registering officer is too far removed from where marriages are normally contracted. Marriages contracted under customary law are often performed in remote locales that are not readily accessible to registration authorities. If the obligation to register a marriage is placed on the parties, “these marriages more often than not become [a] secret affair, as far as the state authorities are concerned.” This difficulty may be partially mitigated by the immediate issuing of a marriage certificate upon registration so couples need not return to the registration office to retrieve the certificate.

Although registration should be required by law, failure to register should not affect the validity of the union nor should other penalties be imposed on couples for non-registration. Rendering unregistered unions void would deprive many existing

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152 U.N. Human Rights Committee, “Concluding Observations: Namibia,” U.N. Doc. CCPR/CO/81/NAM, 81st Session, 30 July 2004, para. 9. The low compliance with registration regimes in sub-Saharan Africa also reflects the need for public education campaigns to disseminate both the requirements for registration and the location of local registering officers.

153 CEDAW Committee, “General Recommendation No. 21” (supra), para. 39.


156 Ibid, p.17.

157 See COHRE, Bringing Equality Home, p. 63, discussing a 1991 amendment to Ghana’s Customary Marriage and Divorce (Registration) Law of 1995, making registration optional instead of mandatory in
marriages of their validity, as well as create undue hardship for individuals who do not know about the registration requirement or who are under pressure not to register their marriage. Widows and their children could be unfairly penalized in terms of not being able to access property, inheritance and other rights.\textsuperscript{158} Registration of marriage, therefore, should be encouraged and required, but there should be no legal ramifications for failure to register. However, after the expiry of a specific time period for registration, registration of any marriage should be carried out through an application to a court, rather than through the district registrar. This is to ensure that the registrar is not burdened with the task of seeking the evidence required to determine the validity of marriages contracted considerably earlier.

D. Regulation of the Marriage Relationship

\textbf{NOTE:}

Marital powers are clear violations of women’s rights to equality and non-discrimination. The following provisions abolish marital powers and guarantee the full legal capacity of women.

\begin{center}
\textbf{Article 22. Full legal capacity of women}
\end{center}

A woman in any form of marriage has full legal status and capacity, including capacity to own and inherit property and to acquire assets and to dispose of them, to enter into contracts (including to obtain credit) and to litigate, in addition to any other rights she might have under civil, customary or religious law.\textsuperscript{159}

\begin{center}
\textbf{Optional (for countries that recognize marital powers): Article 23. Abolition of marital powers}
\end{center}

(1) The common law or statutory rule according to which a husband obtains marital powers over the person and property of his wife is repealed.

\textsuperscript{158} This is illustrated by the 1995 Zimbabwean case \textit{Katiyo v. Standard Chartered Zimbabwe Pension Fund}, (1995 (1) ZLR 225 (HC), in which a widow was denied access to her deceased husband’s pension fund because her customary marriage was never registered. See also, the case of \textit{Singh v. Ramparsad} (KZN 564/2002) [2007] ZAKZHC 1 (22 January 2007) (South Africa, High Court), in which the defendant husband had refused, for the duration of his marriage to the plaintiff, to register the marriage and claimed he was not “legally” married to the defendant upon separation. The plaintiff sought an order declaring provisions of the South African marriage and divorce legislation unconstitutional, as they did not recognize unregistered religious marriages as legally valid. The Court held that the legislation was constitutional because it applied to all South African couples, it respected couples’ right to marry in accordance with their own religious rituals, and the registration requirement was reasonable.

\textsuperscript{159} This language is drawn from s. 6 of South Africa, \textit{Recognition of Customary Marriages Act of 1998}. 

light of concerns about those who were unable to benefit from protections that depended on the registration of marriage.
(2) Any marital powers which a husband has over the person and property of his wife
prior to the date of coming into operation of this provision is hereby abolished.160

Article 24. Equal status of spouses in management of the family

(1) The spouses shall have equal rights in the management of the family under all forms
of marriage, notwithstanding any custom to the contrary, including:

(a) joint and equal parental authority over any minor or dependent children of the
marriage; and
(b) joint and equal authority over the matrimonial home.161

Article 25. Duties to maintain spouse and children
during marriage

(1) Spouses have a reciprocal duty concerning maintenance of one another, and share the
obligation to maintain their minor and dependent children.

(2) For further clarity, the duty of the spouses to maintain their minor and dependent
children is identical for children born in and out of marriage.

(3) The determination of responsibility for maintenance during the marriage depends,
inter alia, upon the capacity of the spouses and the needs of the family.

(4) Non-monetary contributions, including contributions made by looking after the
home, caring for the family or performing other domestic duties should also be taken
into account when determining a spouse’s contribution to the maintenance of one
another and the family.

(5) Upon failure of the responsible party to adequately maintain his or her spouse, an
aggrieved spouse may apply to the [relevant court] for an order directing payment or
providing direct payment from the responsible spouse’s employment.

Commentary: Articles 22–25

In some countries, civil or customary laws support “marital powers,” whereby a husband
gains legal control over his wife and any marital property. This practice entrenches the
“repugnant notion that women should not be allowed to acquire and hold land and

160 See also, s. 5 of Botswana, Abolition of Marital Power Act of 2004, which provides, “The effect of the
abolition of marital power is to remove the restrictions which the marital power places on the legal capacity
of a wife and abolishes the common law position of the husband as head of the family."

161 This article is derived in part from Ethiopia, Revised Family Code of 2000, s. 54.
housing in their own right, on the grounds that they are helpless to administer it without their husbands.”

The U.N. Human Rights Committee has stated, “During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets.” Marital powers violate married women’s rights to equality, non-discrimination and self-determination; their rights to own property, to the highest attainable standard of health, and to liberty and security of the person; and their rights to be free from degrading treatment, and from slavery and servitude. Marital powers have also been found to violate an individual’s rights to human dignity, life, freedom of trade, occupation, profession and housing. Where marital powers are exercised to prevent women from travelling, such as requiring adult women to obtain the consent of a third party prior to the issuance of a travel document, the U.N. Human Rights Committee has described marital powers as a restriction on “women’s right to freedom of movement.”

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162 COHRE, Bringing Equality Home (supra), p. 46.
163 U.N. Human Rights Committee, “General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23),” para. 8. The CEDAW Committee has also suggested marital powers are discriminatory, and recommended the amendment of a provision in Burundi’s Code des Personnes et de la Famille indicating that the man is the “head of the household”: CEDAW Committee, “Concluding Comments: Burundi,” 40th Session, CEDAW/C/BDI/CO/4, 8 April 2008, para. 12.
164 In particular, marital powers violate art. 16 of the CEDAW, which requires states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. In Moaki v. Moaki and Others (CIV/APN/279/86) [1986] Lesotho High Court 117 (1 October 1986), marital powers were used to justify the male applicant’s right to determine where his wives could live; and in Elizabeth Gumedze (born Shanga) v. President of the Republic of South Africa and Others, Case CCT 50/08 [2008] ZACC 23, 8 December 2008, the South African Constitutional Court held that the codified customary law of marriage in KwaZulu-Natal, which subjected a woman married under customary law to the marital power of her husband, was discriminatory on the ground of gender.
Module 2: Domestic Partnerships

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Prefatory Note

Women, domestic partnerships and HIV/AIDS

Because of growing poverty, the devastation of HIV, evolving social customs and increasing urbanization, domestic partnerships will continue to increase as more couples enter a second union, cannot afford to marry, or simply do not want to enter into formal marriages. In South Africa, some commentators have noted that a primary reason for the prevalence of such relationships is the extent of migrancy in the country. In some cases, informal unions may be followed by formal marriage, or may gradually evolve into a relationship which is viewed by the community as having an equivalent status to a formal marriage. Despite the increasingly common formation of informal domestic partnerships in many countries, they remain unregulated for the most part. Partners in established but non-formalized relationships are therefore excluded from both the rights and obligations of marriage, despite the reality that such relationships often function in a similar manner to traditional marriages. Domestic partners, like some married spouses, may share accommodations, pool resources, depend on each other for emotional and financial support, and raise children. Some domestic partners become financially dependent on their partner, similar to some married spouses. Consequently, domestic partners often suffer hardships upon the breakdown of such relationships similar to those

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1 Centre on Housing Rights and Evictions (COHRE), Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women, 2004, p. 175; South African Law Reform Commission, Project 118: Report on Domestic Partnerships, 2006 [hereinafter Project 118: Report], pp. 3–6. In Namibia, for example, approximately 30 percent of the population is married, while a significant 12–15 percent are living together without being formally married under either customary or civil law. In South Africa, 2.3 million individuals described themselves as “living together like married partners” in a 2001 Census. See Legal Assistance Centre of Namibia (LAC), Proposals for Law Reform on the Recognition of Customary Marriages, 1999, p. 34; The (South African) Alliance for the Legal Recognition of Domestic Relationships, Submission to the Department of Home Affairs on the Draft Domestic Partnerships Bill, 2008, 15 February 2008, p. 2. Significantly, one study of cohabiting couples in Canada revealed that cohabitation (rather than marriage) in many cases was not a realistic choice, and that many couples cohabited because they had no other option (many were from low-income backgrounds, and had moved in together after an unexpected pregnancy or in an attempt to reduce living costs). In the author’s view, the degree of choice partners actually possessed was constrained by the options realistically available to them, given economic and social realities, as well as personal beliefs and preferences: C. Smart, “Stories of family life: cohabitation, marriage and social change,” Canadian Journal of Family Law 17 (2000): 20–53.


3 For the purposes of this commentary, “domestic partnership,” “informal union” and “cohabitation” are used interchangeably.

4 LAC, Proposals for Law Reform (supra), p. 34.

spouses experience upon the termination of their marriage. Unlike those in formal marriages however, domestic partners have few legal protections and may be excluded from property that was acquired or shared over the duration of the union, from a duty of support or from inheriting intestate.6

With respect to HIV, there is some epidemiological evidence to suggest that women in domestic partnerships may be subject to a higher risk of HIV infection than married women.7 A study conducted in Rwanda found that women in informal unions had significantly higher HIV seroprevalence rates than women in either polygamous or monogamous marriages.8 In a subsequent study conducted in Tanzania, cohabiting women also had a significantly higher risk of HIV infection than married women.9 While at least one study has revealed that cohabiting men and women are more likely to use condoms than those who are married,10 studies in Kenya, Uganda and Zambia have revealed that women in informal unions are more likely to report multiple partners compared to married women cohabitating with their husbands.11 These findings support the notion that marriage generally conveys greater sexual exclusivity than informal unions.

Though there are likely a multitude of reasons for the linkage between heightened HIV risk and informal unions, one contributing factor may be women’s need or desire to gain

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6 In Gambia, for example, “[t]he law does not recognize or offer any protection to a woman who cohabits with a man. There is no legal obligation that exists between them; they are regarded as mere companions. This means that the man can get rid of the woman at any time. Where the man dies the woman is not entitled to inherit [from] him”: Committee on the Elimination of Discrimination Against Women (CEDAW Committee), “Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Initial, Second and Third Periodic Reports of States Parties: Gambia,” CEDAW/C/GMB/1-3, 10 April 2003, pg. 43. See also, COHRE, Bringing Equality Home (supra), p. 175.

7 Given that marriage and informal unions are often not easily distinguishable in sub-Saharan Africa, many studies collapse this distinction, with consequently few studies examining the differentials in HIV prevalence or risk factors between the two. For example, “undeclared” customary marriages are considered common law marriages in Côte d’Ivoire. A common law marriage is a de facto household that is not regulated by Côte d’Ivoire’s law: F. Kaudjhis-Offoumou, Des Droits de la Femme en Côte d’Ivoire, 1996. For a discussion of the linkages between HIV and marriage, see Module 1 “Marriage.”


additional financial support as a result of having limited access to their partners’ income. This need may be exacerbated where domestic partnerships are not regulated and women in those relationships have no access to property during the relationship, or property and maintenance if the relationship comes to an end. Research conducted in South Africa, for example, revealed that many poor women had little choice over the form of the relationship they were in or the financial arrangements; many wanted to marry but their male partners refused, “knowing that they would not be obliged by the law to ‘share’ any of their assets or income.”

Giving formal recognition to domestic partnerships and enacting provisions for property and maintenance may help address the economic vulnerability many women find themselves in once the relationship ends. While courts may render progressive judgments that are favourable to women even in the absence of laws recognizing domestic partnerships as marriage-like relationships, reliance on piecemeal decisions by progressive judges obviously does not guarantee women’s access to property or maintenance.

**Women, domestic partnerships and human rights**

The absence of structured and legislated protection for the parties to a domestic partnership disproportionately affects women. Because women are more often in a weaker bargaining position and subject to discrimination in many aspects of their intimate relationships, women in domestic partnerships may be in a vulnerable economic and social position during their relationship. As one commentator has noted, “The lack of legal protection afforded to domestic partnerships increases the vulnerability of [women and children] living within such arrangements.” In addition, women may be left in a vulnerable economic and social position if their relationship ends. For example,

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13 In Kenya, where there is no law governing domestic partnerships, courts have applied common law to resolve such cases. In the precedent-setting cases of Peter Hinga v. Mary Wanjiku, Civil Appeal No. 94 of 1977, Hortensia Wanjiku Yawe v. Public Trustee, Civil Appeal No. 13 of the 1976 and Stephen Mambo v. Mary Wambui, Civil Appeal No. 3 of 1976, the court held that a presumption of marriage required an unspecified “reasonable period” of cohabitation, which is reinforced should there be any children born as a consequence of that relationship, principles that were affirmed in the subsequent decision in Esther Njeri Wanjenga v. Joseph Mwangi Mathaga Alias Justus Ndirangu [High Court Case No. 1548 of 2002]: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Initial, Second and Third Periodic Reports of States Parties: Kenya,” CEDAW/C/KEN/6, 16 October 2006. In contrast, a court in a previous Kenyan case, Mary Njoki v. John Kinyanjui Mutheru & Ors, Civil Appeal No. 21 of 1984, rejected an appellant’s claim to the deceased’s property despite their cohabitation because it held cohabitation had to be accompanied by an attempt to carry out some ceremony or ritual required under customary law, which was affirmed in Machani v. Vernoor [1985] KLR 859.

14 As the Women’s Legal Centre of South Africa noted, “Until women’s political, social and economical standing improves, legal protection of domestic partners is necessary, because without legal protection, women’s poverty will be perpetuated”.

15 B. Goldblatt, “Regulating domestic partnerships” (supra), at 611.
women may be at risk in regard to the division of assets of their former relationship. Accordingly, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has voiced its concerns in at least two jurisdictions where the rights of women in cohabitation remain unprotected by the legal system.

Various international human rights instruments offer potential for the protection of women’s human rights in domestic partnerships. For example, under the International Covenant on Civil and Political Rights (ICCPR), states are obligated to guarantee women’s right to equality before the law, a right that is also recognized in numerous other regional and international treaties. Under the International Covenant on Social, Economic, and Cultural Rights (ICESCR), states are obliged to take steps towards the progressive realization of women’s rights to an adequate standard of living for themselves and their families, and to the highest attainable standard of health. The rights to an adequate standard of living and to health are particularly relevant to the issue of domestic partnerships because women in unregulated domestic partnerships may have no right to the family home during the relationship or rights to property, maintenance or inheritance if the relationship ends. This lack of protection may leave those women with few means to ensure a livelihood, affecting their ability to secure food, water and sanitation necessary for survival and to live with dignity in a safe and secure home free from violence.

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Obligations contained in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) are also relevant to the situation of women in domestic partnerships — such as the obligation on states parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations,” and to give women equal rights to own and administer property.\(^{20}\) As the CEDAW Committee has stated, “The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people…”\(^{21}\) Moreover, the CEDAW Committee has noted, “[G]enerally a de facto union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law.”\(^{22}\)

Correspondingly, the *International Guidelines on HIV/AIDS and Human Rights* (Guidelines) call for the review and reform of laws to ensure women’s equality in “marital relations” and regarding property, so as to reduce women’s vulnerability to HIV infection and to the impact of HIV and AIDS.\(^{23}\) The Guidelines also recommend that “in order to empower women to leave relationships … which threaten them with HIV infection … States should ensure women’s rights to, inter alia, legal capacity and equality within the family, in matters such as … inheritance, child custody, property and employment rights.”\(^{24}\) Arguably, the Guidelines support the recognition and protection of domestic partnerships because their objective is to reduce human rights violations against women in the context of HIV; and because women in domestic partnerships, as evidenced above, are particularly vulnerable to infection in part because of inequalities and discrimination in terms of property, maintenance and inheritance.

Some regional treaties also include obligations which would, if interpreted substantively, be relevant to protecting women in domestic partnerships. For example, the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (Protocol on the Rights of Women in Africa) obligates states to “promote women’s access to and control over productive resources such as land and guarantee their right to property,”\(^ {25}\) and to ensure women’s right to “acceptable living conditions in a healthy environment.”\(^ {26}\) To fulfill the obligation to provide women with acceptable living

\(^{20}\) CEDAW, art. 16, 15(2) and 16(1)(h).


\(^{22}\) Ibid., para. 18.


\(^{24}\) Ibid., p. 86.

\(^{25}\) Protocol on the Rights of Women in Africa, art. 19(b) (“Right to Sustainable Development”).

\(^{26}\) Protocol on the Rights of Women in Africa, art. 16 (“Right to Adequate Housing”).
conditions, “States Parties shall grant to women, *whatever their marital status*, access to adequate housing.” [emphasis added]

### A. Criteria of Domestic Partnership

**NOTE:**
The following provisions provide two options for the definition of domestic partnership, in order to provide greater clarity in determining the relationships to which the provisions apply. A set of criteria are provided to ensure a holistic consideration of a number of factors defining the relationship.

#### Article 1. Definition of domestic partnership

/*Two options for Article 1 are provided below — 1A and 1B. One or the other should be selected, but not both.*/

**Option 1: Article 1A. Definition of domestic partnership with duration of relationship as a criterion**

(1) Two individuals shall be subject to the provisions set out in Articles 3 to 12 of this Act when they are in a domestic partnership for at least [period of time] without having contracted a valid marriage under the [relevant marriage legislation].

(2) In determining whether two individuals are in a domestic partnership, the criteria listed in Article 2 shall be taken into account.

**Option 2: Article 1B. Definition of domestic partnership without reference to duration of relationship**

(1) Two individuals shall be subject to the provisions set out in Articles 3 to 12 of this Act when they are in a domestic partnership without having contracted a valid marriage under the [relevant marriage legislation].

(2) In determining whether two individuals are in a domestic partnership, the criteria listed in Article 2 shall be taken into account.

#### Article 2. Criteria of domestic partnerships

(1) In determining whether two persons are in a domestic partnership, all of the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

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27 Ibid.
(a) whether the two persons live or lived together;
(b) the degree of emotional interdependence between the parties;
(c) the degree of financial dependence or interdependence, including any arrangements for financial support, between the parties;
(d) whether or not a sexual relationship exists or existed;
(e) the ownership, use and acquisition of their property;
(f) the degree of mutual commitment to a shared life;
(g) the care and support of any children of the current or past relationships;
(h) the performance of household duties;
(i) the public aspects of the relationship; and
(j) the duration of the relationship.

(2) **Optional additional text where Article 1A is selected:** With the exception of Article 2(1)(j) of this Act concerning the duration of the relationship, No finding in respect of any of the matters mentioned in Section (1), or in respect of any combination of them, is to be regarded as necessary for the existence of a domestic partnership, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(3) For further clarity, individuals need not represent themselves to third parties as being married in order to be recognized as domestic partners.

(4) A domestic partnership shall not, by itself, constitute a marriage or give rise to a presumption of marriage.

**Commentary: Articles 1 and 2**

Where countries have legislated in the area of domestic partnership, some have equated cohabitation with marriage through a rebuttable presumption of marriage, while others have chosen to define domestic partnership as a separate institution, with its own rights and obligations. In this publication, the domestic partnership regime applies

28 Most of these indicators are derived from s. 4 of New South Wales [Australia], *Property (Relationships) Act of 1984* and s. 169 of the Australian Capital Territory [Australia], *Legislation Act of 2001*.

29 For further clarity, the text in the brackets should be retained only where Article 1A (Definition of domestic partnership with duration of relationship as a criterion) is selected.

30 This section is derived from s. 4(3) of New South Wales, *Property (Relationships) Act of 1984*.

31 This provision is in contrast to the requirement in some jurisdictions for couples in a domestic partnership to “hold themselves out to the world as husband and wife,” which may, for example, be inappropriate for same-sex couples, given the realistic possibility of discriminatory treatment.


automatically to all couples who meet the threshold criteria for domestic partnership; there is no need for registration. Only in the event of a dispute about the presumed status of a relationship, be that during the relationship or upon termination of the relationship, would the matter of the relationship’s status be decided by a court, which would then evaluate the circumstances of the relationship according to Articles 1 and 2 to make a determination.

Under Option 1 (Article 1A), there is a requirement for individuals to be in a domestic partnership for a specified period of time before the domestic partnership law applies to them. This is intended to provide a clear and precise means of determining whether one is in a domestic partnership. The time period integrates some of the likely economic interdependence and mutual expectations that form over the course of enduring domestic partnerships. As one commentator has noted, “Any argument based on functional similarity between common-law couples and married couples gains force only as the period of cohabitation lengthens,” and a number of countries have implemented a system of domestic partnerships premised on a specific period of cohabitation.

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34 This is the case for example in some Canadian provinces, some Australian states and Sweden. See South African Law Reform Commission, Project 118: Report (supra), pp. 93, 198–199 and 234–235.


37 In several jurisdictions, including Canada, a “common law” marriage is a status (like domestic partnership) which may be legally recognized as a marriage even though no legally recognized marriage ceremony is performed or civil marriage contract entered into. Various rights and obligations may arise as a result of this status. According to Conway and Girard, it is reasonable to consider that a “commitment to exist” occurs at the three-year threshold, since “[s]ocial science evidence indicates that less than half of cohabitating relationships reach this point.” Empirical studies in Canada reveal that less than half of all cohabiting unions will last for three years, whereas 90 percent of all first marriages last for at least 10 years. Research in Australia reveals that 43.3 percent of cohabiting couples last for at least three years, 20 percent continue for a period in excess of five years and eight percent continue for more than 10 years. Similar research in sub-Saharan African has not been identified, and findings in other jurisdictions do not necessarily reflect the reality there: H. Conway and P. Girard, “‘No place like home’: the search for a legal framework for cohabitants and the family home in Canada and Britain,” Queen’s Law Journal 30 (2005): 715–771, para. 21, citing Zheng Wu, Cohabitation: An Alternative Form of Family Living, (Don Mills: Oxford University Press, 2000), p. 1; Law Reform Commission of New South Wales, Report 36 — De Facto Relationships, 1983, ss. 5.5–5.6.

38 In Mozambique, art. 202 of Lei de Familia of 2004 prescribes a requirement of one year. In Tanzania, s. 160(1) of the Law of Marriage Act of 1971 provides, “Where it is proved that a man and woman have lived together for two years or upwards, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.” In Eritrea, cohabitation for at least 10 years entitles the parties to access to “compensation”: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women,” Combined Initial, Second and Third Periodic Reports of States Parties: Eritrea,” CEDAW/C/ERI/1-2, 3 February 2004, p. 57. In Angola, a de facto union is when a woman and a man who have the capacity to marry have freely chosen to live together for more than three years and maintain exclusivity of the union: CEDAW Committee, “Consideration of
In contrast, Option 2 (Article 1B) provides the alternative of considering the length of the relationship as one of many factors to assess in determining whether a domestic partnership exists. This approach recognizes the often complex or non-conventional nature of domestic partnerships, which may in some cases be of shorter duration, but characterized nonetheless by significant emotional and financial interdependency.

Article 2 provides a list of indicators in determining whether two persons are in a domestic partnership. Cohabitation is a relevant indicator but not a requirement for domestic partnerships and couples who do not live together are not automatically excluded from the provisions governing domestic partnerships. The duration of the relationship is another relevant consideration under both options, so couples who have been in longer-term relationships (regardless of whether they have already satisfied the threshold period under Article 1A) have a better claim for the status of domestic partners. Where there is a dispute between couples about whether they are, or were, domestic partners, requiring courts to consider a number of relevant factors ensures a more holistic consideration of their needs and expectations.

To protect the economic interests of women in informal unions, the definition of domestic partnership does not rule out concurrent relationships (for example, a relationship involving two parties, one or both of whom is married), especially given the possibility that a domestic partner may not be aware of her or his partner’s concurrent relationship.

(Article 2, however, does not preclude jurisdictions such as those prohibiting polygamy, from refusing to recognize domestic partnerships where there are multiple relationships involved, and courts may opt to consider the existence of other relationships in their determination of whether a domestic partnership exists.) As the Women’s Legal Centre of South Africa has noted, “[D]ue to our history and migrancy, many men who come to work in urban areas get involved in domestic relationships, whilst having wives in the rural areas. Failure to acknowledge this reality and give protection to people in both these relationships will cause hardship for many women.”

Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Initial, Second and Third Periodic Reports of States Parties: Angola,” CEDAW/C/AGO/1-3, 7 November 2002, pp. 10–11. In South Australia, under the Domestic Partners Property Act of 1996, two people living together for at least three years, or an aggregate of three years over four years, are entitled to that law’s property provisions. For the purposes of spousal support, s. 29 of Ontario, Family Law Act of 1990 defines a common law relationship as “two persons who are not married to each other and have cohabited, continuously for a period of not less than three years.”

For example, in Molly Patricia Zulu v. Thandiwe Phylis Zulu and 2 Others, Case No. 17413/2005, 25 February 2008 (High Court of South Africa), the applicant was not aware of her deceased spouse’s previous marriage and had married him in a civil marriage. The court deemed her marriage bigamous and thus void despite 19 years of cohabitation. The applicant was denied any interest in their property after his death. See also, the recommendations of the Law Reform Commission of New South Wales, Report 36 (supra), ss. 17.14-17.17; Law Commission of the United Kingdom, Cohabitation: The Financial Consequences of Relationship Breakdown, 2007, s. 3.71.

Women’s Legal Centre, Domestic Partnership (supra). In one qualitative study in South Africa, one of three main types of cohabitation identified was a man with a “rural wife” who cohabits with a woman in an urban area in a long-term relationship. There are conflicting interests between the rural wife and the urban woman cohabitant over resources. Ongoing maintenance of the two households is “an area of conflict and
Critics of this provision may contend that it creates a conflict of rights between a lawful spouse and a domestic partner, and that the rights of the lawful spouse may be adversely and unfairly affected by the entitlement of the latter party, thereby undercutting the protection accorded to marriage and the rights of lawfully wedded spouses.

While this is a valid concern, the rationale underlying legal protection of individuals in domestic partnerships does not diminish in light of concurrent relationships. Where relationships are characterized by the criteria enumerated in Article 2, mutual rights and responsibilities should apply. In some cases, domestic partners may have had longer relationships and made greater contributions to family property than spouses. Significantly, a threshold needs to be met in order for a relationship to be classified as a domestic partnership; this threshold would exclude casual, short-term relationships with little financial or emotional interdependency, so as to discourage multiple competing claims for domestic partnerships. While it may be rare for a court to be satisfied that the concurrent relationships of a person satisfy the criteria of domestic partnership, the reality of lengthy separations between some spouses or partners suggests there may be cases where the criteria for domestic partnership are met. In these instances of recognized domestic partnership, the parties to the relationships should be protected where the relationships have led to economic dependency.

Defining domestic partnership in legal terms is a difficult exercise, and each criterion outlined in Article 2 will necessarily have different degrees of relevance in different jurisdictions. As the U.N. Human Rights Committee has noted, “[T]he concept of the family may differ in some respects from State to State, and even from region to region within a State, and … it is therefore not possible to give the concept a standard definition.” However, the Committee has also emphasized that, with respect to “unmarried couples and their children,” states parties should indicate “whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.” Given the health and human rights concerns associated with informal unions, states should strongly consider enacting provisions protecting couples in such relationships.

conflicts over property following separation (usually, when the man leaves the cohabitant) are common”: B. Goldblatt, “Regulating domestic partnerships” (supra), p. 613. According to the South African Law Reform Commission, “It is a social reality that married migrant workers, working in urban areas, often see their wives (who stay behind in the rural area) only once a year, but live with their urban partners for the rest of the year. These urban relationships may be stable and of long duration and often there are children born to them”: South African Law Reform Commission, Project 118: Report (supra), p. 92. See also, The (South African) Alliance for the Legal Recognition of Domestic Relationships, Submission to the Department of Home Affairs (supra), p. 2.

41 See again, the case of Molly Patricia Zulu v. Thandiwe Phylis Zulu and 2 Others (supra), in which the applicant had resided with the deceased for 18 years until his death but was denied access to marital property because they were not legally married. The deceased’s first wife, who had lived with the deceased for less than ten years and had ceased living with him before his second “marriage” was awarded half the deceased’s estate.


43 Ibid.
NOTE:
Because domestic partnerships do not necessarily have a definitive ceremony or event marking their beginning and end, there can be a significant amount of uncertainty surrounding them. The following mechanisms provide domestic partners with some options to define their relationships and the consequences of their domestic partnership, including after it ends.

Article 3. Domestic partnership agreements

(1) A domestic partnership agreement is a written agreement concluded between two persons:

(a) that is made in contemplation of their entering a domestic partnership, or while they are domestic partners;
(b) that makes provision with respect to the property of either or both of the parties, the maintenance of either or both of the parties and/or the financial resources of either or both of the parties; and
(c) that is signed by the parties to the agreement, in the presence of and signed by two witnesses;

whether or not it also makes provision with respect to other matters, and/or includes such an agreement that varies an earlier domestic partnership agreement.\(^{44}\)

(2) Nothing in a domestic partnership agreement affects the power of the [relevant court] to make an order with respect to the right to custody of, maintenance of, access to, or otherwise in relation to, any minor or dependent children of the parties to the agreement.

(3) On an application by a domestic partner, the [relevant court] may vary or set aside any one or more of the provisions of a domestic partnership agreement made between the domestic partners, where, in the opinion of the [relevant court]:

(a) the agreement was obtained through fraud, coercion, undue influence or domestic violence; or
(b) the circumstances of the domestic partners have so changed since the time when the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them, were to be enforced.\(^{45}\)

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\(^{44}\) This provision is derived from s. 44 of New South Wales, Property (Relationships) Act of 1984; and suggestions from The (South African) Alliance for the Legal Recognition of Domestic Relationships, Submission to the Department of Home Affairs (supra), p. 6.

\(^{45}\) This provision is derived from s. 49 of New South Wales, Property (Relationships) Act of 1984.
Commentary: Article 3

In jurisdictions without a legal framework governing domestic partnership, rights and responsibilities between domestic partners can be determined by contract. Permitting domestic partnership agreements allows individuals who have the means to do so to determine the financial consequences of their relationship (for example, property ownership and maintenance) and respects their freedom to contract. In addition, where domestic partnerships are regulated, if couples do not wish to be governed by a default property regime, the possibility of concluding a domestic partnership agreement allows them to opt out of the default regime. Concluding a domestic partnership agreement may also encourage couples to consider more carefully the financial implications of their relationship, particularly if their decision is to opt out of the default property regime by contract.

As with all contracts, a contract concluded at the outset of a relationship may fail to make provision for changed circumstances, or it may be framed in a way which makes it difficult to adapt it to the changing circumstances of the union, such as the birth of children. Moreover, domestic partners may not bargain on an equal footing, or the terms of an agreement may be concluded as a result of fraud, coercion, undue influence or domestic violence that is in the financial interest of the economically stronger partner (usually the man). Therefore, Article 3(3) allows a court to vary or set aside any one or more of the provisions of a domestic partnership agreement in cases of serious injustice and where fraud, coercion, undue influence or domestic violence was involved.

Article 4. Declaration of domestic partnership

(1) A person who alleges that he or she is or was in a domestic partnership with another person may apply to the [relevant court] for a declaration as to the existence of a domestic partnership between the persons.

(2) If, on an application under Section (1), it is proved to the satisfaction of the [relevant court] that the two persons are or were in a domestic partnership, the [relevant court] may make a declaration that persons named in the declaration are or were domestic partners, and include the date on which the domestic partnership began, or period during which the domestic partnership existed.

(3) If the applicant or the person alleged to be the applicant’s domestic partner is aware of another person with an interest in the making of a declaration under Section (2), in particular either person’s spouse or domestic partner, he or she shall disclose this person to the [relevant court] in order for that person to be given an opportunity to be so present or represented at the hearing.

(4) A declaration may be made under Section (2) whether or not the person named by the applicant as a domestic partner is alive.

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(5) If, on the application of any person who is affected by a declaration made under Section (2), it appears to the [relevant court] that:

(a) new facts or circumstances have arisen that have not previously been disclosed to the [relevant court]; and
(b) could not by the exercise of reasonable diligence have previously been disclosed to the [relevant court];

the [relevant court] may make an order annulling the declaration.

(6) A declaration which has been annulled pursuant to Section (5) shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.47

Commentary: Article 4
Article 4 outlines the procedures for a declaration of domestic partnership. As discussed above, the domestic partnership regime applies automatically to all couples who meet the threshold criteria for domestic partnership. A declaration is not necessary to establish a domestic partnership, but does provide the advantage of having a court-sanctioned record that, for all purposes, the persons named in the declaration are presumed conclusively to be or have been living in a domestic partnership at the specified date or for the specified period.

Optional: Article 5. Registration of domestic partnership

(1) Any two persons who are both 18 years of age or older may register their relationship as a domestic partnership as provided for in this Article (optional additional conditions where polygamy is prohibited: provided that neither party is:
(a) already a partner to a registered domestic partner; or
(b) already married).48

(2) A registration officer must conduct the registration procedure in the manner provided for in this Article.

(3) The prospective domestic partners must individually and in writing declare their willingness to register their domestic partnership by signing the prescribed documents in the presence of the registration officer.

(4) The registration officer must sign the prescribed documents to certify that the declaration referred to in Section (3) was made voluntarily and in his or her presence.

47 This provision is derived from s. 56 of New South Wales, Property (Relationships) Act of 1984.
48 For further clarity, the text in parentheses should be retained only where polygamy is prohibited.
(5) The registration officer must indicate the existence of a domestic partnership agreement, where applicable, on the registration certificate.

(6) The registration officer must issue the partners with a registration certificate stating that they have registered their domestic partnership and, where applicable, attach a copy of the domestic partnership agreement to the registration certificate.

(7) The registration certificate issued by the registration officer is _prima facie_ proof of the existence of a registered domestic partnership between the parties.

(8) When a registered domestic partnership terminates upon:

(a) the death of one or both registered domestic partners;
(b) mutual agreement, which may be provided for in a termination agreement; or
(c) court order, upon application by one or both registered domestic partners;\(^49\)

the parties to the registered domestic partnership must notify the registration officer of the termination.

(9) Each registration officer must keep a register of all registration of domestic partnerships conducted by him or her, indicate the existence of a domestic partnership agreement, where applicable, in the register and remove from the register domestic partnerships that have been terminated pursuant to Article 5(8).\(^50\)

**Commentary: Article 5**

Some jurisdictions have instituted a system of “opt-in” registration of domestic partnerships in which parties need to be registered to obtain legal protection, thus requiring parties to take specific steps to formalize their relationship.\(^51\) The “opt-in” approach has been criticized because it does not provide a real solution to those individuals who wish to register their relationships but are not able to convince their partners to do so.\(^52\) Therefore, an “opt-in” registered partnership model is unlikely to be significantly more accessible to some partners than marriage would be, because such partners would presumably remain in unregistered relationships despite the availability of a registered partnership. An “opt-in” system may be also perceived as overly cumbersome, especially for many couples in the early stages of their domestic partnership who are not prepared to contemplate the consequences of possible

\(^49\) This article is derived from s. 12 of South Africa, *Domestic Partnerships Bill of 2008*.

\(^50\) This article is derived from s. 6 of South Africa, *Domestic Partnerships Bill of 2008*.


breakdown.\textsuperscript{53} Unlike “opt-in” registration, which requires the agreement of both parties to the relationship, Article 4 enables either party to a relationship to apply for a court declaration of their domestic partnership should he or she wish to have a state-sanctioned record of their relationship.

While a system of registration could be established which does not preclude the application of domestic partnership law to those who do not register, it is likely that many domestic partners will not contemplate registration because it is a bureaucratic measure they may wish to avoid. Nevertheless, there may be cases where couples do wish to register their domestic partnership during their relationship, especially if this is a straightforward and inexpensive option; and where couples wish to ensure their rights are protected and wish to avoid a subsequent dispute requiring costly and time-consuming court intervention. For this reason, an optional additional provision is provided for the establishment of a system of registration of domestic partnerships. Under optional Article 5, both parties to the relationship must be over 18 years of age. In jurisdictions where polygamy is prohibited, additional optional provisions are provided prohibiting the registration of concurrent relationships (be they marriage or another domestic partnership).

\section*{B. Rights and Responsibilities of Domestic Partnership}

\textbf{NOTE:}
To facilitate domestic partners’ access to an adequate standard of living and housing, the following provisions set out (a) mutual obligations with respect to maintenance; and (b) a right to the occupation of the family home.

\begin{samepage}
\textbf{Article 6. Duty to maintain domestic partner and children during relationship}

(1) Domestic partners have a reciprocal duty concerning maintenance of one another, and share the obligation to maintain their minor or dependent children.
\end{samepage}

\textsuperscript{53} South African Law Reform Commission, \textit{Project 118: Report} (supra), p. 121. Nevertheless, one possible advantage of the “opt-in” registration approach suggested by the South African Law Reform Commission was that couples would “be forced to consider whether any prior relationships have been properly terminated before being allowed to formally initiate a new relationship.” In its view, “[A] couple in a presumed domestic partnership may only be forced to consider the question whether either of them is still married to a third party at the point when the subsequent domestic partnership breaks up. Both parties in such a relationship are vulnerable to the unfavourable legal outcome. For example, since the previous marriage was not terminated in law, the former spouse still has all the legal rights of marriage and may lay claim to goods in which the domestic partners may have expected to have sole title. The Court would be called upon to settle the dispute. If the enabling legislation prescribes that the outcome of the case must be decided on an equitable basis, the Court may rule in favour of the second relationship if the marriage has, for all practical purposes, ceased to exist and the second relationship has all the qualities of a marriage”: South African Law Reform Commission, \textit{Project 118: Report} (supra), p. 95.
(2) Maintenance means the responsibility of each domestic partner to provide for the other partner’s living expenses which depend, *inter alia*, upon the capacity of the domestic partners and the needs of the family.\(^{54}\)

**Article 7. Right of occupation of family home**

(1) The “family home” means the building(s) or part of a building in which the domestic partners ordinarily reside together and includes:

(a) household goods and furnishings used in relation to the residence; and
(b) the surrounding residential land.\(^{55}\)

(2) Each domestic partner has an equal right to occupy the family home during the existence of the domestic partnership, irrespective of which of the domestic partners owns or rents the property, subject to the provisions of the [relevant domestic violence legislation] and any protection orders issued pursuant to that.\(^{56}\)

(3) The domestic partner who owns or rents the family home may not evict the other domestic partner from the family home during the existence of the domestic partnership.\(^{57}\)

**Commentary: Articles 6 and 7**

Whatever the expectations of the parties may have been at the beginning of the relationship, it is unfair to ignore the interdependencies and vulnerabilities that in fact arise. In many long-term relationships, expectations may differ between the two parties and may change over time. However, if a domestic partner wishes to argue that he or she should not presumptively have any obligations to his or her domestic partner during or at the end of the relationship, he or she should have the onus of proving that this was the clear expectation of both parties, and that it was reflected in a contract. Where there is no explicit contract, relationships that meet the threshold of domestic partnership should imply consent to mutual rights and responsibilities.\(^{58}\)

\(^{54}\) This provision is derived, in part, from s. 1 of South Africa, *Domestic Partnerships Bill of 2008*.

\(^{55}\) This provision is derived, in part, from s. 1 of Tanzania, *Law of Marriage Act of 1971*, defining the matrimonial home.


\(^{57}\) Sections (2) and (3) are derived from s. 11 of South Africa, *Domestic Partnerships Bill of 2008*.

Because domestic partnerships remain unregulated, in many countries the legal obligations of one domestic partner towards the other are uncertain. Articles 6 and 7 clarify some of these rights and responsibilities. The provisions set up a framework of mutual responsibility that is not conditional on formalities such as registration or a written contract of partnership. This is especially important in contexts where a significant proportion of the population, and particularly women, has little knowledge of the law and no easy access to registries or courts.59

A lack of maintenance or of secure access to the family home may render women in domestic partnerships socially and economically vulnerable. In many cases, domestic partnerships already involve express or tacit undertakings to provide emotional and material support.60 In these relationships, couples share everything that they earn or bring into the relationship.61 However, a qualitative study revealed that in cases of domestic partnerships where women had no income and their male partners had some, the male partners would control their income tightly, so that many women were financially dependent on their male partners, with “little power to access, both during and after the dissolution of the relationship, a significant share of the property and money in the partnership.”62 In the author’s view, the lack of legal protection of cohabitation contributed to women’s financial insecurity in those relationships.63 While a legal provision explicitly requiring a reciprocal duty of maintenance between domestic partners may not bestow upon financially vulnerable partners any additional control over money or property, it does stipulate a “duty to maintain” each partner in a domestic partnership. Thus, domestic partners have a right to, at minimum, some reasonable support from their partner, where funds are available.

Correlatively, inequalities in terms of women’s access to property may result in their exclusion from their homes.64 Even where domestic partners keep their economic lives separate, the one area in which they must co-operate is with regard to their shared home, especially if there are children concerned.65 Without a legislative provision stipulating otherwise, a domestic partner does not have the statutory possessory rights that a married spouse has to occupy the family home. Moreover, allowing women to be evicted from their homes by virtue of the fact that they are not the legally registered owners subjects

61 B. Goldblatt, “Regulating domestic partnerships” (supra), p. 615.
62 Ibid.
63 Ibid.
64 For example, the family home may be registered solely in the male partner’s name, making the process by which a woman may prove her interest in that home onerous and uncertain: S. Chirawu, “Till death do us part: marriage, HIV/AIDS and the law in Zimbabwe,” Cardozo Journal of Law & Gender 13(1) (2006): 23–50, at 47.
65 H. Conway and P. Girard, “ ‘No place like home,’ ” (supra), para. 21.
some women to insecurity, vulnerability, poverty and sexual violence. Therefore, Article 7 prohibits one domestic partner from evicting the other from the family home during the relationship.

As discussed above, the ICESCR obligates states to take steps towards the progressive realization of women’s rights to an adequate standard of living for themselves and their families, and to the highest attainable standard of health. According to the U.N. Committee on Economic, Social and Cultural Rights, the human right to adequate housing is “derived from the right to an adequate standard of living” and is “of central importance for the enjoyment of all economic, social and cultural rights.” Similarly, to fulfill their obligation to realize women’s right to “acceptable living conditions in a healthy environment,” the Protocol on the Rights of Women in Africa urges states parties to “grant to women, whatever their marital status, access to adequate housing.” The Committee on Economic, Social and Cultural Rights has stated that the right to adequate housing is “the right to live somewhere in security, peace and dignity,” which includes security of tenure. It has also stipulated that “[t]he right to adequate housing applies to everyone…. Thus, the concept of ‘family’ must be understood in a wide sense.” In particular, the Committee has recognized that women suffer disproportionately from the practice of forced eviction, “given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and [women’s] particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”

**NOTE:**

To ensure women share in the property, assets and income acquired in the course of a domestic partnership, the following provisions stipulate accrual as the default property regime for domestic partnerships and allow courts to vary the proprietary consequences of a domestic partnership in certain circumstances.

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69 Protocol on the Rights of Women in Africa, art. 16.

70 U.N. Committee on Economic, Cultural and Social Rights, “General Comment No. 4: The Right to Adequate Housing (Article 11(1))” (supra), para. 7.

71 Ibid., para. 6.

72 Ibid., para. 10.
Article 8. Default property regime for domestic partnerships

(1) Without prejudice to a domestic partnership agreement described in Article 3, when the domestic partnership ends, property acquired during the domestic partnership shall be considered to be held in accrual as set out in the [relevant marital property legislation].

(2) For further clarity, the default property regime for domestic partnerships described in Section (1) does not preclude domestic partners from contracting any of the other property regimes set out in the [relevant marital property legislation].

Article 9. Variation of property consequences of domestic partnership

[Two options for Article 9 are provided below — 9A and 9B. One or the other should be selected, but not both.]

Option 1: Article 9A. Variation of proprietary consequences of domestic partnership where multiple relationships permitted

(1) Where any person, in particular any other spouse or domestic partner of either of the domestic partners, whose interests would, in the opinion of the [relevant court], be affected by the proprietary consequences of a domestic partnership, the [relevant court] may, on application by that person, vary or set aside the proprietary consequences of the default property regime, the property regime elected or the domestic partnership agreement, where it would lead to serious injustice if those proprietary consequences were to be enforced, and make an order that it regards as just and equitable in the circumstances.73

(2) For further clarity, the existence of a concurrent civil, customary or religious marriage or domestic partnership does not preclude domestic partners from access to property or maintenance when the domestic partnership ends.

(3) In its decision to vary or set aside the proprietary consequences of a domestic partnership as set out in Section (1), the [relevant court] shall take all the circumstances of the domestic partnership into account, including the factors enumerated in Article 2 of this Act, as well as the existence of a concurrent marriage or domestic partnership.

73 Part of this section is derived from s. 29(3)(c) of South Africa, Domestic Partnerships Bill of 2008.
Option 2: Article 9B. Variation of proprietary consequences of domestic partnership where multiple relationships not permitted

(1) Where any person whose interests would, in the opinion of the [relevant court], be affected by the proprietary consequences of a domestic partnership, the [relevant court] may, on application by that person, vary or set aside the proprietary consequences of the default property regime, the property regime elected or the domestic partnership agreement, where it would lead to serious injustice if those proprietary consequences were to be enforced, and make an order that it regards as just and equitable in the circumstances.

(2) In its decision to vary or set aside the proprietary consequences of a domestic partnership as set out in Section (1), the [relevant court] shall take all the circumstances of the domestic partnership into account, including the factors enumerated in Article 2 of this Act.

Commentary: Articles 8 and 9 (both Article 9 options)
The practical result of establishing a permanent relationship for many domestic partners, as it is for many married spouses, is the sharing of a joint home and household goods. While some jurisdictions have allowed domestic partners to “opt-in” to the marital property schemes applicable to married couples, many jurisdictions have chosen not to create any proprietary obligations between domestic partners, premised on the view that people who choose not to marry are exercising their freedom of choice and may wish to keep their property separate. Yet in many domestic partnerships, women in long-term relationships may have made contributions, such as raising children, caring for elderly relatives, and discharging household duties, that are of a non-financial nature and which enabled her partner to earn an income and increase the family assets. Whatever the expectations of the parties may have been at the beginning of the relationship, it is unfair to ignore the interdependencies and vulnerabilities that in fact arise.

In the absence of a legislative framework for domestic partnership, property rights between domestic partners can be determined by contract, though it has been contended that is “reserved largely for the sophisticated, literate middle class.” The judiciary can also extend property rights to domestic partners through progressive judgments, but this

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74 See, for example, the “opt in” possibilities in the Canadian provinces of British Columbia and Nova Scotia, under British Columbia, Family Relations Act of 1996 and Nova Scotia, Law Reform (2000) Act, respectively. In the Netherlands, all provisions relating to marriage (such as provisions pertaining to property) are automatically applicable to registered partnerships.

75 This is the case, for example, in the U.K., most states in the U.S. and most African countries. See also, B. Goldblatt, “Regulating domestic partnerships” (supra), p. 615; and H. Conway and P. Girard, “‘No place like home’” (supra).

76 See N. Bala, “Controversy over couples in Canada” (supra), para. 25; G. Douglas et al, A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown, Cardiff University and the University of Bristol, 2007, para 10.3.

is also not an adequate replacement for legislation regulating domestic partnerships. Property disputes between domestic partners may be determined in accordance with legal principles that apply to disputes between strangers, taking no account of the intimate relationship between partners, and placing great emphasis on the formal title to disputed property. Courts may not be permitted to recognize substantial indirect or non-financial contributions made by one partner to the well-being of the family generally, or to the other partner, which has prompted calls for reform in at least one jurisdiction. Moreover, the extreme flexibility of the law of unjust enrichment, the emphasis on proving a contribution, the lack of any presumption of equal sharing and the need to prove all the details of the parties’ economic lives make court processes costly and inaccessible for couples who wish to resolve a dispute over property. Relying on courts to determine the proprietary consequences of a domestic partnership would render the legal situation of parties to such relationships uncertain in terms of their obligations and rights towards each other.

Therefore, Article 8 proposes a default property regime of accrual for domestic partnerships which provides domestic partners with a more modest set of rights in each other’s property than married spouses have. This approach would leave largely intact the value of autonomy in domestic partnerships while acknowledging the economic interdependency that arises from such unions. Under an accrual regime, each partner administers his or her property separately during the relationship, but shares equally in all of the gains to both individuals’ property during the existence of the relationship. Thus, accrual provides some measure of protection for those couples if their relationship ends, which in some cases may be the only time they specifically consider their property.

Article 8 also permits couples who do not wish to be governed by the scheme to “opt out” through a domestic partnership agreement. Moreover, where the default property regime

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79 Law Reform Commission of New South Wales, Report 36 (supra), s. 5.9.

80 See Ibid., ss. 3.58 and 5.10–11, which describes three cases of property disputes between domestic partners in which the presiding judges expressed regret over what they perceived to be unfair conclusions because the court had no power to vary the property rights of the parties as it did in relation to married spouses. The Commission also cited a demographic study of cohabiting couples in Australia which revealed that “in many instances both de facto partners make financial contributions to the running and maintenance of the household. This may be important in cases where one partner holds the legal title to property and perhaps is nominally responsible for mortgage repayments on the home.”

would lead to serious injustice, particularly where there is another spouse or domestic partner concerned, Option 1 (Article 9A) authorizes courts to vary or set aside the proprietary consequences of the accrual regime. In jurisdictions where multiple concurrent relationships are prohibited, Option 2 (Article 9B) is provided to remedy serious injustice in the absence of an existing concurrent relationship.

In the context of HIV, access to property provides women with economic security, livelihoods and dignity. Numerous studies have demonstrated how poverty and insecurity drive women to remain in violent relationships or engage in behaviours that put them at increased risk of contracting HIV. Where women are involved in relationships characterized by mutual commitment and emotional and economic interdependency, they should be entitled to share in the gains to the property they likely contributed to acquiring or maintaining. As the CEDAW Committee has stated, “In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women, with or without children, should be revoked and discouraged.”

C. After the Relationship Ends

NOTE:
Domestic partners’ needs and vulnerabilities do not end when the relationship does. Therefore, a number of rights and responsibilities should exist after the relationship ends. The following provisions authorize courts to award spousal and child maintenance, child custody, access to children, and inheritance rights to domestic partners if the relationship ends.

Article 10. Maintenance

(1) In the absence of an acceptable domestic partnership agreement between the domestic partners (as defined in Article 3) as to maintenance, a court may, on application by either or both domestic partners, make an order for the adequate, just and equitable provision of maintenance to the other domestic partner after

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83 CEDAW Committee, “General Recommendation 21” (supra), para. 33.
consideration of the factors set out in the spousal maintenance provisions in the [relevant divorce legislation].

(2) Except as otherwise provided for by this Article, an application to a court for an order under Section (1) must be made within two years after the domestic partnership ends.

(3) A court may, at any time after the expiration of the period referred to in Section (2), grant leave to an applicant to apply to the court for a maintenance order if the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave was granted.84

Commentary: Article 10

As in marriage, many women become economically dependent on men in the course of a domestic partnership, and may suffer financial hardship upon separation or the death of their male partners. Where there are no legal provisions for maintenance or property, courts may have no power to alleviate the financial hardship suffered by one party, despite the fact that the relationship may have been marked by freely given reciprocal support. This is so even where the hardship is caused by needs stemming from, and attributable to, the relationship (for example, where the woman cannot support herself because she has responsibility for the care of children born of the relationship) and the other party has ample means to provide support.85 While it has been contended that domestic partners should not be treated in a similar manner to married spouses — since they may have consciously opted not to marry and may not have consented to the obligations of marriage — bestowing domestic partners with rights to maintenance and property after the relationship ends may actually reflect the desires of many domestic partners. In one study pertaining to financial support on relationship breakdown and property inheritance, the majority of domestic partners were very supportive of the notion that domestic partners should have the same rights as married couples.86

84 Sections (2) and (3) are derived from ss. 23(1) and 23(2) of South Africa, Domestic Partnerships Bill of 2008.

85 For example, a demographic study of cohabiting couples in Australia revealed that a “significant proportion of de facto relationships involve child care responsibilities which preclude or minimize the opportunity for income-earning employment by one partner, usually the woman…. [T]he evidence strongly demonstrates that women contribute to de facto relationships as homemakers and parents”: Law Reform Commission of New South Wales, Report 36 (supra), ss. 3.58 and 5.12.

86 South African Law Reform Commission, Project 118: Report (supra), pp. 74–75, citing Barlow et al, “Just a piece of paper? Marriage and cohabitation,” in A. Park et al, British Social Attitudes: Public Policy, Social Ties (London: SAGE Publications, 2001). In Barlow’s study, it was also found that 70 percent of current cohabitants thought that a cohabiting woman should have the same rights to financial support on relationship breakdown as a married woman. Nearly 97 percent of cohabitants thought that a woman should have the same rights as a married woman to remain in a house bought in the man’s name after his death without a will. Note, however, that the study was conducted in the U.K. and so may not reflect the views of domestic partners elsewhere.
Recognizing the economic vulnerability of women at the end of a domestic partnership, the CEDAW Committee has urged the consideration of “how women’s rights, including with regard to alimony and child custody, can be protected following dissolution of domestic partnerships.” Therefore, Article 10 empowers courts to award maintenance in light of the factors set out in divorce legislation with respect to maintenance. There is a substantial element of judicial discretion to award maintenance, and this allows for accommodation of the vastly different scenarios courts may be confronted with in the context of domestic partnerships, particularly when there are multiple concurrent relationships involved. Notwithstanding that an explicit authorization for courts to award maintenance may provide more systematic protection of women when domestic partnerships end, it is also imperative to supplement this protective effort with judicial and public legal education, issues discussed more thoroughly in Module 6 “Implementation Provisions.”

**Article 11. Child custody, access and maintenance**

(1) The [relevant court] may make any order it deems to be in the best interests of the affected minor or dependent children after consideration of the factors set out in the child custody, access and maintenance provisions in the [relevant divorce legislation].

(2) Where domestic partners have concluded an acceptable domestic partnership agreement (as defined in Article 3) concerning the custody, access and/or maintenance of any affected minor or dependent children, the [relevant court] may confirm the agreement as an order of the court if it deems the agreement to be in the best interests of the minor or dependent children after consideration of the factors set out in the child custody, access and maintenance provisions in the [relevant divorce legislation].

**Commentary: Article 11**

In terms of child custody and access and child maintenance, there is no reason to differentiate between domestic partnership and marriage. While courts may recognize the responsibility of a domestic partner to provide child support in the absence of specific legislative provisions authorizing such payments, there is no guarantee this will happen.

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88 For example, in the case Volks N.O. v. Robinson and Others 2005 (5) BCLR 446 (CC) 21 February 2005, the Constitutional Court of South Africa held that the Maintenance of Surviving Spouses Act 27 of 1990 was not unfair to distinguish between survivors of marriage and survivors of heterosexual cohabiting relationships in the context of maintenance claims, such that it did not provide for domestic partners to claim maintenance from their partner’s deceased estates. Although the majority of judges recognized the structural dependence of women in domestic partnerships, they held that it was not the under-inclusiveness of the law which was the cause, but the fact that there is no law that places rights and obligations on domestic partners during their lifetime, as well as the vulnerability of women in society.

89 See, for example, the case of JGM v. CNW, Civil Appeal No. 40 of 2004 (Kenya, High Court at Nakuru) in which the appellant, who had cohabited with the respondent for years and had had two children, denied
Therefore, Article 11 authorizes the court to make any order it deems to be in the best interests of the child after consideration of the factors set out in the divorce legislation.

Both the *African Charter on the Rights and Welfare of the Child* and the ICCPR provide that “[i]n the case of dissolution, provision shall be made for the necessary protection of the child/any children.”90 In terms of the amount of maintenance to be awarded, the *Convention on the Rights of the Child* (CRC) and the ICESCR recognize the right of children to an adequate standard of living.91 The CRC further stipulates that children’s standard of living should be adequate for their “physical, mental, spiritual, moral and social development.”92 As a number of international treaties and bodies confirm, these principles apply regardless of the marital status of the parents. The CEDAW Committee has noted that “in practice, some countries do not observe the principle of granting the parents of children equal status, particularly when they are not married. The children of such unions do not always enjoy the same status as those born in wedlock and, where the mothers are divorced or living apart [from the fathers], many fathers fail to share the responsibility of care, protection and maintenance of their children.”93 Therefore, Article 16 of CEDAW obligates states parties to ensure, on a basis of equality of men and women, the “same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.” Similarly, Article 7 of the Protocol on the Rights of Women in Africa stipulates that “in case of separation … women and men shall have reciprocal rights and responsibilities towards their children.” The *African Charter on the Rights and Welfare of the Child* further stipulates that “[n]o child shall be deprived of maintenance by reference to the parents’ marital status.”94
Article 12. Inheritance rights of domestic partners

[Two options for Article 12 are provided below — 12A and 12B. One or the other should be selected, but not both.]

Option 1: Article 12A. Domestic partner as “spouse”

The provisions referring to “spouse” in the [relevant inheritance legislation] include a person who was the domestic partner of the deceased.

Option 2: Article 12B. Inheritance

(1) In the absence of an acceptable domestic partnership agreement between the domestic partners (as defined in Article 3) as to maintenance from the estate, a court may, on application by the surviving domestic partner, make an order for the adequate, just and equitable provision of maintenance to the surviving domestic partner after consideration of the factors set out in the maintenance of dependants provisions in the [relevant inheritance legislation].

(2) Further, in the absence of an acceptable domestic partnership agreement between the domestic partners (as defined in Article 3) as to the continuing occupation of the family home, if any, following the death of the domestic partner who is the owner of the family home, a court may, on application by the surviving domestic partner, make an order for the continuing occupation of the family home by the surviving domestic partner, having regard to the following factors:

(a) the best interests of the affected minor or dependent children, as defined in the [relevant divorce legislation];
(b) whether the family home is situated on family or traditional property, as defined in the [relevant marital property legislation]; and
(c) the financial position of the applicant.

(3) Further, in the absence of an acceptable domestic partnership agreement between the domestic partners (as defined in Article 3) as to inheritance, a court may, on application by the surviving domestic partner, make an order for a just and equitable share of the residue of the estate, having due regard to the manner of distribution in the [relevant inheritance legislation] and the legitimate interests of the other beneficiaries of the estate.

(4) If the deceased has left a will that addresses the inheritance rights of the domestic partner, the instructions in that will shall be duly considered by the court. Notwithstanding the provisions of the will, the court may make orders pursuant to Sections (1), (2) and (3) if equity and good conscience so dictate.
(5) Except as otherwise provided for by this Article, an application to a court for an order under Sections (1), (2) and (3) must be made within six months after the death of the domestic partner.

(6) A court may, at any time after the expiration of the period referred to in Section (5), grant leave to an applicant to apply to the court for a maintenance order if the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave was granted.

Commentary: Article 12 (both options)
When domestic partners separate or one of the partners dies, disputes often arise between the two families as to who may lay claim to the property.95 Because the legal status of their relationship is often unclear, women in domestic partnerships have been described as “prime candidates for disinheritance.”96 Yet to date, few countries in the world have enacted explicit legislative provisions addressing the inheritance rights of domestic partners.

Article 12 therefore presents two possible options for addressing the inheritance rights of domestic partners in legislation. Option 1 (Article 12A) proposes extending the legislative provisions applicable to spouses in inheritance legislation to also cover domestic partnerships.97 Option 2 (Article 12B) sets out a scheme whereby a domestic partner can apply to the court for an order with respect to maintenance from the estate, the right to continue occupying the family home, or the right to inherit a share of the residue of the estate. Both options allow for legal intervention in order to minimize the injustice that occurs when rights are denied to a domestic partner who may have been dependant on his or her partner.

Option 2 allows for more discretion on the part of the judge, which may be appropriate with respect to inheritance issues in order to protect the legitimate expectations of any spouses (in the case of a concurrent relationship), to protect the welfare of any children who are affected, and to give due consideration of the rights and needs of other

95 See COHRE, Bringing Equality Home (supra), p. 43, describing the situation in Botswana.
96 HRW, Double Standards: Women’s Property RightsViolations in Kenya, 2003, p. 23. In this report, Omwena Omung’ina describes being disinheriteds from her partner’s property despite having lived with her partner for nine years and having two children together. See also COHRE, Bringing Equality Home (supra), p. 43, which provides, “When male cohabitant dies, woman is usually an outcast and the male descendants take the property.”
97 This is the approach contemplated in South Africa, Domestic Partnerships Bill of 2008 with respect to maintenance after death and intestate succession for registered domestic partnerships: ss. 19–20. Separate schemes to apply for maintenance orders after the death of an unregistered domestic partner and for intestate succession when an unregistered domestic partner dies are laid out in ss. 29–31. Sierra Leone, Devolution of Estates Act of 2007 also includes an interpretation provision which states that “spouse” means a person married to the deceased, but also an unmarried man or woman who has cohabited with an unmarried man or woman as if they were in law husband and wife for a period of not less than five years immediately preceding the death: s. 2.
beneficiaries of the estate. In exercising their discretion, judges should consider what constitutes an adequate, just and equitable order in the circumstances.
# Module 3: Property in Marriage

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Prefatory Note

Women, property and HIV/AIDS

In many communities, gender disparities with regard to land are linked to notions of men being its sole stakeholders for multiple reasons, including presumptions that land given to women is lost to another family in the event of marriage or divorce, and that women are incapable of managing property — or expectations that men in the family or community will support the women.¹ Despite international recognition of women’s rights to equality and to administer and own property, the property law regimes of many countries continue to support these often false presumptions. As the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has noted, some countries do not acknowledge a woman’s right to own an equal share of property with her husband during a marriage or when that marriage ends.² Where countries do recognize that right, the practical ability of women to exercise it may nevertheless be limited by legal precedent or custom.³

These impediments are particularly pronounced where women primarily acquire access to, and ownership of, property through inheritance or through marriage, as is the case in sub-Saharan Africa.⁴ Few women have sufficient resources to independently purchase significant property, and traditional systems tend to assign property to men. Moreover, with the socio-economic changes that have taken place in sub-Saharan Africa in recent decades, women have increasingly come to rely on marriage for access to land as


⁴ See COHRE, Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women, 2004, pp. 7 and 20–21; A. Mason, Engendering Development Through Gender Equality in Rights. Resources, and Voice, World Bank, 2001, p. 4.; and Human Rights Watch (HRW), Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa, 2003, p. 41. In Cameroon, a survey by the National Institute of Statistics revealed that the proportion of women who own a house is higher among those who have been married or have cohabited with a partner compared with those who are currently married or cohabiting and those who have never been married: CEDAW Committee, “Responses to the list of issues…” (supra), pp. 29–30.
women’s inheritance through lineage has declined and available land has become scarcer. Therefore, how the property of married couples is administered, used, owned and distributed during and at the end of a relationship has considerable relevance for women’s rights. In the context of HIV, the laws governing women’s property rights take on even more significance.

In general terms, protecting women’s property rights has both preventive and mitigating impacts in the context of the HIV epidemic. On the preventive side, security of tenure over housing and land provide women with economic security, livelihoods and dignity. Numerous studies have demonstrated how poverty and insecurity drive women to remain in violent relationships or to engage in behaviours that put them at increased risk of contracting HIV. As the U.N. Commission on Human Rights has affirmed, “the lack of adequate housing can make women more vulnerable to various forms of violence, including domestic violence, and in particular … the lack of housing alternatives may limit many women’s ability to leave violent situations.”

Ostensibly, women with access to resources (including land, financial resources and supportive social networks) are better able to negotiate condom use in their sexual relationships, to leave abusive partners, and to provide for their own and their children’s needs.

In terms of mitigation, property rights can help ease the impact of HIV and AIDS on individuals and families. Failing to recognize women’s interest in marital property can have particularly harsh consequences for women affected by HIV, who may face stigma,
discrimination and forced eviction as a result. In households affected by HIV/AIDS, it has been estimated that household incomes can drop by 80 percent, food consumption by 15 to 30 percent, and primary school enrollment by 20 to 40 percent. The impact of HIV/AIDS on poorer rural households with small land holdings is even harsher than on wealthier ones. Another important aspect of mitigation is the ability to plan for the future of one’s children. Women are better able to secure their children’s future when they have secure property rights. Moreover, access to shelter, clean water and services helps to keep those infected with HIV healthy.

Women, property and human rights

As the U.N. Commission on Human Rights has recognized, there is a linkage between the growing prevalence of HIV/AIDS among women and “laws that inhibit the full enjoyment of women’s rights to land ownership and inheritance.” Therefore, “positive change and attention to women’s empowerment and protection of women’s housing and land rights” is necessary “to make women less vulnerable to HIV/AIDS.” In the context of marriage, laws must recognize men and women’s equal claims on marital assets in the context of the mutual rights and responsibilities spouses have towards one another.

Marital property rights are addressed by international human rights guarantees with respect to non-discrimination and equality as well as international human rights

10 As one activist recounted, “There are many women who live in Mathare [a slum in Kenya], not because they were born or married in Mathare, but because they were chased away from their rural homes where they were married. … Since the HIV and AIDS pandemic hit our communities, widows are considered as people who are dying, therefore not needing support. They are also seen as people who brought HIV and AIDS home. People do not want to be seen associating with somebody with HIV and AIDS in the home compound. HIV and AIDS escalated the eviction of widows”: Esther Mwauru-Muiru, Organiser, GROOTS Kenya, Interview by K. Izumi, January 2005, in K. Izumi (ed), Reclaiming Our Lives: HIV and AIDS, Women’s Land and Property Rights and Livelihoods in Southern and East Africa (Cape Town: HSRC Press, 2006), pp. 19–22.


14 For example, HRW’s investigations into women’s property rights violations in Kenya found that living in squalor was one of the common consequences of women’s property rights violations, and that for women with HIV/AIDS, these conditions can lead to earlier deaths: HRW, Double Standards: Women’s Property Rights Violations in Kenya, 2003, p. 30.


16 Ibid.
guarantees in the context of marriage, family, property and housing. The prohibition of discrimination on the basis of sex and other grounds is a fundamental provision of international human rights law, with non-discrimination provisions included in every international and regional human rights treaty.\textsuperscript{17} For example, the \textit{Convention on the Elimination of all Forms of Discrimination Against Women} (CEDAW) obliges states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.\textsuperscript{18} States are required to ensure that both spouses enjoy the same rights with respect to the ownership, acquisition, management, administration, enjoyment and disposition of property.\textsuperscript{19} As the CEDAW Committee has noted, “[A]ny law or custom that grants men a greater share of property at the end of marriage or \textit{de facto} relationship … is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband.”\textsuperscript{20}

Rights to equality — equality before the law, equal protection of the law, equal enjoyment of rights, and equality of spouses — are closely related to the prohibition on discrimination and are also included in many international and regional human rights treaties.\textsuperscript{21} Equality between spouses in marriage extends to all matters arising from their relationship, including choice of residence and administration of assets. This equality continues to be applicable to arrangements regarding the dissolution of the marriage.\textsuperscript{22} Therefore, all laws that discriminate against women in terms of their ability to use, rent, own or inherit property because of their marital status would constitute a violation of the right to equality before the law.\textsuperscript{23}

\begin{footnotesize}
\begin{itemize}
\item[18] CEDAW, art. 16.
\item[19] CEDAW, art. 16(1)(h).
\item[20] CEDAW Committee, “General Recommendation No. 21” (supra), para. 28.
\item[21] See, for example, ICESCR, art. 3; ICCPR, art. 3, 23(4) and 26; CEDAW, art. 15; African Charter on Human and Peoples’ Rights, art. 3.
\item[22] U.N. Human Rights Committee, “General Comment 19: Article 23 (Protection of the Family, the Right to Marriage and Equality of the Spouses),” 39\textsuperscript{th} session, 1990, para. 6.
\item[23] On the right of women to have equality with men before the law, the CEDAW Committee has noted in its General Recommendation No. 21 that the right to equality before the law and equality in marriage and family relations overlap and complement each other. The Committee explains that when a woman requires her husband’s or a male relative’s permission to enter into a contract or access credit, she is denied legal autonomy. The right to own, manage, enjoy and dispose of property is central to a women’s right to enjoy financial independence, to earn a livelihood and to provide for herself and her family. These rights should be guaranteed regardless of a women’s marital status: CEDAW Committee, “General Recommendation No. 21” (supra), paras. 7, 26, 28 and 29.
\end{itemize}
\end{footnotesize}
The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa) recognizes specific rights of women with respect to marital property in Africa.\(^{24}\) It obliges states parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.\(^{25}\) In particular, it includes obligations to enact appropriate national legislative measures to guarantee that the husband and wife shall by mutual agreement choose their matrimonial regime and place of residence, and that during marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.\(^{26}\)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes a right to housing.\(^{27}\) In its General Comment interpreting the right to housing, the U.N. Committee on Economic, Social and Cultural Rights emphasized that the right is to *adequate housing*.\(^{28}\) The elements of adequacy are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; adequate location; and cultural adequacy.\(^{29}\) As noted by one commentator, “The relevance and significance to women of these terms can only be elucidated when viewed through a gender perspective and applied to women’s specific experiences.”\(^{30}\) In determining the adequacy of women’s housing and the fulfillment of a state’s obligations with respect to the right to housing, the legal framework governing marital property is of utmost importance.

By reinforcing women’s dependence on their husbands, unequal marital property rights can impact on married, divorced, separated or widowed women’s economic autonomy, security, dignity and health. Therefore, other human rights of relevance with respect to legislating for property rights in the context of marriage are the right to the highest attainable standard of health;\(^{31}\) the right to an adequate standard of living;\(^{32}\) the right to

\(^{24}\) For example, art. 21 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 13 September 2000, O.A.U. Doc. CAB/LEG/66.6 (entered into force 25 November 2005) [Protocol on the Rights of Women in Africa], specifies a widow’s right to an equitable share in the inheritance of the property of her husband. See also CEDAW, art. 15(2) and 16(1)(h); African Charter, art. 14.

\(^{25}\) Art. 6.

\(^{26}\) Art. 6(e) and (j).

\(^{27}\) ICESCR, art. 11.1. Although the right to housing is part of the broader right to an adequate standard of living in the ICESCR, under international human rights law it is understood as an independent right: L. Farha, *Women and Housing Rights* (supra), COHRE, 2000, p. 21. See also, art. 16 of the Protocol to the Rights of Women in Africa.

\(^{28}\) U.N. Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The Right to Adequate Housing (Article 11(1)),” 6\(^{th}\) session, 1991, para. 7.

\(^{29}\) Ibid., para. 8.


freedom from cruel, inhuman or degrading treatment or punishment; the right to be free from slavery and servitude; the right to liberty and security of the person; and the right to life. As the CEDAW Committee has noted, the “right to own, manage, enjoy and dispose of property is central to a woman’s right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.” This statement underscores the interdependence of rights related to women’s access to marital property. For example, a right to marital property will require legal protection against domestic violence (which is linked to rights to liberty and security of the person, to life, and to be free from cruel, inhuman or degrading treatment or punishment), and all of these rights are essential to realize the highest attainable standard of health.

A. Protected Property

NOTE:
The following section includes provisions pertaining to the treatment of the matrimonial home to protect women’s access to housing during, and at the dissolution of, a marriage. In contexts where family and traditional property are integral parts of the customary law of property, an option is also provided to exclude such property from the joint estate.

Article 1. Definition of the matrimonial home

(1) The “matrimonial home” means the building(s) or part of a building in which the spouses ordinarily reside together and includes:

(a) household goods and furnishings used in relation to the residence; and
(b) the surrounding residential land.

33 ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.
34 ICCPR, art. 8; African Charter, art. 5.
35 ICCPR art. 9–10; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 6.
36 ICCPR, art. 6; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 4.
38 This provision is derived in part from s. 1 of Tanzania, Law of Marriage Act of 1971.
Article 2. Rights and duties with respect to the matrimonial home

(1) Each spouse has an equal right to possession, use and enjoyment of the matrimonial home, subject to the provisions of the [relevant domestic violence legislation] and any protection orders issued pursuant to that Act.39

(2) Both spouses have a reciprocal duty to contribute to the upkeep of the matrimonial home, including through the performance of household duties and in proportion to their respective financial positions.40

(3) A spouse shall not be evicted from the matrimonial home during the subsistence of the marriage:

(a) by or at the instance of the other spouse, except in accordance with an order of a court; or
(b) by any person except on the sale of any estate or interest in the matrimonial home in execution of a decree, by a trustee in bankruptcy or by a mortgagee or charge in exercise of a power of sale or other remedy given under any law.41

(4) Where any interest in the matrimonial home is owned by either spouse, that spouse shall not, while the marriage subsists and without the prior and written consent of the other spouse, dispose of or encumber any interest in the matrimonial home.42

(5) If a spouse disposes of or encumbers an interest in a matrimonial home in contravention of Section (4):

(a) the transaction may be revoked by an application from the other spouse; or
(b) the interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until the marriage is dissolved pursuant to the [relevant divorce legislation] and the court orders that this right has been terminated;

unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice that the property was a matrimonial home at the time of acquiring it or making an agreement to acquire it.43

39 This provision is derived in part from s. 19 of Ontario, Canada, Family Law Act of 1990. See also, art. 223 of Belgium, Civil Code. See Legal Assistance Centre of Namibia (LAC), Marital Property in Civil and Customary Marriages: Proposals for Law Reform, p. 271 for a discussion of treatment of the matrimonial home in the context of domestic violence. See Volume 1, Module 2 “Domestic Violence” (of this publication) for further discussion of domestic violence legislation and protection orders.

40 See, for example, LAC, Marital Property (supra), p. 263.

41 This section is derived from s. 12(2) of Kenya, The Matrimonial Property Bill of 2007.

42 This section is adapted from s. 29 of Tanzania, Law of Marriage Act of 1971 and s. 21(1) of Ontario, Canada, Family Law Act of 1990.
Article 3. Applicability of provisions regarding matrimonial home

(1) Article 2 regarding the matrimonial home applies irrespective of the marital property regime elected, the terms of any antenuptial agreement, or, in the case of communal land, the relevant communal land law or practice.

(2) Spouses are not permitted to contract out of Article 2.45

Commentary: Articles 1–3

All too often, when marriages come to an end (whether because of separation, divorce or the death of one spouse), women lose their home.46 The matrimonial home is central to family life and is often the primary asset of a couple. If a woman loses access to the matrimonial home, she may well become homeless, destitute and lose custody of her children. Allowing women to be evicted from their homes (whether by an ex-spouse, his family or others) also subjects women to insecurity, vulnerability, poverty and sexual violence.47 Accordingly, the U.N. Committee on Economic, Social and Cultural Rights has expressed concern where a husband has an “absolute right to keep the conjugal home in the case of divorce.”48 Enacting specific protections for the matrimonial home is a practical and increasingly common means to protect women’s access to housing during, and at the dissolution of, a marriage.49 Ensuring that these provisions are applicable

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43 This section is derived from s. 59(2) of Tanzania, Law of Marriage Act of 1971 and s. 21(2) of Ontario, Canada, Family Law Act of 1990. See also, s. 8 of Namibia, Married Persons Equality Act of 1996.

44 This section is derived from s. 8 of Namibia, Married Persons Equality Act of 1996.

45 See LAC, Marital Property (supra), p. 271.

46 See for example HRW, Double Standards (supra), pp. 16–29.


49 See, for example, s. 59 of Tanzania, Law of Marriage of 1971; art. 123 and 125 of Burundi, Code Civil; art. 238 of the draft revisions to Rwanda, Family Code; Ireland, Family Home Protection Act; art. 215 of France, Civil Code; ss. 19, 21 and 24 of Ontario, Canada, Family Law Act of 1990. The treatment of the matrimonial home at the dissolution of a marriage is addressed in Module 4 “Divorce” and Module 5 “Inheritance.”
irrespective of the couple’s chosen marital property regime, antenuptial agreement or communal land right reinforces the importance of these protections.

Because the matrimonial home may be registered solely in the husband’s name, the process by which a woman would have to prove her interest in that home may be onerous and uncertain.\(^{50}\) Article 2(1) expressly provides for equality in terms of possession, use and enjoyment of the matrimonial home so women need not have to prove their financial interest in the home to be entitled to it. Article 2(3) further protects a spouse against forced eviction, except in specific circumstances. However, spouses’ equal right to the matrimonial home is subject to any domestic violence legislation and related protection orders. This is an important qualification because under legislation aimed at combating domestic violence, judges can issue orders requiring a spouse to stay away from the matrimonial home. In order to protect against domestic violence and allow an abused spouse to safely remain in the home, the right to possess, use and enjoy the matrimonial home cannot be absolute.

Requiring the consent of the other spouse before disposing of, or encumbering, the matrimonial home further reinforces the equal rights of each spouse to that home, and also prevents either spouse from invoking civil, religious or customary law to support the validity of such transactions.\(^{51}\) Articles 2(4), (5) and (6), therefore, are essential to protect the equal rights of the spouses in the matrimonial home and provide a remedy should that equality not be respected.

As noted above, the right to adequate housing is an internationally recognized human right. The U.N. Committee on Economic, Social and Cultural Rights has described this right as “the right to live somewhere in security, peace and dignity,” with security of tenure.\(^{52}\) Forced evictions are \textit{prima facie} incompatible with this right.\(^{53}\)


\(^{51}\) See, for example, the Nigerian case of \textit{Onwuchekwa v. Onwuchekwa}, [1991] 5 N.W.L.R. 739 (Nigeria, Court of Appeal), in which the wife (the Appellant) claimed that she had contributed money jointly to purchase land and erect a building with her husband (the First Respondent), who then sold the property to the Second Respondent without her consent. The Appellant sought various remedies, including applying to the court to cancel the sale, or to declare that she was entitled to half the proceeds. While these remedies would have been available under civil law, the First Respondent relied on the customary law of his community, which stipulated that a wife and her wealth are considered her husband’s property, as a basis for conducting the unilateral sale. The Appellant challenged the existence of this custom, but the court found that the First Respondent’s claims were in accordance with the customary law of his community and, as a result, delivered judgment in his favour.


\(^{53}\) Ibid., para. 18.
Optional: Article 4. Family and traditional property

(1) Notwithstanding the provisions governing the administration and division of property in this Act, the following property will remain the separate property of the spouse in question and the power of the court to make an order for the administration and division of the property of the spouses shall not extend to any property which is proved, to the satisfaction of the court, to be:

   (a) property inherited before or during the marriage and held in trust by the spouse in question in terms of customary law for the benefit of other members of the spouse’s kin group; or
   (b) traditional property acquired before or during the marriage which in terms of the relevant customary law must be held separately by the spouse in question.

(2) The maximum value of property which is exempted from the joint estate in accordance with Section (1) is equal to 50 percent of the sum of:

   (a) the total value of the joint estate; and
   (b) the property which is eligible for exemption;

as calculated at the time of the division of the estate. Any property in excess of this value must be treated as part of the joint estate in accordance with the marital property regime elected by the spouses.

(3) The onus of proving that any property falls within the exempted categories pursuant to Section (1) falls on the party who is claiming that the property is exempted.54

Commentary: Article 4

Some aspects of customary law may disadvantage or discriminate against women in the context of marital property. These aspects should be reformed to ensure equality of access. But respect for culture also requires that customary law frameworks be applied where they are relevant and fair. Therefore, in jurisdictions where family and traditional property form a central aspect of land ownership, it may be desirable to exclude family and traditional property from the joint estate and related legislative provisions regarding administration and division of property. Some marital property regimes which have not exempted family and traditional property from provisions regarding administration and division of marital property have been criticized for replacing “the property interests of the heir’s siblings, especially female siblings, with those of the heir’s wife and children.”55

54 For similar language, see, for example, s. 4(3) of Ontario, Canada, Family Law Act of 1900; s. 60 of British Columbia, Canada, Family Relations Act of 1996.

Because land is often the principal source of wealth of a married couple, Article 4(2) sets a maximum value in terms of the property that can be exempted. This ensures that the exemptions for family and traditional property do not leave the spouse who has less access to such property (usually the wife) without a significant share of property upon marriage dissolution. Article 4(2) is therefore an attempt to achieve a workable balance between respect for traditional property systems and the need for an equitable division of property between spouses. Furthermore, the distinction between different categories of property is not always clear, and how property is classified may depend on the function it serves and the family status of the person to whom the property has been allocated. To ensure individuals are protected from the possible abuse of a provision excluding family and traditional property from the joint estate, Article 4(3) requires the person seeking the exclusion to prove that it is indeed family or traditional property. Because men more often control family and traditional property, this provision may offer women important protection against illegitimate claims.

B. Choice of Marital Property Regime

NOTE:
Antenuptial agreements provide couples with greater choice and control of financial arrangements. The following provision outlines specific procedures to facilitate fairness of outcome.

Article 5. Antenuptial agreements

(1) Nothing in this Act shall preclude the parties to a marriage from concluding an antenuptial agreement pertaining to the division of property between them.

(2) An antenuptial agreement shall be dated, signed on each page by the spouses and by two witnesses and registered in the same manner prescribed for the registration of marital property regimes.

(3) An antenuptial agreement shall not absolve a spouse from his or her legal duties to the other spouse or any minor or dependent children of the marriage.

(4) A court may vary or set aside any written agreement pertaining to the division of property between spouses if it is satisfied that the agreement has been obtained through fraud, coercion, undue influence or domestic violence.

56 This approach is recommended by LAC. Personal communication, May 2008.

Where a court has set aside any antenuptial agreement pursuant to Section (4), the parties to the marriage will be deemed to have chosen to be governed by a modified community of property regime as set out in Articles 10–18 of this Act.

Commentary: Article 5
Antenuptial agreements provide couples with significant freedom to determine the proprietary consequences of their marriage. To ensure such agreements are accessible, the requirements for making binding antenuptial agreements should not be onerous, and they should be registered in the same manner prescribed for the registration of marital property regimes. At the same time, requiring the agreement to be signed, witnessed and registered provides greater certainty as to its legitimacy, which benefits both spouses and the interest of creditors. Spouses should not be permitted to contract out of their legal duties to each other or to any minor or dependent children because duties of mutual support and child maintenance facilitate an adequate standard of living for the family. Therefore, Article 5(3) prohibits such agreements.

Commentators have noted that some women may not negotiate contracts from a position of strength and may be pressured to conform to their husband’s desires. To protect women from antenuptial agreements which may leave them economically and socially vulnerable, Article 5(4) authorizes courts to vary or set aside antenuptial agreements where there is evidence of fraud, coercion, undue influence or domestic violence. In such circumstances, Article 5(5) provides that the couple’s property shall be treated as if they have chosen modified community of property, the default marital property regime, to ensure the rights of both spouses are protected.

NOTE:
The choice of marital property regime is a crucial financial decision for couples to make. The following provisions outline the procedures for registration of the chosen regime and any subsequent changes.

58 LAC, Marital Property (supra), p. 228.
59 See the corresponding commentaries in Module 1 “Marriage” and Module 4 “Divorce” for a further discussion of duties of spousal and child maintenance.
60 Gender Project, Community Law Centre (University of the Western Cape) and Gender Unit, Legal Aid Clinic (University of Western Cape), Submissions on South African Law Commission’s Issue Paper No. 15: Islamic marriages and Related Matters, 2000, p. 6.
61 See Ratanee v. Maharaj and Another 1950 (2) SA 538 (D), as cited in LAC, Marital Property (supra), p. 172, for an example of pressure on a wife to enter into an antenuptial agreement which did not reflect her true wishes. The court held that the evidence showed the relationship between husband and wife to be such that she was incapable of resisting his will and that she was entitled to relief even in the absence of a finding of undue influence.
Article 6. Choice of marital property regime

(1) The parties may, at the time of marriage and by mutual consent, choose to be governed by any of the three marital property regimes set out in Articles 8–24 of this Act.

(2) The parties shall register their choice of marital property regime on their marriage certificate as set out in the [relevant marriage legislation].

(3) If the parties to a marriage fail to elect a marital property regime or fail to conclude a valid antenuptial agreement, they will be deemed to have chosen to be governed by a modified community of property regime as set out in Articles 10–18 of this Act.

Article 7. Change of marital property regime

(1) The parties may, at any time during the marriage and by mutual consent, choose to change the marital property regime they elected under Article 6 by concluding and registering a postnuptial agreement with the [Registrar General / district registrars / local registering officer].

(2) The postnuptial agreement shall be dated, signed on each page by the spouses and by two witnesses, and registered in the same manner prescribed for the registration of marital property regimes.

(3) The [Registrar General / district registrar / local registering officer] shall only register the change to the marital property regime if:

   (a) both spouses have during separate consultations with the [Registrar General / district registrar / local registering officer] indicated that the change is by mutual consent and that each spouse understands the effect of the proposed change;
   (b) the proposed changes will not prejudice the rights of any minor or dependent children of the marriage; and
   (c) the proposed changes will not absolve a spouse from his or her legal duties to the other spouse or any minor or dependent children of the marriage.

(4) A court may vary or set aside any postnuptial agreement proposing to change the elected marital property regime if it is satisfied that the agreement has been obtained through fraud, coercion, undue influence or domestic violence, and the spouses will continue to be governed by the marital property regime they chose at the time of marriage.

(Optional additional sections where polygamy is not prohibited:)

(5) In the case of a polygamous marriage, any change in marital property regime must be made by application by one of the spouses to the court. The court may approve the
change in marital property regime, subject to any condition it may deem just, if satisfied that:

(a) the consent of the other spouse or spouses has been obtained by the spouse making the application and each spouse understands the effect of the proposed change;
(b) an equitable distribution of the property according to the original marital property regime or the antenuptial agreement has been effected, if appropriate; and
(c) all the relevant circumstances of the other spouse or spouses and minor or dependent children which would be affected if the application is granted have been taken into account;

or may refuse the application if in the court’s opinion the interests of any of the parties would not be sufficiently safeguarded by the proposed marital property regime.

(6) All persons having a sufficient interest in the matter, and in particular the applicant’s other spouse or spouses, must be granted standing to participate in any proceedings instituted under Section (5).

(7) If a court grants an application under Section (5), the [relevant court official] must furnish each spouse with an order of the court, and the applicant spouse shall register the new marital property regime with the [Registrar General / district registrars / local registering officer].62

**Commentary: Articles 6 and 7**

Providing prospective spouses with a range of marital property regimes to choose from encourages them to consider the proprietary consequences of their marriage and to decide upon a regime that best reflects their wishes. Three different marital property regimes are outlined below: full community of property, modified community of property and accrual. Legislators can:

(a) include all three options in the legislation, with procedures for spouses to be informed of their choices and an obligation for spouses to elect a marital property regime at the time of their marriage;
(b) include just one regime to apply to all marriages in the country; or
(c) include all three options in the legislation, with procedures for spouses to be informed of their choices and to elect a marital property regime at the time of their marriage, while designating a default regime which would apply to all marriages where a regime has not been elected by the spouses.

The provisions in this publication have been drafted assuming that legislators include all three options and designate the modified community of property regime as the default

62 Sections 5–7 are adapted from s. 7 of South Africa, *Recognition of Customary Marriages Act of 1998*. 

If legislators choose to only include one possible marital property regime, or not to designate a default regime in the country’s marriage legislation, the provisions should be revised accordingly.

Spouses may find after marrying that they made the wrong choice regarding a suitable marital property regime because they were unaware of their options, because they had the wrong information or misunderstood the legal position, because their actual circumstances after marriage were different from what they had anticipated, or because of unforeseen changes in their circumstances during the marriage. Article 7, therefore, allows spouses to change their marital property regime after marriage, with court oversight as a safeguard against abuse.

While having a choice between marital property regimes provides couples with greater flexibility, education on the details and consequences of each regime is necessary to ensure that the selected regime is appropriate. Women and men must be able to engage equally in the decision-making process, with full knowledge of the regimes and their consequences. To that end, Modules 1 and 6 (on “Marriage” and “Implementation Provisions,” respectively) include provisions for accessible marriage registration, public legal education and judicial training (which can be adapted for the purposes of a marital property regime framework).

C. Marital Property Regimes

NOTE:
The following three options recognize women’s contributions to property acquired during marriage and provide access to it upon marriage dissolution.

Article 8. Full community of property and presumption of joint estate

(1) In a marriage in full community of property, all of the assets and liabilities acquired by or accruing to either spouse before, on or after the date of the marriage shall be deemed to constitute one joint estate, even if registered in the name of only one of the spouses.66

63 The modified community of property regime is discussed in the commentary to Articles 10–13 below.
64 Women & the Law in South Africa: Empowerment Through Enlightenment, Unit for Gender Research in Law, University of South Africa (UNISA) (Kenwyn: Juta & Co, 1998), pp. 56–57.
(2) All income earned by each of the spouses shall be deemed to be part of the joint estate.

(3) Property donated or bequeathed conjointly to the spouses shall be deemed to be part of the joint estate, unless otherwise stipulated in the act of donation or relevant testamentary document.67

(4) Each spouse shall own an undivided half share of the joint estate.

**Article 9. Full community of property and debts of spouses**

(1) Where one spouse incurs any debt without the prior written consent required under Article 15, upon the division of the joint estate an adjustment in respect of the amount paid out of the joint estate in settlement of the debt shall be effected in favour of the other spouse or his or her estate, as the case may be.68

**Commentary: Articles 8 and 9**

As the CEDAW Committee has noted,

In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets.69

An “out of community of property” regime (which is not included in this module) is primarily concerned with the individual ownership of specific items of property. While many countries provide an option for, or default regime of, “out of community of property,” this marital property regime has proven to be disadvantageous to many women.70 Under this regime, many women retain virtually nothing after marriage dissolution because property must either be registered in their own name or they must prove that they made a contribution to its acquisition or maintenance in order to demonstrate that they have a proprietary interest in it. Since property acquired during the marriage is usually registered in the husband’s name and women are often unable to

67 This section was adapted from art. 62 of Ethiopia, Revised Family Code of 2000.

68 This approach is drawn from LAC, Marital Property (supra), p. 157.

69 CEDAW Committee, “General Recommendation No. 21” (supra), para. 32.

70 See, for example, Zimbabwe, Married Person’s Property Act of 1929; Tanzania, Law of Marriage Act of 1971; Botswana, Married Persons Property Act of 1971; Senegal, Family Code of 1972. Some countries in which this regime existed have since found the separate property regime faulty in practice and have attempted to modify it because it does not provide a fair solution to property division between spouses, given the difficulty of proving contribution to a specific property without record. See COHRE, Bringing Equality Home (supra), pp. 68, 92 and 119.
provide courts with records of their possessions and contributions to the family’s property, women have little to claim as their own upon marriage dissolution.\(^{71}\) Moreover, because women’s domestic and caregiving work is not often recognized as an economic activity and is difficult to quantify, husbands more often can claim ownership of the assets that they personally purchased.\(^{72}\) Courts have held that “an inference of joint ownership of property is not to be made from a mere fact of marriage”; to claim a share in property (on marriage dissolution) that is not registered in a wife’s name, her financial contribution must be demonstrated.\(^{73}\) Therefore, the “out of community of property” regime does not recognize spouses’ equal claims on marital assets in the context of mutual rights and responsibilities and implies that women make a lesser, secondary contribution.

In contrast, a full community of property regime renders any property possessed by the spouses at any time (on the day of marriage or anytime thereafter) part of the joint estate.\(^{74}\) Under this regime, there are no exceptions for separate property and women are not required to prove their contribution to the property before they are entitled to a share of it. As one human rights organization has noted, women who have married in community of property generally feel more secure and empowered than those who marry

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\(^{72}\) In Tanzania, for example, once a marriage is dissolved, the court has the power to divide assets jointly acquired by the couple during the course of the marriage (pursuant to s. 114 of the *Law of Marriage Act of 1971.*). The two main factors the court considers in making this determination are the customary norms of the community to which the parties belong and the “contributions made by either party in money, property, or work towards the acquiring of the assets.” This latter provision has proven contentious, as it does not specify what kinds of activities constitute work done in contribution to the acquisition of marital assets. In 1980, the Tanzanian High Court in the case of *Zawadi Abdallah v. Ibrahim Iddi,* High Ct. Civil App. 9 (1980), held that a wife’s domestic services did not factor into economic contributions because the drafters of the *Law of Marriage Act* did not positively acknowledge its applicability in the division of assets. According to one observer, “[C]ourts still are reluctant to divide matrimonial properties equally and instead continue to give preferential treatment to the income-generating spouse who is usually the husband”: J. Rakstad et al, “The progress of Tanzanian women in the law: women in legal education, legal employment and legal reform,” *Southern California Review of Law and Women’s Studies* 10 (2000): 35–113, at 98. In Malawi, the High Court has insisted that property vests only in the party who can prove that its title vests in her/him and any claim based on contribution must demonstrate a direct financial contribution. Housework and indirect contributions are not given any value: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Second, Third, Fourth and Fifth Periodic Report of States Parties: Malawi,” CEDAW/C/MWI/2-5, 28 Jun 2004, para. 16.11.1, p. 83.

\(^{73}\) See, for example, *Amadi v. Nwosu,* [1992] 5 NWLR 273 (Supreme Court of Nigeria), in which the Court held that in a marriage concluded under customary law, where a wife does not have the right to property ownership, she must prove her monetary contribution to family property before she can invoke other laws to claim joint ownership of the property; S. White, “Can rights lift the poor out of poverty? Intersecting the law, women’s property rights, and poverty in Malawi,” paper presented at the Workshop on Poverty, Legal Empowerment and Pro Poor Governance organized by the Centre for Development and the Environment, University of Oslo, 2007, Oslo, Norway, p. 7.

\(^{74}\) COHRE, *Bringing Equality Home* (supra), pp. 92 and 119.
under other marital property regimes. More generally, research has indicated that increasing the assets controlled by women in marriage increases their bargaining power within the household and results in better education and health for their children.

Under international law, the Protocol on the Rights of Women in Africa calls for states to adopt legislation and “take the necessary measures to recognize the economic value of the work of women in the home.” Similarly, the CEDAW Committee has recommended that the “[f]inancial and non-financial contributions [of women in marriage] should be accorded the same weight.” As such, the U.N. Human Rights Committee has stated,

To fulfil their obligations under article 23, paragraph 4 [equality of rights and responsibilities of spouses] States must ensure that the matrimonial regime contains equal rights and obligations for both spouses, with regard to … the ownership or administration of property, whether common property or property in the sole ownership of either spouse. States should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property…”

**Article 10. Modified community of property and presumption of joint estate**

(1) In a marriage in modified community of property, all of the assets and liabilities acquired by or accruing to either spouse on or after the date of the marriage shall be deemed to constitute one joint estate, even if registered in the name of only one of the spouses.

(2) All income earned by each of the spouses on or after the date of the marriage shall be deemed to be part of the joint estate.

(3) Property donated or bequeathed conjointly to the spouses on or after the date of the marriage shall be deemed to be part of the joint estate, unless otherwise stipulated in the act of donation or relevant testamentary document.

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75 Ibid., p. 120. Other reasons cited for this feeling are because women married pursuant to South Africa, Recognition of Customary Marriages Act of 1998 are able to register their marriages and have proof of them.


77 Protocol on the Rights of Women in Africa, art. 13(h).

78 CEDAW Committee, “General Recommendation 21” (supra), para. 32.


80 This section was adapted from art. 63 of Ethiopia, Revised Family Code of 2000. See also s. 11 of Ghana, Property Rights of Spouses Bill of 2008.

81 This section was adapted from art. 62 of Ethiopia, Revised Family Code of 2000.
(4) Each spouse shall own an undivided half share of the joint estate.

**Article 11. Modified community of property and retention of ownership of separate property**

(1) Any property possessed by a spouse before the date of his or her marriage shall be deemed that spouse’s separate property, and any debt incurred prior to the date of marriage shall be deemed the sole responsibility of that spouse.

(2) Property acquired in exchange for payment by one of the spouses after marriage shall also be deemed separate property of that spouse where the acquisition has been made by exchange for property owned separately, or with money owned separately or derived from the sale of property owned separately. 82

(3) Any property acquired by a spouse as a gift, whether before or during the marriage, shall remain the separate property of that spouse.

**Article 12. Modified community of property and administration of separate property**

(1) Each spouse married in modified community of property:

   (a) shall administer his or her respective separate property and receive the income thereof; and
   (b) may freely dispose of his or her respective separate property. 83

**Article 13. Modified community of property and debts of spouses**

(1) Any debt incurred by one spouse prior to the date of marriage or with respect to that spouse’s separate property shall be settled from the separate property of the indebted spouse.

(2) Any debt incurred by one spouse without the prior written consent required under Article 15 shall be settled from the separate property of the indebted spouse.

(3) Where the indebted spouse has no separate property or insufficient separate property to settle such debt as referred to in Sections (1) and (2), upon the division of the joint estate an adjustment in respect of the amount paid out of the joint estate in settlement

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82 Articles 11(1) and 11(2) are derived from art. 58 of Ethiopia, Revised Family Code of 2000.

83 This section was adapted from art. 59 of Ethiopia, Revised Family Code of 2000.
of the debt shall be effected in favour of the other spouse or his or her estate, as the case may be.  

(4) Where debt has been incurred in the interest of the household and with the consent of both spouses, it shall be deemed to be the joint and several obligation of both spouses and may be recovered from the joint estate or from the separate property of either of the spouses.

**Commentary: Articles 10–13**

“Modified community of property,” the default marital property regime provided in this module, renders all property acquired during marriage part of the joint estate, with a limited exception for separate property which remains the individual interest of each spouse. Under this regime, any property possessed before the marriage remains the separate property of the spouse, but everything acquired during the marriage is shared and administered equally.

In terms of married women’s access to property, many of the arguments supporting a full community of property regime similarly apply to a modified community of property regime. The sole distinction is the fact that spouses can deal independently with property possessed before the marriage, which may better reflect the wishes of the prospective spouses. Some commentators have noted that a modified community of property strikes the appropriate balance between respecting individuals’ autonomy with respect to property acquired before marriage and property acquired as gifts, while recognizing spouses’ unpaid contributions during marriage, such as providing support, childcare and household labour. For this reason, the modified community of property regime is designated as the default regime for the purposes of this module.

**NOTE:**

Articles 14–18, which apply to both full community of property and modified community of property regimes, regulate the responsibilities and powers of spouses with respect to the handling of their joint estate. Certain procedures are designed to ensure that the joint estate is administered in a fair manner. When the processes outlined are not followed (to the disadvantage of one spouse), several remedies are provided.

**Article 14. Full or modified community of property and equal power of spouses**

(1) Subject to Article 15, spouses married in full or modified community of property shall have equal capacity:

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84 This approach is drawn from LAC, *Marital Property* (supra), p. 157.

85 This section is derived from art. 70 and 71 Ethiopia, *Revised Family Code of 2000*.

86 This was underscored by the experts at *Legislating for Women’s Rights in the Context of HIV/AIDS*, consultation meeting, 16–18 January 2008, Johannesburg, South Africa.
Commentary: Article 14

In some countries, including those where “marital powers” is in existence, men have had exclusive legal authority to determine how property is used. Even though many countries have legal protections against discrimination on the basis of race, sex, religion and other grounds, such protection is often weak in practice. As the CEDAW Committee has noted, “Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man.” In order to overcome cultural practices, religious beliefs and social attitudes that may continue to discriminate against women with respect to the use and management of marital property, explicit protections of their equal capacity should be provided in legislation. Accordingly, Article 14 underscores that all spouses, male and female, are subject to identical powers and restraints.

Article 15. Full or modified community of property and permission to alienate or encumber the joint estate

(1) Subject to the provisions of Section (2), a spouse married in full or modified community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) A spouse married in full or modified community of property shall not without the prior and written consent of the other spouse:

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87 This section is derived from s. 5 of Namibia, Married Persons Equality Act of 1996, s. 14 of South Africa, Matrimonial Property Act of 1984 and s. 5 of Lesotho, Legal Capacity of Married Persons Act of 2006.

88 See, for example, Namibia, prior to the implementation of the Married Persons Equality Act of 1996; Botswana, prior to the implementation of the Amendment to the Deeds Registry Act of 1996; art. 1421 and 1422 of Cameroon, Civil Code of 1981. For a further discussion of marital powers, see the associated commentary in Module 1 “Marriage.”

89 CEDAW Committee, “General Recommendation No. 21” (supra), para. 31. In Ghana, for example, Article 22(3) of the Constitution requires spouses to have equal access to property jointly acquired during marriage, though court decisions have not sufficiently reflected the regime guaranteed by the Constitution. This has been attributed to the lack of guidelines and workable standards for courts: J. Gharaty, Property Rights of Spouses Bill 2008 Memorandum, undated.

90 For example, Tanzania has incorporated such provisions in its legislation to overcome customary laws which restrict women’s rights to use, transfer and own land: Tanzania Land Act of 1999, s.142(I)(d)(ii). The FAO also explicitly calls for the principle of non-discrimination to be incorporated into both constitutions and legislation in order to overcome discrimination entrenched in socio-economic life: FAO, FAO Legislative Study — 76, Gender and Law: Women’s Rights in Agriculture, 2002, pp. 155–158.

91 This Section is derived from s. 15(1) of South Africa, Matrimonial Property Act of 1984.
(a) alienate, burden or in any way confer to another party any real right in immovable property that forms part of the joint estate, except through the making of a will;
(b) alienate, burden or in any way confer to another party any movable property or securities that form part of the joint estate the value of which exceeds [monetary amount];
(c) donate any part of the joint estate that exceeds [monetary amount];
(d) borrow any money that exceeds [monetary amount];
(e) stand as a surety for a debt exceeding [monetary amount] for another person; or
(f) buy or agree to buy any immovable property.92

(3) Where one of the spouses has entered into a transaction in violation of the provisions of Section (2), the [relevant court] may, upon the application of the other spouse, revoke such transaction and recover relevant assets from the person with whom the transaction was made, unless that person does not know and cannot reasonably know that the transaction was entered into without the consent required in terms of Section (2).93

(4) Where an unauthorized transaction is not revoked by the [relevant court] pursuant to Section (3), and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse:
(a) upon division of the joint estate; or
(b) upon demand of the other spouse at any time during the subsistence of the marriage.94

(5) An application under Section (3) to revoke a transaction may not be made later than [period of time] after the day on which the applicant spouse became aware of such transaction, and, in any case, no later than [period of time] after such transaction arises.95

(6) When a spouse withholds the consent required in terms of Section (2) or when for any other reason that consent cannot be obtained, the [relevant court] may, on the application of the spouse wishing to conduct the transaction, give him or her permission to enter into the transaction without the required consent if it is satisfied, in the case where the consent is withheld, that such withholding is unreasonable or, in any other case, that there is good reason to dispense with the consent.96

92 This Section is derived from s. 15(2) of South Africa, Matrimonial Property Act of 1984, s. 7 of Namibia, Married Persons Equality Act of 1996 and s. 7 of Lesotho, Legal Capacity of Married Persons Act of 2006.
93 This provision is derived from art. 69 of Ethiopia, Revised Family Code of 2000 and s. 21(2) of Ontario, Canada, Family Law Act of 1990.
94 This provision is derived from s. 8 of Namibia, Married Persons Equality Act of 1996.
95 This provision is derived from art. 69(2) of Ethiopia, Revised Family Code of 2000.
96 This provision is derived from s. 10 of Namibia, Married Persons Equality Act of 1996.
Article 16. Full or modified community of property and power of court where consent for transaction obtained by fraud, coercion, undue influence or violence

(1) Where a court is satisfied that the consent of one spouse as required pursuant to Article 15(2) was obtained by fraud, coercion, undue influence or domestic violence, either at the time of negotiations or at any time before the consent was given, and that it would cause serious injustice to enforce the consent given or any of its terms, such court may:

(a) issue an order revoking or setting aside the transaction;
(b) issue an order for the recovery of assets or losses from third parties in any case where the third party knew or ought reasonably to have known that the consent was improperly obtained;
(c) issue an order for an appropriate adjustment to the property of the respective spouses or to their shares in the joint estate;
(d) in the case of a marriage in modified community of property, issue a warrant of execution against the separate property of the spouse who obtained consent by fraud, coercion, undue influence or domestic violence in order to make restitution for loss to the other spouse resulting from the transaction in question; or
(e) make any other order which the court deems appropriate.98

Article 17. Full or modified community of property and power of court to order division, adjustment or both of joint estate

(1) A court may, upon the application of a spouse, order the immediate division of the joint estate in equal shares or may order that an adjustment be made in favour of the applicant spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse.99

97 This provision is derived from s. 10 of Namibia, Married Persons Equality Act of 1996.
98 This approach is drawn from LAC, Marital Property (supra), pp. 171–174.
99 The language for this article is derived from s. 20 of South Africa, Matrimonial Property Act of 1984.
Article 18. Full or modified community of property and accounting in respect of joint estate

(1) One of the spouses shall, at the request of the other spouse, notify the latter of any income and assets received by him or her which form part of the joint estate and of any debts against the joint estate.

(2) The court may, upon the application of one spouse, compel the other spouse to notify the applicant spouse of the income and assets received by him or her, and of any debts incurred against the joint estate, if it is satisfied that the interest of that spouse in the joint estate is being or may be adversely affected by the conduct or proposed conduct of the other spouse.

Commentary: Articles 15–18

A legal entitlement to property on its own may not be sufficient to guarantee that women are able to access, use and transact with respect to that property. Inadequate safeguards against manipulation and abuse of the joint estate, coupled with family or community pressures, may prevent some women from exercising their right to their property during marriage. According to the CEDAW Committee, “In many States, including those where there is a community property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits woman’s ability to control disposition of the property and the income derived from it.”

In order to provide greater clarity as to the administration of property of the joint estate, it is essential not only that legislation designate ownership of the assets, but also that provisions are included with respect to: limitations on what a spouse can do independently with property; remedies, if these limitations are not respected; duties of financial disclosure between spouses; and procedures for division or adjustment of the joint estate where there is the likelihood of serious prejudice to one spouse.

Articles 15 and 16 provide remedies where property is administered without the prior and written consent of the other spouse, and where consent to a transaction is obtained by fraud, coercion, undue influence or violence. Prior and written consent is important to dissuade spouses from entering into major financial transactions without first consulting their partners. Explicitly acknowledging domestic violence as a ground of relief also recognizes it as a distinct and important issue, which may not be the case if the issue is subsumed under general law principles on contracts. Women who have suffered domestic violence and know they are entitled to marital property reportedly do not attempt to claim their share of the property because of a fear of further attacks. To the very limited extent that survivors of domestic violence will challenge agreements made with violent partners, there needs to be clear and explicit recognition of the relevance and

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100 This provision is derived from art. 64 of Ethiopia, Revised Family Code of 2000.
101 CEDAW Committee, “General Recommendation No. 21” (supra), para. 31.
impact of domestic violence on the fairness of the bargain and its enforceability, such that a court has express power to vary or set aside an agreement where it is satisfied that the applicant signed the agreement because of actual or threatened violence. Further, where one spouse is repeatedly entering into transactions without the required consent of the other spouse, or is recklessly squandering the joint estate, Article 17 authorizes a court to order the immediate division of the joint estate or an adjustment in favour of the applicant spouse.

Some women may not be aware of the property their spouse owns or the transactions they engage in. As a result, women may not be able to prevent their spouse from disposing of marital property and their own interests may be diminished by the actions of their spouse. In cases where a spouse is not aware of the property comprising the joint estate, Article 18 authorizes a court to compel the other spouse to notify the applicant spouse of its particulars. This may be an important tool where women are not privy to information related to the income and assets of their spouse. Given the various forms this notification could take, the details of such notification should be determined by each individual country.

### Article 19. Accrual and separation of all property during marriage

(1) In a marriage subject to accrual, the spouses shall retain separate ownership and administration of all property acquired by each of them before the marriage and during the marriage.

### Article 20. Calculation of accrual

(1) The accrual of the estate of a spouse is the amount by which the net value of his or her estate at the dissolution of the marriage exceeds the net value of his or her estate at the commencement of that marriage.

(2) At the dissolution by divorce or by the death of one or both of the spouses of a marriage subject to accrual, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse or his or her estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

(3) Subject to the provisions of Article 24, a claim in terms of Section (2) arises at the dissolution of the marriage.

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104 HRW, *Double Standards* (supra), p. 29.

105 The accrual approach is drawn from ss. 2–10 of South Africa, *Matrimonial Property Act of 1984*. Some of the procedural and technical details have been omitted here.
(4) The right of a spouse to share in the accrual of the other spouse’s estate during the subsistence of the marriage is not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.\textsuperscript{106}

**Article 21. Property subject to accrual**

(1) In the determination of the accrual of the estate of a spouse:

(a) any amount which accrued to that estate by way of damages, other than damages for loss of wages, profit or income, is excluded from the estate;
(b) an asset which has been excluded from the accrual of the estate of a spouse in terms of the antenuptial agreement of the spouses, as well as any asset which he or she acquired by virtue of his or her possession of an asset excluded in terms of an antenuptial agreement, is not taken into account as part of that estate at the commencement or the dissolution of the marriage; and
(c) the net value of that estate at the commencement of that spouse’s marriage is calculated with due allowance for any difference which may exist in the value of the currency at the commencement and dissolution of the marriage.

(2) The accrual of the estate of a deceased spouse is determined before effect is given to any bequests or instructions left in a will, gifts given in anticipation of death or distribution of that estate in terms of the law of intestate succession.\textsuperscript{107}

(3) All property acquired by the spouses during marriage by gift and property that remains separate property according to Article 4 does not form part of the accrual of the estate of a spouse, except insofar as the spouses may stipulate otherwise in their antenuptial agreement or will.

(4) All debts and liabilities incurred by either spouse before, on or after the date of marriage remain the sole responsibility of that spouse.

**Article 22. Accrual and proof of commencement value of estate**

(1) A party to an intended marriage may for the purpose of proof of the net value of his or her estate at the commencement of the marriage declare that value:

(a) before the marriage is entered into, with their marriage certificate in accordance with the [relevant marriage legislation]; or
(b) within six months after the date of the marriage in a statement which is signed by both spouses and filed with their marriage certificate;

\textsuperscript{106} This article is derived from s. 3 of South Africa, *Matrimonial Property Act of 1984*.

\textsuperscript{107} Sections 1–3 of Article 21 are derived from s. 4 of South Africa, *Matrimonial Property Act of 1984*. 
which shall serve as *prima facie* proof of the net value of the estate of the spouse concerned at the commencement of the marriage.

(2) The net value of the estate of a spouse at the commencement of his or her marriage is deemed to be nil for the purpose of determining the amount of accrual upon dissolution of his or her marriage if:

(a) the liabilities of that spouse exceed his or her assets at such commencement; or

(b) the value of the estate was not declared by either of the methods set forth in Section (1) and it is not proved that the net value of the estate at the commencement of marriage exceeds nil.108

**Article 23. Accrual and obligation to furnish particulars of value of estate**

(1) In order to determine the accrual of the estate of a spouse or a deceased spouse at the time of the dissolution of a marriage, the spouse or executor of the estate of the spouse, as appropriate, shall furnish full particulars within a reasonable time.109

**Article 24. Power of court to order division of accrual**

(1) A court may, upon the application of a spouse whose marriage is subject to accrual and who satisfies the court that his or her right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned.110

**Commentary: Articles 19–24**

Under a regime of accrual, each spouse continues to own and control her or his own estate during marriage but, upon divorce or death, any increase in the value of either or both estates is shared equally by the parties.111 Accrual thus allows both parties to benefit from the growth in value to their separate property during the marriage, and carries the advantages of providing autonomy during the marriage, as well as an equal division of the gains which take place during the existence of the relationship. In calculating accrual to the estate of a spouse, Article 21 excludes any amount which is accrued to an estate by way of damages (other than damages for loss of wages, profit or income) or by way of

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108 This article is derived from s. 6 of South Africa, Matrimonial Property Act of 1984.

109 This article is derived in part from s. 7 of South Africa, Matrimonial Property Act of 1984.

110 This article is derived from s. 8 of South Africa, Matrimonial Property Act of 1984.

gift, and any property that remains separate property. This is consistent with the basic principle of the accrual model which is that assets are only included in accrual calculations if they have come to the spouses by their own efforts. The accrual system is generally considered to be one of the fairest approaches to property in marriage, achieving a balance between autonomy and interdependence of spouses.\footnote{LAC, *Marital Property* (supra), p. 182.}

It has been suggested that the accrual approach may perpetrate gender inequality, as the male spouse is more likely to bring assets of greater value into the marriage at the outset, given gender-based economic inequalities that persist more generally, so that a woman would, upon dissolution of the marriage, have an entitlement only to her own separate property and to half of the value of the increase in assets acquired by either spouse during the marriage.\footnote{Ibid., p. 205.} In comparison to a community of property regime, the accrual approach does provide a lesser share of the total estate. However, the automatic sharing of accrual entitles a spouse who cannot obtain or increase her own separate estate during the marriage to a legal right to a share in the growth of the other spouse’s estate and to a form of recognition of the unpaid contribution the spouse may have made to the estate in terms of providing support, childcare and household labour.\footnote{Women & the Law in South Africa (supra), p. 53.} The accrual system also gives some protection to spouses against liability for their spouse’s debts: Only the separate property of the spouse who incurred the debts can be used for debt payment.

Another potential disadvantage to women married under the accrual system is that neither spouse has any say over the manner in which the other deals with his or her own assets, even if this takes place in a reckless or intentionally vindictive manner. This would disproportionately impact women, who in most cases will have fewer assets entering marriage.\footnote{See for example HRW, *Double Standards*, (supra), p.10; A. Quisumbing and R. Meinzen-Dick, “Strengthening women’s assets” (supra), p. 7.} Article 24 therefore provides some protection for a spouse whose share in the accrual of the other spouse’s estate is being endangered. A prejudiced spouse can request a court to order an immediate division of the accrual, which could potentially prevent a husband, for example, from reducing his spouse’s share in the accrual any further.
D. Polygamous Marriages

NOTE:
Where polygamy continues to enjoy legal recognition, the provisions below empower courts to oversee the distribution of property in polygamous marriages to ensure that women in those unions have more equitable access to property during marriage and upon divorce.

Article 25. Division of property

[Two options for Article 25 are provided below — 25A and 25B. One or the other may be selected, but not both. Note: Articles 26 and 27 should be retained ONLY IF Article 25B is selected.]

Option 1: Article 25A. Serial division of property

(1) Where a party has more than one spouse in a polygamous marriage, ownership of property between that party and each spouse shall be determined as follows:

(a) all of the assets and liabilities acquired by or accruing to the party and the first spouse before, on or after the date of the marriage, and acquired or accrued before the party married the second spouse, shall be owned in equal shares between the party and the first spouse;

(b) any property acquired by or accruing to the party after he or she marries the second spouse shall be owned in equal shares between the party, the first spouse and the second spouse, and the same principle shall be applied to any other subsequent spouse or spouses; and

(c) any property acquired by or accruing to the spouses of the party after the first marriage shall be their respective separate property and they have the right to administer and freely dispose of it.116

Commentary: Article 25A
Where the proprietary consequences of polygamous marriages are not regulated, women in such relationships do not have a clear right to property within marriage, or any means of enforcing their property rights.117 Women in polygamous marriages may, as a result,

116 This section is derived in part from s. 70 of Uganda, Domestic Relations Bill of 2003, s. 11 of Kenya’s The Matrimonial Property Bill of 2007 and s. 20 of Ghana, Property Rights of Spouses Bill of 2008.

117 See, for example, COHRE, Bringing Equality Home (supra), p. 175; and the case of Maryam Mbaraka Saleh v. Abood Saleh Abood, Appeal No. 1 of 1992 (Court of Appeal of Tanzania Civ.), as cited in B. Rwezaura, “Tanzania: building a new family law out of a plural legal system,” University of Louisville Journal of Family Law 33(2) (1995): 523–540, at 530. In that case, a senior co-wife was unsuccessful in re-opening divorce proceedings involving her husband and a former co-wife, who had won her case before the Court of Appeal, which held that she was entitled to forty percent of the marital property based on her contribution. The fact that the husband was engaged in a polygamous marriage was never raised until the
face economic uncertainty because of the possibility of future co-wives and the necessity of sharing their husband’s income and assets with these other wives. Evidence linking polygamous marriage with women’s social and economic vulnerability as well as HIV infection further reinforces the need to ensure women in polygamous unions have adequate financial autonomy.\(^{118}\) For example, one study found women living in settings where there are higher rates of polygamy were less likely to work outside the home; to work in the formal sector in professional, managerial, technical or clerical occupations; or to be working for themselves — and consequently they were less likely to earn wages than women in lower polygamy settings.\(^{119}\) The financial autonomy of women in polygamous marriages is enhanced where a legal framework exists to provide greater clarity to those in polygamous relationships and where this framework ensures that women have access to, and ownership of, property during marriage and upon divorce.

A number of human rights and women’s rights organizations have called for a default presumption of community of property to better protect women’s access to marital property in polygamous unions.\(^{120}\) As discussed above, a community of property regime may provide women with greater control over property during marriage because they need not prove their contribution to marital property before they are entitled to a fair share.\(^{121}\)

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\(^{118}\) See, for example, S. Kapiga et al, “Risk factors for HIV infection among women in Dar-es-Salaam, Tanzania,” *Journal of Acquired Immune Deficiency Syndromes* 7(3) (1994): 301–309, which found a higher HIV prevalence among women in polygamous marriages than those married to one spouse; H. Brahmbhatt et al, “Polygyny, maternal HIV status and child survival: Rakai, Uganda,” *Social Science & Medicine* 55 (2002): 585–592, which found higher HIV prevalence among polygynous mothers than among mothers married to one spouse; E. A. Adejuyigbe, “Sociodemographic characteristics of HIV-positive mother-child pairs in Ile-Ife, Nigeria,” *AIDS Care* 16 (2004): 275–282, which found that HIV-positive mothers, compared with HIV-negative mothers, were younger, unemployed, had earlier sexual exposure, lower education and were married to polygynous spouses; C.S. Bambra, “Current status of reproductive behaviour in Africa,” *Human Reproduction Update* 5 (1999): 1–20, at 3, which found that women in areas with high rates of polygamy in Kenya entered marriage, started sexual activity, and had their first child earlier than women in non-polygamous areas; V. Agadjanian and A. Chika Ezeh, “Polygyny, gender relations, and reproduction in Ghana,” *Journal of Comparative Family Studies* 31 (2000): 427–441, which found that areas with higher levels of polygyny were characterized by a higher degree of gender inequality and by women’s dependency on men than in areas where there are lower levels of polygyny; I.O. Orubuloye et al, “Sexual networking in the Ekiti District of Nigeria,” *Studies in Family Planning* 22(2) (1991): 61–73, which found women in polygamous marriages were more likely than women married to one spouse to have sex outside of marriage, citing the need for material or economic assistance as one reason for doing so.

\(^{119}\) V. Agadjanian and A. Chika Ezeh, “Polygyny, gender relations, and reproduction in Ghana” (supra), pp. 427–441.

Option 1 (Article 25A) provides for a form of community of property regime, in the form of a serial division of marital property. This default regime does not necessarily require court intervention.

Prior to a husband marrying a second wife, the spouses share all of the assets and liabilities they own in equal shares. There is no distinction in the treatment of property between polygamous and non-polygamous marriages that are governed by a full community of property regime. In order to protect the interests of the first wife, second and subsequent wives do not share in property acquired before their marriage. Therefore, where a husband marries more than one wife, each subsequent wife shares with her husband and any preceding wives only the property acquired by her husband after the date of their marriage. Article 25A(1)(c) stipulates that each co-wife retains individual ownership of any property or assets that she acquires. This is to ensure a wife is not required to share her own separate property with her co-wives, and that her husband bears the primary responsibility for sharing his wealth with his spouses. While the rights of the first wife diminish to a certain extent (because any property acquired after a subsequent marriage is shared with her co-wives), the property rights of the co-wives are protected in that neither the first wife nor the subsequent wives are required to share their separate property with co-wives while the husband’s property is shared with them all. Regulating property in a fair and effective manner in polygamous marriages is inherently complicated and imperfect. This approach, based on proposals made in several sub-Saharan African countries, is one solution that seems to present both the desired clarity and fairness sought in regulating property where polygamous marriages continue to exist.

Option 2: Article 25B. Presumption of modified community of property for potentially polygamous marriage

(1) A potentially polygamous marriage, as defined in the [relevant marriage legislation], is a marriage subject to the regime of modified community of property set out in Articles 10–18 of this Act, unless a different manner of distributing marital property is registered in an antenuptial agreement.

Article 26. Second further marriage

(1) A person in a potentially polygamous marriage who has obtained either the consent of the first spouse or court approval for the subsequent marriage, and who wishes to enter into a subsequent marriage with another person must make an application to the
court to approve a written agreement which will regulate the future marital property regime of the marriages.

(2) When considering the application in terms of Section (1), a court must:

(a) determine whether the consent of the first spouse or court approval for the subsequent marriage has been obtained by the spouse making the application;
(b) terminate the marital property regime or antenuptial agreement which is applicable to the marriage;
(c) determine the equitable apportionment of the property according to the applicable marital property regime or the antenuptial agreement; and
(d) take into account all the relevant circumstances of the existing spouse and minor or dependent children which would be affected if the application is granted.

(3) When considering the application in terms of Section (1), a court may:

(a) allow such further amendments to the terms of the agreement as it may deem just;
(b) grant the order subject to any condition it may deem just; or
(c) refuse the application if in the court’s opinion the interests of any of the parties would not be sufficiently safeguarded by means of the proposed agreement.

(4) All persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse and the applicant’s prospective spouse, must be granted standing to participate in any proceedings instituted by Section (1).

(5) If a court grants an application pursuant to Section (3), the [relevant court official] must furnish each spouse with an order of the court, including a certified copy of any agreement approved by the court, and must ensure that a copy of the agreement is included in the marriage register.123

Article 27. Penalties

(1) Where a person in a potentially polygamous marriage enters into a subsequent marriage with another person without having made an application to the court as contemplated in Article 26:

(a) the subsequent marriage is voidable at the option of the existing spouse; and
(b) the spouse who fails to make the application commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

123 This article is derived from s. 7 of South Africa, Recognition of Customary Marriages Act of 1998.
Commentary: Articles 25B, 26 and 27

Under Option 2, a modified community of property regime is applicable to the first marriage, with subsequent unions determined by agreement and subject to authorization by the court. This approach differs from Option 1 because it only applies to potentially polygamous marriages (or before a party has married a second spouse). In contrast, Option 1 could theoretically be applied retroactively to polygamous marriages. Therefore, polygamous marriages concluded before the adoption of the legislation are not governed by the approach in Option 2.124

To ensure that the needs and wishes of all those directly affected by the subsequent marriage are heard, all spouses must be joined in the proceedings and the court is obliged to ensure an equitable distribution of the property. The framework requires the court to undertake a more contextual analysis of the relationships and circumstances of those affected by the order than a purely presumptive framework would require.

The rationale for a contract approach for subsequent marriages is that only the first wife would have an expectation to share property acquired during the marriage, since subsequent wives would be aware of the type of union they are contracting.125 This option may be more desirable where it is not feasible to have concurrent marriages in community of property due to, for example, requirements for land registration and the administration of estates.126 However, this model may be inaccessible for many people, given the desirability of legal representation and court expenses involved. Individuals may therefore choose to enter subsequent marriages without respecting the requirement of court authorization, though the penalties for ignoring this requirement (as provided in Article 27) may deter some from doing so.

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124 In South Africa, from which this approach is derived, polygamous marriages concluded prior to the adoption of the Recognition of Customary Marriages Act of 1998 “continue to be governed by customary law”: s. 7(1).


126 Ibid.
Module 4: Divorce

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Prefatory Note

Women, divorce and HIV/AIDS

Lack of access to divorce on fair terms is one factor that puts women at greater risk of HIV infection and leaves women, especially HIV-positive women, vulnerable to economic destitution. While women in sub-Saharan Africa increasingly worry about HIV infection as a result of their husbands’ sexual activity outside the marriage, many remain in those relationships. Moreover, a study of socio-cultural factors linked to HIV revealed that women were often inhibited from demanding safer sex in marriage because of their fear of the poverty associated with divorce. This fear may be reinforced in jurisdictions where divorce regimes discriminate against women in terms of access to property and do not have provisions for spousal maintenance.

The likelihood of imminent or worsening poverty upon divorce has also been shown to constrain HIV-positive women’s ability to seek appropriate treatment and support. For women living with HIV, their inability to seek HIV information or to start and continue using antiretroviral treatment may be impeded by violence and the fear of violence by intimate partners; or by the fear of abandonment and divorce, in an environment where women suffer insecure property rights and property grabbing upon the death of a spouse. In situations where married women perceive the negative economic and social consequences of leaving high-risk relationships to be more serious than the health risks of staying in those relationships, access to property and maintenance upon divorce is critical to enabling women to end unwanted and abusive marriages and to discouraging informal separations, which leave women and children without legal protection. Therefore,


3 Human Rights Watch (HRW), Hidden in the Mealie Meal: Gender-Based Abuses and Women’s HIV Treatment in Zambia, 2007, p. 21. Another report noted that many women feared that HIV testing itself, regardless of the outcome of the test, would jeopardize their primary relationship, which would translate into a loss of financial support and imminent or worsening poverty and suffering: Physicians for Human Rights, Epidemic of Inequality: Women’s Rights and HIV/AIDS in Botswana & Swaziland, 2007, p. 48.

4 The negative economic consequences of divorce may be further compounded by an inability to return to the natal home, or a lack of prospects for another partnership: K. Yu-Isenberg, Why All the Talk about Women and AIDS? Information Sheet on Gender Issues in Sub-Saharan Africa, World Bank, 1996; L. Heise and C. Elias, “Transforming AIDS prevention to meet women’s needs: a focus on developing countries,” Social Science and Medicine 40 (1995): 931–943. See also, Legal Assistance Centre of Namibia (LAC), Summary of Proposals for Divorce Law Reform in Namibia, 2000 [hereinafter Proposals], p. 1; National Council of Welfare, Women and Poverty Revisited (Ottawa: Supply and Services Canada,
facilitating women’s access to divorce requires the legal frameworks governing divorce to be fair. At a minimum, laws should stipulate the equitable division of marital property between spouses upon divorce and specify conditions for the provision of spousal maintenance.

The procedures governing divorce should also apply equally to men and women. Yet, laws in some countries continue to discriminate against or disadvantage women in divorce proceedings. Some countries’ laws stipulate different grounds for divorce between men and women, as well as establish lengthier or more complicated procedures for women than men to divorce, thus hindering women’s ability to end the marriage. For example, a husband’s adultery may never be considered a ground for divorce, while an act of adultery by a wife is a sufficient ground. Women’s ability to end their marriage may also be hindered if there is a risk of losing access to their children where divorce regimes discriminate against women in terms of child custody, as they do in some countries.

5 For example, according to a 2006 CEDAW report, under “customary law” in Sierra Leone, a husband can leave his wife for numerous reasons, including “persistent adultery,” “repeated disobedience and laziness,” “slander of husband,” “non-co-operation with co-wives,” “refusal to allow husband to marry another wife,” “frequent misconduct causing the husband to pay fines” and “refusal to convert to Islam or husband’s religion.” Conversely, the only grounds for divorce available to a woman are “non-maintenance,” “unhelpfulness to wife’s parents” and “impotence”: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Initial, Second, Third, Fourth and Fifth Periodic Report of States Parties: Sierra Leone,” CEDAW/C/SLE/5, 14 December 2006, p. 81. See also, different grounds for divorce between men and women in Tanzania pursuant to Local Customary Law (Declaration) Order, Government Notice No. 279 of 1963, First Schedule, Laws of Persons in Judicature and Application of Laws Act [translated from Swahili into English] [hereinafter, Local Customary Law]. In Djibouti, Article 39 of Code de la Famille of 2001 permits the court to pronounce a divorce at the request of the husband (“à la demande du mari”), at the request of the wife because of the injuries she has sustained (“à la demande de l’épouse en raison des préjudices qu’elle a subis”) or at the request of the wife by deposition (“à la demande de l’épouse par déposition (kholo)”). In Egypt, in order to initiate a divorce providing full financial rights, an Egyptian woman must show evidence of harm inflicted by her spouse during the course of their marriage, often supported by eyewitness testimony, whereas Egyptian men have a unilateral and unconditional right to divorce and never need to enter a courtroom to end their marriages. See HRW, Divorced from Justice: Women’s Unequal Access to Divorce in Egypt, 2004.

6 See, for example, ss. 106 and 157 of Tanzania, Local Customary Law (“according to custom, adultery committed by a man is not considered a ground for divorce”). See also, HRW, Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa, 2003, p. 81.

7 See, for example, s. 104 of Tanzania, Local Customary Law, which states, “Children belong to the father, and he shall have the right to insist that they reside with him or with his relatives.”
Women, divorce and human rights

Women’s human rights may be violated in terms of their ability to formally divorce and their access to property and children upon divorce. As the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides, states parties must take all appropriate measures to eliminate discrimination against women in matters relating to marriage and family relations ensuring, on a basis of equality of men and women, the same rights and responsibilities at marriage dissolution.8 Similarly, the U.N. Human Rights Committee has stated that “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection.”9

The right to an adequate standard of living10 and the right to property11 are also relevant to legislating in divorce because, as the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has noted, many divorced women have the sole responsibility to support a family. 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 that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship … is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.12

Affirming the CEDAW Committee, the International Guidelines on HIV/AIDS and Human Rights stipulate the review and reform of laws to ensure that discriminatory limitations of rights of women (such as limitations on rights to equitably share assets upon divorce or separation) are removed.13 Moreover, the U.N. Secretary General’s Task

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Force on Women, Girls and HIV/AIDS in Southern Africa has called for strengthening legal and policy frameworks that support women’s right to economic independence.14

Some regional treaties also provide specific obligations with respect to protecting women upon divorce. For example, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa) obligates states parties to “enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage.” Therefore, states parties must ensure that women and men have the “same rights to seek separation, divorce or annulment of a marriage,” and that this shall be “effected by judicial order.” In case of separation, divorce or annulment of marriage, states parties must ensure that women and men have “reciprocal rights and responsibilities towards their children” and have the “right to an equitable sharing of the joint property deriving from the marriage.”15

Many of the other human rights which are relevant to the issue of divorce intersect and overlap with those relevant to marriage. For example, women’s right to freedom of association is violated when she is forced into marriage and when she is unable to leave an unwanted marriage.16 Requiring women to remain in abusive relationships against their will also violates women’s right to the highest attainable standard of health,17 their right to life,18 their right to freedom from cruel, inhuman or degrading treatment or punishment,19 their right to be free from slavery and servitude,20 their right to liberty and security of the person,21 and their right to be protected from violence.22 These rights have

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16 International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art. 22.
17 ICESCR, art. 12; CEDAW, art. 12; Protocol on the Rights of Women in Africa, art. 14; African Charter, art. 16.
18 ICCPR, art. 6; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 4.
19 ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.
20 ICCPR, art. 8; African Charter, art. 5.
21 ICCPR, art. 9–10; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 6.
22 Women’s right to be free from sexual violence is explained in General Recommendation No. 19 of the CEDAW Committee at 24(b): “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”: CEDAW Committee, “General Recommendation No. 19: Violence Against Women,” U.N. Doc. A/47/38, 1993.
have been explicitly recognized by the CEDAW Committee as rights which are impaired or nullified by gender-based violence.\(^{23}\)

**A. Equal Grounds for All Forms of Divorce**

**NOTE:**
Whether they are married according to civil, customary or religious law, all women should have the same access to divorce proceedings. The provision below subjects all forms of marriage to the same grounds for, and effects of, marriage dissolution.

**Article 1. Grounds for, and effects of, marriage dissolution**

(1) The grounds for, and the effects of, dissolution of marriage shall be the same whichever the form of celebration of the marriage and whichever the forum or procedure for dissolution.\(^{24}\)

**Commentary: Article 1**
In many jurisdictions, divorce under customary law is a private matter that can be arranged by the spouses and their families on any terms they choose.\(^{25}\) Questions of maintenance, distribution of the matrimonial estate and rights to children are not commonly disputed, since customary law divorce is often based on an assumption that women will return to their own families and their children will either remain with their fathers or move to their maternal families.\(^{26}\) Recourse to a court or third party is necessary only if agreement is impossible. While customary law regimes offer the advantages of accessibility, ease and adherence to customary practices, women’s rights with respect to property, maintenance or child custody may not be protected.

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\(^{23}\) CEDAW Committee, “General Recommendation No. 19” (supra), paras. 7–9.

\(^{24}\) This article is derived from Ethiopia, *Revised Family Code of 2000*, art. 74(1).


Therefore, it is important that all forms of marriage be subjected to some minimum statutory conditions regarding divorce.\(^{27}\) This ensures that individuals married under any form of marriage are afforded the same access to, and effects of, the protections provided in divorce legislation. The CEDAW Committee has expressed concern about situations where legislation on marriage and divorce does not apply to all communities.\(^{28}\) Accordingly, several countries in Africa have already instituted uniform law governing divorce for both civil and customary marriages.\(^{29}\)

### B. Forum for Dissolution of Marriage

**NOTE:**
In order for divorce to be a fair and realistic option for individuals, the forum for dissolution should be accessible. As well, adjudicators should be competent and impartial, and they should apply the law without discrimination. Two options for the forum for divorce proceedings are provided below. The best option for a given country will depend on factors such as the accessibility of civil courts and the challenges of implementing civil divorce where customary or religious divorce are well-established.

### Article 2. Forum for dissolution

(Two options for Article 2 are provided below — 2A and 2B. One or the other should be selected, but not both.)

**Option 1: Article 2A. Civil court only**

(1) Any marriage, however solemnized, may only be dissolved by a civil court.\(^{30}\)

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\(^{29}\) For example, Tanzania, *Law of Marriage Act of 1971* applies to all marriages, and s. 99 allows “any married person” to “petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down.” Ethiopian law provides the “causes and effects of dissolution of marriage shall be the same whichever the form of celebration of the marriage. No distinction shall be made concerning dissolution whichever the form according to which the marriage is celebrated”: art. 74(1) of Ethiopia, *Revised Family Code of 2000*. See also, Zimbabwe, *Matrimonial Causes Amendment Act of 1987*, which amended the *Matrimonial Causes Act of 1986* to extend the grounds for divorce applicable to civil marriages to customary law marriages; Burkina Faso, *Individual and Family Code of 1990*, which applies to all marriages and divorces in the country.

\(^{30}\) This provision is derived from South Africa, *Recognition of Customary Marriages Act of 1998*, s. 8(1) and Ethiopia, *Revised Family Code of 2000*, art. 117.
Commentary: Article 2A

Divorce under civil law generally offers greater legal protections for women because civil courts provide a means to oversee property division, maintenance and child custody matters. In jurisdictions where customary or religious law divorce is available for couples married under more than one regime, men may opt out of civil law divorce because it mandates certain protections for women. Customary or religious courts have also been alleged to be unaccountable, undemocratic and biased against women. Under customary law, the procedural requirements for women to divorce may be more onerous than those for men. As a result, some countries have excluded customary law courts from having jurisdiction over matters such as maintenance, custody or guardianship of minor children; dissolution of marriage; and the interpretation of the validity and effect of wills. In situations where customary or religious law departs significantly from civil law in the protections afforded to women, requiring divorces to take place in civil courts may be the easiest way to ensure the faithful application of divorce legislation.

Option 2: Article 2B. Civil, customary or religious court

(1) Any marriage, however solemnized, may be dissolved by a civil court.

(2) With the free and full consent of both spouses, a customary marriage may be dissolved by a customary court established or recognized by statute.

(3) With the free and full consent of both spouses, a religious marriage may be dissolved by a religious court established or recognized by statute.

(4) Decisions in relation to marriage dissolution under Sections (2) and (3) may be appealed by either spouse to a civil court.

31 LAC, Proposals (supra), p. 72.


33 For example, women may be required to inform community leaders of their desire to divorce, a requirement which is not imposed upon men. In Namibia’s Caprivi community of Subia, a man can divorce his wife at any time by writing a letter to her parents, while a woman seeking a divorce must inform the village headman. When a woman seeks divorce, if the case ultimately goes to a tribal district court and the court rules against the woman, she must pay her husband 15 head of cattle in order to obtain a divorce: LAC, Proposals (supra), p. 14.

34 See, for example, Zimbabwe, Customary Law and Local Courts Act of 1990, ss. 16 (1) (c), (d), (e) and (f). Similarly, in South Africa, matters relating to divorce and separation are excluded from the jurisdiction of traditional courts: South African Law Commission, Project 90, Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders, para. 6.4.1; s. 5 of South Africa, Traditional Courts Bill of 2008.
Commentary: Article 2B

In some settings, civil courts may be located too far from where people live, may involve procedures that are too expensive, or may be under-resourced, leading to long delays for obtaining a hearing. This would impact on women, who are likely to have fewer means than men to attend civil court. Where civil courts are inaccessible or are unlikely to be used or respected, customary or religious courts may be a useful and desirable mechanism for the speedy resolution of disputes given their nature as an easily accessible, inexpensive, simple and, in some cases, fluid system of justice. In Zambia, for example, local customary courts have acquired progressively more authority over customary marriages and have laid down conditions and consequences for the dissolution of marriage which have developed over time. Some local customary courts have increasingly applied a “best interests of the child” standard in resolving custody disputes and have been willing to order maintenance and property division, even if it means deviating from strict interpretations of customary law.

Sections (2) and (3) require the consent of both parties to help prevent a vulnerable party to the marriage from being compelled to plead before a customary or religious court if she feels it is against her best interest. These sections also require customary and religious courts presiding over divorce to be established or recognized by statute. This allows some measure of oversight to ensure that customary and religious courts comply with statutory provisions of divorce legislation. Broad rights of appeal from decisions of religious or customary courts that do not comply with statutory provisions may also address, to some extent, concerns about bias, lack of expertise, or resistance to applying human rights norms.


37 Ibid. For a discussion of the “best interests of the child” standard, see Articles 18 to 20 below.

38 For example, in the Ethiopian case Ms. Kedija Beshir [Cassation Division Case No. 12400], a dispute arose between Ms. Kedija and her husband’s family members in relation to the succession of his property after his death. To obtain a share of the assets, the family members instituted proceedings in Sharia Court against Ms. Kedija’s objections. With the intervention of the Ethiopian Women Lawyers Association, the case was taken to the Council of Constitutional Inquiry, which recommended that only civil courts have compulsory jurisdiction and that Sharia Courts may exercise jurisdiction only on the basis of consent: African Development Bank, Law for Development Review, Volume 1, 2006, pp. 142–143.

39 In its concluding comments to Sierra Leone, for example, the CEDAW Committee expressed concern that, in the context of marriage and divorce, “local courts, which apply customary law, are not part of the judicial system and consequently their decisions are not subject to appeal”: CEDAW Committee, “Concluding Comments: Sierra Leone,” 38th Session, CEDAW/C/SLE/CO/5, 11 June 2007, para. 38.
C. Divorce Procedures

**NOTE:**
In practice women may face a number of obstacles to exercising their right to divorce. Articles 3–5 strive to make divorce proceedings as uncomplicated and as accessible as possible in order to enable those seeking divorce to do so.

**Article 3. Right to petition for dissolution**

(1) Either spouse in a marriage may petition individually for its dissolution, or both spouses may petition jointly.

**Article 4. Mutual consent to divorce**

(1) Where the spouses have agreed to divorce by mutual consent, they may petition the court for divorce by submitting in writing an agreement regarding the division of assets, spousal and child maintenance and custody of, and access to, any affected minor or dependent children.

(2) Spouses who petition for divorce by mutual consent are not required to state any reason for the divorce.40

(3) A court granting a decree of divorce shall not confirm as an order of court an agreement between the spouses described in Section (1) unless the court is satisfied that it is in accordance with Article 10 of this Act.

(4) Provided there is no evidence that either spouse was subject to fraud, coercion, undue influence or domestic violence in order to agree to the divorce and that the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act, the court shall approve the divorce without delay.

**Commentary: Articles 3 and 4**

Complicated legal procedures may limit women’s ability to begin divorce proceedings.41 Some jurisdictions may mandate the presentation of documents such as marriage certificates and children’s birth certificates, which may, in practice, be controlled by the husband, in order to begin divorce proceedings. As well, the costs associated with filing

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40 This section is derived from Ethiopia, Revised Family Code of 2000, art. 77(3).

41 For example, procedural complexity may make it difficult for NGOs to assist women with their divorces, and may create the need for legal representation: LAC, Proposals (supra), pp. 80 and 185. See also HRW, Divorced from Justice (supra); HRW, Policy Paralysis (supra), p. 81; CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Initial, Second and Third Periodic Report of States Parties: Ethiopia,” CEDAW/C/ETH/1-3, 21 May 1993, p. 18.
a petition for divorce and expensive legal fees present barriers to some people seeking divorce.\textsuperscript{42} One consequence of the complexity of divorce proceedings is that couples who are married under both civil and customary regimes may choose to dissolve their marriage only under customary procedures if this process is seen as a more accessible and less expensive option. However, under customary rules women may not receive their fair share of marital property, spousal maintenance or child support.\textsuperscript{43}

Therefore, legislation should not enable, or require, courts to impose obstacles to divorce such as lengthy contemplation or waiting periods. Nonetheless, laws in some countries prohibit a person from petitioning for divorce until he or she has been married for a designated period of time (usually two or three years), while other laws require couples to wait for a specified period after filing for divorce before the divorce is effective.\textsuperscript{44} The goal of such provisions is to encourage reconciliation. However, these laws may force women to remain in abusive relationships. Many couples contemplating divorce have already discussed the decision at length with family members, friends or community and religious leaders, and do not need further, forced reconciliation time imposed by courts.\textsuperscript{45} Lengthy divorce proceedings may serve to extend an already difficult process causing unnecessary additional trauma to families and to children.\textsuperscript{46} Moreover, long waiting periods do not increase the likelihood of reconciliation. In at least two sub-Saharan African jurisdictions, statistics reveal that courts rarely succeed in reconciling parties.\textsuperscript{47}

Article 4 simplifies divorce procedures by requiring adjudicators to grant divorces in all cases where they are uncontested. This would eliminate the need for legal representation in most cases where spouses have agreed on the terms of their divorce.\textsuperscript{48} However,

\begin{itemize}
\item \textsuperscript{42} LAC, \textit{Proposals} (supra), pp. 81 and 36–37.
\item \textsuperscript{43} Ibid., pp. 70–71. See also HRW, \textit{Hidden in the Mealie Meal} (supra), pp. 17 and 32.
\item \textsuperscript{44} For example, in Kenya, s. 6 of the \textit{Matrimonial Causes Act of 1941} provides, “No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of marriage.” In Tanzania, s. 100 of the \textit{Law of Marriage Act of 1971} stipulates, “No person shall, without the prior leave of the court, petition for divorce before the expiry of two years from the date of the marriage which it is sought to dissolve,” while s. 110 permits the court to adjourn divorce proceedings for up to six months for “further attempts at reconciliation to be made.” In Botswana, s. 21 of the \textit{Matrimonial Causes Act of 1973} restricts divorce actions within two years of marriage. In Malawi, civil marriages cannot be terminated within three years of celebration unless there is exceptional deprivation and hardship: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Second, Third, Fourth and Fifth Periodic Report of States Parties: Malawi,” CEDAW/C/MWI/2-5, 28 June 2004, pp. 82–83. In Zambia, s. 6 of the \textit{Matrimonial Causes Act of 2007} states, “No petition for divorce shall be presented to the Court unless, at the date of the presentation of the petition, one year has passed since the date of the marriage.”
\item \textsuperscript{45} LAC, \textit{Proposals} (supra), p. 170.
\item \textsuperscript{46} Ibid.
\item \textsuperscript{48} LAC, \textit{Proposals} (supra), p. 183.
\end{itemize}
courts should only grant a petition for divorce once appropriate arrangements have been made in respect of the welfare of any minor or dependent children who are affected. This practice is followed in a number of countries and gives the court leverage to encourage the parties to agree upon suitable arrangements for the children and to avoid potentially traumatic delays. 49

**Article 5. Affidavit evidence**

(1) A court may grant a decree of divorce based on affidavit evidence alone, but may summon one or both of the spouses and any other person whom the court considers necessary to appear before a judge in chambers or in court to give further evidence. 50

**Commentary: Article 5**

Article 5 allows divorces based on affidavit evidence. This reduces costs and may reduce the trauma that women experience in speaking about the failures of their marriage in public. Standard form affidavits in clear and simple language could be provided via all courts that are competent to grant divorces. 51

**NOTE:**

The provision below would abolish court orders for the restitution of conjugal rights. Such orders sanction marital rape, place women at increased risk of violence and abuse and violate individuals’ freedom of association (by compelling spouses to continue cohabitating).

**Article 6. Abolition of orders for restitution of conjugal rights**

(1) No court shall be competent to issue an order for the restitution of conjugal rights. 52

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50 This article is derived from s. 16 of the *Draft Divorce Act* featured in LAC, *Proposals* (supra). In Canada, courts will also hear uncontested divorces on affidavit evidence where the divorce and items of corollary relief are agreed upon. No appearance is required. See, for example, Rule 60(25) of British Columbia, *Court Rules Act*, B.C. Reg. 221/90; Rule 36 of Ontario, *Family Law Rules*, O. Reg. 114/99; Rule 70.12 of Manitoba, *Court of Queen’s Bench Rules*, Regulation 553/88.

51 LAC, *Proposals* (supra), p. 184. See, for example, the standard family law affidavit forms provided by Ontario Court Services (Canada), online: www.ontariocourtforms.on.ca/english/family.

Commentary: Article 6

Conjugal rights have been defined as the “legal rights of each partner in a marriage to companionship, support, and affection (often taken to imply sexual relations) provided by the other.” 53 Conjugal rights have also been understood to confer on men unlimited sexual access to their wives.54 Some countries require or allow courts to order restitution of conjugal rights before a divorce can be granted.55 In current practice, orders for restitution of conjugal rights are effectively court-ordered waiting periods designed to encourage reconciliation but, ultimately, they unduly delay divorce. Conjugal rights which confer a duty on spouses to cohabit may sanction marital rape and enable domestic violence. Many countries long ago abolished the power to order conjugal rights and recognized that “[i]t is an intolerable interference with the freedom of individuals for the court to order adults to live together.”56 Conjugal rights also may be abused in an attempt to gain leverage in divorce negotiations.57 In order for a country to be compliant with CEDAW, “legislation should not empower courts to provide an order for restitution of conjugal rights … which are discriminatory as they take away a woman’s autonomy to choose when and with whom she has sexual relations.”58

D. Grounds for Divorce

NOTE:

A requirement to demonstrate fault as a condition of divorce limits women’s access to divorce, particularly where fault is disproportionately and unfairly attributed to women. In the absence of mutual consent, the irreparable breakdown of marriage should be a sufficient ground for divorce.


55 For example, under current Namibian practice, a court must issue an order for restitution of conjugal rights after a claimant seeks a divorce (unless adultery can be proved). The court can enter a divorce decree only if the parties have not reconciled within six to eight weeks of the date that the order for restitution of conjugal rights has been served: LAC, Proposals (supra), p. 34. In Nigeria and Kenya, s. 47 of Nigeria, Matrimonial Causes Act of 1991 and s. 20 of Kenya, Matrimonial Causes Act of 1941, respectively, permit a petition to be made by a party to a marriage for a decree of restitution of conjugal rights. Claimants seeking divorce in Swaziland face a similar predicament. See T. Ezer et al, “Divorce reform” (supra), p. 894, citing s. 44 of Swaziland, High Court Rules of 1954.


57 For example, in the Namibian case James v. James 1990 NR 112(HC), the respondent in a divorce proceeding tried to halt the proceeding with an offer to restore conjugal rights, not in good faith but rather merely as an attempt to gain leverage in divorce negotiations.

Article 7. Grounds for divorce

(1) The only grounds on which a decree of divorce may be granted are:

(a) mutual consent, as contemplated in Article 4;
(b) the irreparable breakdown of the marriage, as contemplated in Article 8;
(c) lack of mental capacity, as evidenced by the medical testimony of at least two psychologists, that the non-petitioning spouse lacked mental capacity at the time of the petition and will continue to lack mental capacity, with no reasonable expectation of recovery; or
(d) continued unconsciousness, as evidenced by the medical testimony of at least two medical doctors specializing in neurology, that the non-petitioning spouse is in a persistent vegetative state and that there is no reasonable expectation of recovery.59

Article 8. Irreparable breakdown of a marriage

(1) For the purposes of this section, “irreparable breakdown” occurs when there is no reasonable prospect of the restoration of a mutually satisfactory marriage relationship between the spouses.60

(2) If one spouse petitions for divorce and the other spouse does not deny that there has been irreparable breakdown of the marriage, the court shall grant a decree of divorce, provided the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act and there is no evidence that either spouse was subject to fraud, coercion, undue influence or domestic violence in order to seek or acquiesce to the divorce.

(3) If one spouse petitions for a divorce and the other spouse denies that there has been irreparable breakdown, the court shall, after consideration of the spouses’ affidavits and such oral evidence as the court may deem necessary, either:

(a) make a finding that the marriage is irreparably broken down and grant a decree of divorce, provided the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act; or
(b) if there appears to the court to be no evidence of domestic violence and a reasonable prospect of reconciliation, postpone the matter for a period not exceeding [number] months, at the end of which period the court shall enter a

59 Subsections (c) and (d) are derived from s. 5 of South Africa, Divorce Act of 1979.

60 This section is derived from s. 4 of South Africa, Divorce Act of 1979 and s. 8(2) of South Africa, Recognition of Customary Marriages Act of 1998.
decree of divorce, provided the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act, and either of the spouses continues to allege that the marriage is irreparably broken down.  

**Commentary: Articles 7 and 8**

Under a number of divorce law regimes, husbands are able to divorce their wives for a host of reasons which are not available to wives. For example, some countries’ laws focus on grounds related to a wife only, particularly on an alleged fault or failing on her part, as the basis for a divorce, while having little regard for the grounds on which a husband’s fault or failing may or ought to give rise to a woman’s right to divorce. Equal grounds for divorce between men and women uphold women’s right to equality and the prohibition of discrimination. Therefore, Article 7 stipulates the same grounds for divorce for men and women.

There has been a trend across the globe away from fault-based divorce, as modern marriage is increasingly viewed as a contract between individuals which can be terminated at the will of either party. A right to freedom of association also prevents courts from compelling people to remain married to each other against their will. The role of law is now seen as ensuring that assets are distributed equitably upon dissolution and protecting the interests of children, rather than compelling continued marriage.

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61 This section is drawn from recommendations contained in LAC, Proposals (supra), and premised on the idea that it should not be the role of the court to force a contemplation period unless there is reasonable prospect of reconciliation. “Reconsideration” or “reflection” periods for divorce are found in, for example, U.K. law (nine months), Swedish law (six months), Finnish law (six months), Canadian law (unspecified time period) and South African law (unspecified time period). See R. Bird and S. Cretney, Divorce: The New Law, (London: Family Law, 1996), p. 41; K. Boele-Woelki et al, Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses (Antwerp: Intersentia, 2004), p. 55; s. 10 of Canada, Divorce Act of 1985; s. 4 of South Africa, Divorce Act of 1979.

62 For example, in Sierra Leone and Tanzania, a husband can leave his wife for numerous reasons not available to wives: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Initial, Second, Third, Fourth and Fifth Periodic Report of States Parties: Sierra Leone,” CEDAW/C/SLE/5, 14 December 2006, p. 8; Tanzania, Local Customary Law.

63 In Uganda, the Constitutional Court found that the provisions of the Divorce Act which established different grounds of divorce for men and women were discriminatory (on the basis of gender) and thus contrary to the Constitution. The Court held that women, like men, should have the right to divorce their husbands for the sole reason of adultery, and that provisions related to compensation for adultery, maintenance and settlement should apply to both sexes: Uganda Association of Women Lawyers and 5 Others v. the Attorney General, Constitutional Petition No. 2 of 2003, Constitutional Court.


65 Article 22 of the ICCPR provides, “Everyone shall have the right to freedom of association with others…. No restrictions may be placed on the exercise of this right.” See also, Snyman v. Snyman, Case No. (P) I 166/2003, High Court of Namibia, in which the plaintiff husband successfully argued that the Namibian Constitution’s guarantee of freedom of association gave him the right to withdraw from an association, such as his marriage, which had broken down irretrievably, so he was not limited to the grounds for divorce accepted under Namibian law.
against the will of one or both spouses. If either spouse experiences economic hardship as a result of divorce, this should be addressed through equitable provisions on marital property and maintenance rather than by requiring the legal persistence of a marriage that has irreparably broken down. However, some countries continue to provide an enumerated list of grounds upon which a person may petition for divorce. Such lists may be problematic for a number of reasons:

- They are highly restrictive and fail to recognize the complexity of marriage and its breakdown.
- The grounds cited are usually fault-oriented and thus reinforce the adversarial nature of the divorce process, adding unnecessary tension to an already difficult process.
- Spouses may actively engage in perjury to fulfill the legal requirement of a fault-based ground.
- Limiting access to divorce through the requirement of fault may encourage informal separations which leave economically weaker parties, who tend to be women, without protection.

In order to overcome these above-mentioned limitations, Article 7(2) stipulates that “irreparable breakdown” is a sufficient ground for divorce where there is no mutual consent. In some communities, the notion of irreparable breakdown also comports with traditional understandings of marriage dissolution and accommodates the parties’ cultural orientation while integrating the conciliation procedures typical of customary law into the divorce process. At the same time, it is important that entitlements to divorce be clear,
so that neither partner is able to manipulate informal rules and procedures for his or her personal benefit.\footnote{LAC, Proposals (supra), pp. 72–73.}

Where one party seeks divorce and the other party does not wish to divorce, Article 8(3)(b) gives courts the discretion to postpone the divorce for a short reflection period if there appears to be a reasonable prospect of reconciliation, after which the court must grant the divorce if either of the spouses continues to allege that the marriage is irreparably broken down.\footnote{In the U.K., the requirement of a period of reflection and consideration in the Family Law Act was intended to ensure that the door to reconciliation would be kept firmly open throughout the divorce process, and that the importance of attempting to save a marriage would be “loudly signalled.” Other benefits cited by the U.K. Government for this period were: that it would ensure that couples whose marriages are in difficulty will be better informed about the options available to them; introduce a system that is better at identifying saveable marriages; facilitate referrals to marriage guidance when couples believe there may be some hope for the marriage; make available every opportunity to explore reconciliation even after the divorce process has started; and ensure that there is an adequate period of time to test whether the marriage has genuinely broken down: J. Walker, “Divorce Reform and the Family Law Act 1996,” in J. Walker (ed), Information Meetings and Associated Provisions Within the Family Law Act 1996 (Newcastle Centre for Family Studies, University of Newcastle upon Tyne: 2000), pp. 25 and 27.} Unlike mandatory waiting periods, this provision is discretionary and conditional on a party’s objection to the divorce, no evidence of domestic violence and a reasonable prospect of reconciliation. The intention is to ensure that the marriage has genuinely broken down where some doubt may exist.

In all cases, however, the court can only grant a decree of divorce provided the arrangements made in respect of the welfare of the minor or dependent children are in the best interests of the children in the circumstances. Laws in many countries stipulate that no court should be able to grant a divorce until it is satisfied that the best possible arrangements have been made for the minor or dependent children.\footnote{See, for example, s. 71 of Zambia, The Matrimonial Causes Act of 2007; s. 6 of South Africa, Divorce Act of 1979; s. 11 of Canada, Divorce Act of 1985; s. 55A of Australia, Family Law Act of 1975.} This approach is designed to ensure that children’s interests are prioritized and gives courts leverage to push parties to agree upon suitable arrangements for the children, thereby reducing delays in divorce proceedings which can be traumatic for children.\footnote{LAC, Proposals (supra), p. 175.}

**NOTE:**
The following provision prohibits the requirement to return marriage payment as a condition of divorce.

**Article 9. Prohibition of return of marriage payment**

(1) It is prohibited to demand a return of marriage payment, as defined in the [relevant marriage legislation], as a requirement of divorce.
Where marriage payment has been given by any party to a marriage, any person demanding the return of that marriage payment as a requirement of divorce is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.\(^75\)

**Commentary: Article 9**

Marriage payment (also known in various situations as bride price, bride wealth, *lobola* or *lobolo*) may result in discrimination against women upon marriage dissolution.\(^76\) Under some customary regimes, a woman’s father must return the marriage payment to her husband if she seeks a divorce.\(^77\) Where such customary practices are followed, wives cannot divorce their husbands without the consent of their fathers, whereas husbands are able to initiate divorce without obtaining anyone’s consent. According to one commentator, the necessity of the “[r]efund of bride price(wealth) has hitherto kept women in bad marriages.”\(^78\) To remove this potential barrier to divorce for women therefore, Article 9 prohibits the requirement to refund marriage payment in order to terminate a marriage.\(^79\)

**NOTE:**

Some parties seeking divorce may be able to agree upon the terms of their divorce before going to court. In these circumstances, the court can accept this agreement if certain criteria are met.

**Article 10. Agreement between spouses**

(1) A court granting a decree of divorce may, in accordance with a written agreement between the spouses, make an order on division of property, the payment of maintenance by one spouse to the other, or custody of and access to any minor or dependent children, or related matters, if it is satisfied that:

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\(^75\) This text is derived from ss. 16 and 20 of Uganda, *Domestic Relations Bill of 2003*.

\(^76\) For a more detailed discussion of the human rights and HIV arguments against marriage payment, see the related commentary in Module 1 “Marriage.”


\(^79\) Similarly, the Ugandan Law Reform Commission has suggested the requirement to refund marriage payment in order to terminate a marriage must be eliminated and made a criminal offence: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Third Periodic Report of States Parties: Uganda,” CEDAW/C/UGA/3, 3 July 2000, p. 69.
(a) the agreement has not been obtained through fraud, coercion, undue influence or domestic violence;
(b) the agreement is not manifestly unfair;
(c) any provisions of the agreement concerning any affected minor or dependent children are in the best interests of the children, as defined in Articles 18 to 20 of this Act;\(^\text{80}\) and
(d) the division of assets and liabilities includes, at a minimum, detailed provisions for the disposition of the assets and liabilities described in Article 13.

**Commentary: Article 10**

Any marital property regime can generally be varied by an agreement entered into before, or as a condition of, marriage, on the premise that couples should be free to determine how marriage and divorce will affect their property, the arrangements in relation to their children, and other related matters. Where spouses have agreed to divorce by mutual consent pursuant to Article 4, they may also opt to submit a written agreement to the court regarding the division of assets, spousal and child maintenance and custody of children.

However, systemic power imbalances, stemming from social and economic inequalities, place men as a group in a better bargaining position in relation to women, imbalances which are exacerbated where domestic violence is involved.\(^\text{81}\) Therefore, courts should have the power to ensure agreements between spouses are fair; sufficiently precise; obtained in the absence of fraud, coercion, undue influence or domestic violence; and in the best interests of the minor or dependent children. In all cases, courts must balance parties’ freedom to contract with the rights of vulnerable parties to the divorce.

**E. Division of Property**

**NOTE:**

In many cases of divorce, women acquire very little from the marriage other than their personal belongings. The following provisions stipulate a default marital property regime of modified community of property and outline the procedures for equitable property division upon divorce.

\(^{80}\) This article is derived from art. 15 of the Draft Divorce Act in LAC, Proposals (supra).

Article 11. Default marital property regime: modified community of property

(1) Where the spouses have not:

(a) elected a marital property regime to be subject to; or
(b) entered into an agreement specifying the distribution of property upon divorce that accords with the requirements set out in Article 10;

they shall be deemed to have elected to be in modified community of property, as defined in the [relevant marital property legislation], and a court shall order a division of property acquired during the marriage in equal shares where there are no minor or dependent children, or may divide property acquired during the marriage in such unequal shares as the court deems just and equitable, where minor or dependent children are placed in the custody of one spouse, with the larger share going to the custodial parent.82

(2) Notwithstanding Section (1), where family and traditional property, as defined in the [relevant marital property legislation], is excluded from the joint estate, the court may divide the remaining property acquired during the marriage in such unequal shares as the court deems just and equitable, considering the following factors:

(a) the duration of the marriage;
(b) the direct or indirect contribution made by each spouse, including contributions made by looking after the home, caring for the family, or performing other domestic duties;
(c) the unwarranted dissipation of the marital property by either spouse;
(d) the economic circumstances of each spouse at the time of the divorce, taking into account the:
   (i) income;
   (ii) earning capacity, including the extent to which it may have been impaired by a spouse having devoted time to domestic duties or having foregone education, training, employment or career opportunities due to marriage;
   (iii) assets and other financial resources; and
   (iv) financial obligations and responsibilities, including maintenance payments ordered at the time of the divorce; that each spouse is likely to have in the foreseeable future;
(e) the custody arrangements regarding any minor or dependent children of either spouse, including the desirability of awarding the matrimonial home or the right to live in it indefinitely, or for some other reasonable period of time based on custody arrangements or until alternative housing arrangements may be made for, or by, the spouse charged with child custody;

82 This provision is derived from LAC, Proposals (supra), p. 174.
(f) the value to either of the spouses or to a child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage; and

(g) any other factor which the court deems relevant.\(^3\)

**Commentary: Article 11**

Norms and practices regarding the division of property upon marriage dissolution vary greatly between communities. However, in many cases of religious and customary divorce, women acquire very little from the marriage other than their personal belongings.\(^4\) While some traditional obligations of kin networks may have ensured that women and children were adequately taken care of following a divorce, in many communities these mechanisms are no longer adequate or functional. In some systems, a woman is expected to leave the matrimonial home and return to her parents and family.\(^5\) Where this is not feasible, some women may remain in abusive relationships because they have limited alternative options for survival.\(^6\)

Recognizing this, the CEDAW Committee has stated that “[m]any countries recognize that right [of women and men to share marital property equally upon divorce], but the practical ability of women to exercise it may be limited by legal precedent or custom.”\(^7\) The notion of sharing marital property upon divorce is also recognized in the Protocol on the Rights of Women in Africa, which obligates states parties to enact appropriate

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\(^4\) See, for example, T. Bennett, *Customary Law and the Constitution: A Background and Discussion Paper*, Law Reform and Development Commission, Ministry of Justice Namibia, 1996; HRW, *Double Standards: Women’s Property Rights Violations in Kenya*, Vol. 15, No. 5(A), 2003, p. 25, online via: www.hrw.org; J. Shezongo-Macmillan, “Women’s property rights in Zambia,” paper presented to the Strategic Litigation Workshop, 14-18 August, 2005, Johannesburg, South Africa, para. 2.2. See also, the case of Ryland v. Edros, [1997] (2) SA 690, Case No. 16993/92, High Court, Cape Provincial Division, South Africa; and the Tanzanian case Mohamed v. Makamo, Civil Appeal No. 45 of 2001, High Court of Tanzania at Dar Es Salaam, 8 June 2001, in which the appellant wife appealed a decision of the district court awarding her five percent of the marital property, and her husband 95 percent, upon their divorce. The High Court held that the lower court decision was “discriminatory and a reflection of stereotyped concepts of the roles of man and woman.” It was deemed to be contrary to Tanzania, *Law of Marriage Act of 1971* and Tanzania’s Constitution, which guarantees equal protection of the law. The appellant wife was consequently awarded 50 percent of the marital assets.


\(^6\) See HRW, *Double Standards (supra)*, p. 25.

\(^7\) CEDAW Committee, “General Recommendation No. 21” (supra), paras. 30–33.
legislation to ensure that “in 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.”

Article 11(1) specifies a “modified community of property” as the default marital property regime for all forms of marriage. This regime renders all property acquired during marriage part of the joint estate, a scheme that generally provides women with greater access to property upon divorce than a separation or an “out of community” of property regime (which involves the separate ownership of individual property during marriage). Where minor or dependent children are placed in the custody of one spouse, Article 11(1) also authorizes the court to award the larger share to the custodial parent. This is to compensate for the “lost opportunity costs” the custodial parent may experience as a result of the significant responsibilities (financial and otherwise) associated with custody and which may not be compensated through child maintenance awards. Article 11(2) also makes exceptions where family and traditional property is excluded from the joint estate. Because this may constitute a significant share of property and in many cases may be the residence or principal source of wealth of a married couple, or both, Article 11(2) allows for compensation to the other spouse through the re-adjustment of joint assets upon marriage dissolution.

Article 12. Overriding exercise of judicial discretion and criteria for division of joint estate

(1) Where the spouses have entered into an agreement specifying the distribution of marital property upon divorce which the court finds manifestly unfair or was the result of fraud, coercion, undue influence or domestic violence, the court may make such disposition of the assets and liabilities of the parties, without regard to which spouse holds title or rights to any property, as shall appear just and equitable, considering the factors enumerated in Article 11(2).

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88 Art. 7(d) of the African Protocol on the Rights of Women in Africa.

89 For a discussion of the health and human rights arguments associated with other marital property regimes, see the commentaries in Module 3 “Property in Marriage.”


91 For a discussion of family and traditional property, see the related commentary in Module 3 “Property in Marriage.”
Commentary: Article 12
Spouses may not always be in an equal bargaining position at the time of marriage and during its course. Women, in particular, may make contributions to the couple’s shared estate through managing the home, caring for children and contributing their employment income to the household, although they may not have any property registered in their own names. There should, therefore, be some degree of judicial discretion to adjust property division equitably where women have given up property rights upon marriage or where their contributions to the marriage, whether financial or otherwise, are not reflected in the terms of the antenuptial agreement.92

Accordingly, Article 12 authorizes judges to allocate marital property in a more equitable manner, guided by a list of factors to facilitate the fair exercise of judicial discretion. These factors include ones which have been traditionally overlooked in terms of women’s contribution to a marriage and the household, such as looking after the home, caring for the family, or performing other domestic duties, as well as the extent to which women’s earning capacity may have been impaired by having devoted time to domestic duties.

NOTE:
The following provisions establish a requirement to record the items that were acquired before or during the marriage and to regulate the use of those items during divorce proceedings to ensure marital property is eventually equitably distributed.

Article 13. Inventory of immovable and movable property
(1) Within [number] days after the commencement of divorce proceedings, an inventory of all immovable and movable property acquired before or during the marriage shall be made jointly by the spouses and submitted to the court.

(2) Failure to make an inventory described in Section (1) does not affect the rights of either spouse, but the burden to prove the existence of any property shall be on the spouse alleging the existence of that property.

Article 14. Types of assets and liabilities
(1) Any order for the division of property as set out in Articles 11 and 12 must include, at a minimum, detailed provisions for the disposition of the following types of assets and liabilities acquired during the marriage:

(a) immovable property;  
(b) shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment held in a financial institution;  
(c) jewellery, coins, stamps, paintings, livestock or any assets held mainly as investments;  
(d) furniture or other effects of the common household;  
(e) credit agreements, where either spouse is a credit receiver;  
(f) contracts, where either spouse is a purchaser in terms of such a contract;  
(g) any other outstanding indebtedness which affects the joint estate; and  
(h) any costs, duties and professional fees incurred in the division of assets and liabilities under this section.93

Article 15. Interim order

(1) Neither spouse shall damage, transfer, encumber, conceal or otherwise dispose of any property in the course of the divorce proceedings, except in the usual course of business or for the necessities of life.

(2) Notwithstanding the foregoing, nothing in the interim order shall preclude either spouse from using any property to pay reasonable legal fees and costs in order to retain legal counsel in the divorce proceeding.94

(3) On an application by either spouse, if the court considers it necessary for the protection of the other spouse’s interests under this Act, the court may make an interim or final order:

   (a) restraining the depletion of a spouse’s property; and  
   (b) for the possession, delivering up, safekeeping and preservation of the property.95

(4) On an application by either spouse, the court may vary or rescind an order made under Section (3) on terms it considers appropriate.

(5) Where a spouse knowingly violates the terms of an order to restrain the depletion of a spouse’s property made under Section (3), the court may re-apportion the amount awarded to each spouse to account for such depletion.96

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93 The items on this list are derived from s. 6(6) of the Draft Divorce Bill in Republic of Namibia Law Reform and Development Commission, Report on Divorce Project 8, November 2004.

94 This provision is derived from T. Ezer et al, “Divorce reform” (supra), p. 952 (s. 15 of the proposed Matrimonial Causes Act of 2007 is, in turn, modeled after s. 2040 of California, U.S., Family Code of 2006).

95 This section is derived from s. 12 of Ontario, Canada, Family Law Act, R.S.O. 1990, c. F.3.

96 This section is derived from s. 5(6) of Ontario Family Law Act.
Commentary: Article 15
An inventory provides an essential mechanism for accountability and oversight with respect to the distribution of the marital property. The precise form and requirements of the inventory may vary from jurisdiction to jurisdiction, but in general terms the inventory is a list of all of the movable and immovable property acquired before and during the marriage, containing a reasonably detailed description of the property along with its fair market value.

Article 14 ensures that orders for the division of marital property are sufficiently detailed to prevent further disputes between the parties. Article 15 prohibits a spouse from disposing of property during divorce proceedings in order to avoid the equitable distribution of marital property. To deter individuals from misappropriating items and to remedy any resulting injustice, Article 15(5) authorizes the court to re-allocate the amount awarded to each spouse in any final marital property settlement to reflect the amount of property that has been depleted against an order of the court.

NOTE:
Article 16 mandates special provisions pertaining to possession of the matrimonial home upon divorce. These provisions are applicable irrespective of the marital property regime chosen by the couple.

Article 16. Exclusive possession of matrimonial home
(1) Neither spouse may evict the other spouse from the matrimonial home, as defined in the [relevant marital property legislation].

(2) Without regard to which spouse holds title to the matrimonial home, the court may on application by either spouse, make an interim or final order to:

(a) provide for the transfer of possession, safekeeping and preservation of the matrimonial home;
(b) direct that one spouse be given exclusive possession of the matrimonial home or part of it for the period that the court directs;
(c) direct a spouse to whom exclusive possession of the matrimonial home is given to make periodic payments to the other spouse;
(d) direct that the contents of the matrimonial home, or any part of them:
   (i) remain in the home for the use of the spouse given possession, or
   (ii) be removed from the home for the use of a spouse or child;
(e) order a spouse to pay for all or part of the repair and maintenance of the matrimonial home and of other liabilities arising in respect of it, or to make periodic payments to the other spouse for those purposes; or
(f) authorize the disposition or encumbrance of a spouse’s interest in the matrimonial home, subject to the other spouse’s right of exclusive possession as ordered.97

97 This section is derived from s. 24(3) of Ontario, Family Law Act.
(3) In determining whether to make an order under Section (2)(b), the court shall consider:

(a) the best interests of the minor or dependent children affected, as defined in Articles 18 to 20 of this Act, and in particular the desirability of allowing the custodial parent to occupy the matrimonial home until the children have reached the age of majority;
(b) whether the matrimonial home is situated on family or traditional property, as defined in the [relevant marital property legislation];
(c) any existing orders under this Act and any existing maintenance orders;
(d) the financial position of both spouses;
(e) any written agreement between the spouses;
(f) the availability of other suitable and affordable accommodation; and
(g) any violence committed by a spouse against the other spouse, any affected minor or dependent children, or any other family member.98

(4) In the event of a court making an order giving a spouse exclusive possession for any period of time in the matrimonial home, that order shall also state that the right must be registered against any title deed and against any mortgage bond which may exist over the matrimonial home.99

Commentary: Article 16
The matrimonial home is central to family life and is often the primary asset of a couple. However, inequalities in terms of ownership and access to the matrimonial home continue in many countries, at times resulting in the exclusion of women from their homes. For example, the matrimonial home may be registered solely in the husband’s name, making the process by which a woman may prove her interest in that home onerous and uncertain.100 All too often, a woman loses her home when her marriage comes to an end.101 Allowing women to be evicted from their homes by virtue of the fact that they are not the legally registered owners subjects women to insecurity, vulnerability, poverty and sexual violence.102

98 Ibid.
99 This subsection is derived from s. 6(7) of the Draft Divorce Bill in Republic of Namibia Law Reform and Development Commission, Report on Divorce Project 8, November 2004.
Enacting specific protections for the matrimonial home is a practical and increasingly common means to protect women’s access to housing at the dissolution of a marriage. Article 16 empowers courts to make orders for the exclusive possession of the matrimonial home, regardless of the terms of a marital property regime or antenuptial agreement. This enables courts to consider the needs of both spouses, with particular attention to arrangements for child custody and relationships involving domestic violence.

The right to adequate housing is an internationally recognized human right. The U.N. Committee on Economic, Social and Cultural Rights has articulated that the right is “the right to live somewhere in security, peace and dignity,” which includes security of tenure. Forced evictions are prima facie incompatible with this right. In particular, the Committee has recognized that women suffer disproportionately from the practice of forced eviction, “given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and [women’s] particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.” In the Committee’s view, the non-discrimination provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) “impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.”

F. Maintenance and Custody

NOTE:
Spousal and child maintenance are critical to ensure that women are able to divorce without the threat of economic destitution. The following provisions set out the criteria for spousal maintenance, child maintenance and child custody.

Article 17. Spousal maintenance

(1) In the absence of an acceptable agreement between the spouses as defined in Article 10 as to spousal maintenance, a court may, on application by either or both spouses during or after a divorce proceeding, make an order for the adequate, just and
equitable provision of support of the other spouse after consideration of the following factors:\(^{108}\)

(a) the duration of the marriage and the age of the spouses;
(b) the standard of living of the spouses immediately prior to the divorce;\(^{109}\)
(c) the economic circumstances of each spouse at the time of the divorce, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;
(d) any impairment of the present or future earning capacity of the spouse seeking maintenance as a result of that spouse having devoted time to domestic duties, including the maintenance of the family home, care and upbringing of the children, or having foregone or delayed education, training, employment or career opportunities as a result of the marriage;
(e) contributions by the spouse seeking maintenance to the education, training, employment, career or career potential or business of the other spouse;
(f) contributions by the spouse seeking maintenance to the maintenance of family and traditional property as defined in the [relevant marital property legislation] which has been excluded from the joint estate;
(g) the custody arrangements regarding any affected minor or dependent children, taking into account the loss of economic opportunity and earning capacity forgone from the responsibility of custody, and not including maintenance expenses arising from custody;
(h) any economic hardship arising from the breakdown of the marriage;
(i) the goal of promoting, as far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time;
(j) the relevant financial circumstances of another marriage(s) or domestic partnership(s) of either spouse; and
(k) any other factor which the court deems relevant.\(^{110}\)

(2) Upon application by either spouse, the court may make an order against the non-applicant spouse for a contribution of costs to the pending action referred to in Section (1) for the applicant spouse.

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\(^{108}\) See s. 2 of British Columbia, Canada, *Wills Variation Act of 1996*. The meaning of “adequate, just and equitable” was dealt with by the Supreme Court of Canada in *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807, in which the court held that the twin purposes of the Act was to ensure that “adequate, just, and equitable” provision is made for spouses and children, while giving appropriate recognition to testamentary autonomy.

\(^{109}\) See, for example, the Ugandan case *Bakojja v. Bakojja*, Divorce Cause No. 11 of 1998, High Court of Uganda at Kampala, 20 February 2000, in which the Court held that the petitioner was entitled to alimony that would support her at a standard comparable with that of her position during marriage, and not significantly less than her husband’s lifestyle.

\(^{110}\) This section is derived from s. 7 of South Africa, *Divorce Act of 1979*; s. 15.2 of Canada, *Divorce Act of 1985*; s. 4320 of California, U.S., *Family Code*; s. 75 of Australia, *Family Law Act of 1975*; art. 14 of the *Draft Divorce Act in LAC, Proposals* (supra). Subsection (g) does not refer to maintenance expenses, but to the fact that child custody may exclude the spouse in question from certain jobs, such as those with long hours or evening hours, or those involving extensive travel.
**Commentary: Article 17**

Spousal maintenance is intended to enable an ex-spouse to achieve a standard of living upon divorce that is comparable to that during the marriage and to compensate the ex-spouse for lost opportunity costs. Therefore, statutory provisions related to spousal maintenance should be primarily based on need, not fault. The need for spousal maintenance is particularly acute in cases where women are denied access to property upon divorce because of the particular marital property regime chosen, the provisions of an antenuptial agreement, or in cases where property used during marriage involves family or traditional property.

Because according to a number of customary and religious traditions, women are expected to return to their parents’ home upon marriage dissolution, with the responsibility for their maintenance shifting to their parents, many customary and religious law regimes have little concept of post-marital spousal maintenance. Women may have no guarantee of support from their families after the dissolution of their marriage and are often left to raise minor children alone. Insufficient maintenance for women post-divorce has been found to lead to malnutrition, disease and even death. Various forms of “compensation” may be paid under customary laws. Arguably, however, statutory recognition of the right to spousal maintenance in specific circumstances may more systematically protect women from poverty after divorce.

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114 For example, the South African Law Commission noted that a father is generally required to pay a beast (*isondhlo* in Xhosa) to the person who raised his child, though *isondhlo* is not compensation for past expenditure, nor is it a contribution to future costs. Nevertheless, courts have confounded *isondhlo* with maintenance in order to update customary law to meet modern conditions. See South African Law Commission, *Project 90, Discussion Paper 74* (supra), p. 132. A form of post-marital maintenance is also recognized in Islamic law during the *idda* period (a three-month waiting period when a divorce is still revocable): Gender Project, Community Law Centre (University of the Western Cape) and Gender Unit, Legal Aid Clinic (University of Western Cape), *Submissions on South African Law Commission’s Issue Paper No. 15: Islamic Marriages and Related Matters*, 2000, p. 36. In the Indian case *Mohammad Ahmad Khan v. Shah Bano Begum*, SCC 2 (1985) Sec. 556, the Indian Supreme Court granted a Muslim woman maintenance on the basis that this was in line with the Quranic spirit of justice in respect of support for a person in need. However, religious leaders objected to the decision and challenged the court’s authority to interpret the Quran, which led to the passage of a law which effectively invalidated the court’s decision.

115 See S. Goonesekere, “Family support and maintenance: emerging issues in some developing countries with mixed jurisdictions,” *Family Court Review* 44(3) (2006): 361–375; M. Gordon, “Spousal support guidelines and the American experience: moving beyond discretion,” *Canadian Journal of Family Law* 19 (2002): 247–343. See also, the Tanzanian case *Njobeka v. Mkorogoro*, P.C. Civil Appeal NA. 6 of 2001, High Court of Tanzania at Dar Es Salaam, 13 July 2001, in which the appellant wife argued that the primary court’s order to her husband to pay a certain amount as a “parting gift” in divorce was inadequate because it failed to take into account both parties’ contributions to the marital property. The High Court found that the lower court erred by failing to provide the appellant an effective remedy in accordance with
Therefore, Article 17 lists specific criteria for determining the amount of maintenance to be paid to ensure a minimum level of support for a former spouse in need and to dissuade arbitrary determinations of the amount of the award.\footnote{In Algeria, for example, despite the requirement for spousal maintenance, judges have awarded spousal maintenance conditional on child custody. This has, in the past, led to fathers initiating custody disputes as a way to circumvent spousal maintenance: A. Mammeri, “Algerian women cite problems with implementation of new family code,” \textit{Magharebia}, 15 February 2008.} The list includes factors which have been traditionally overlooked in terms of women’s contribution to marriage, including limitations on the nature and hours of work women are realistically able to pursue because of domestic duties or support for a spouse’s education or career, contributions by women to the maintenance of family and traditional property, and compensation for lost opportunity costs (for example, diminished potential for future earning).\footnote{R. Langer, “Post marital support discourse, discretion, and male dominance,” \textit{Canadian Journal of Family Law} 12 (1994): 67–90.} Article 17 also permits the parties to make an application for maintenance during or after a divorce, to allow greater flexibility in terms of when such an application is made, as well as for either party to make an application for the other spouse to contribute to the costs of the pending action, so a party with fewer financial means is not further dissuaded from making an application for maintenance.\footnote{See T. Ezer et al, “Divorce reform” (supra), p. 922, who contends that because women are under “a great deal of emotional stress and are entirely focused on having their marriage dissolved,” they may overlook their need for maintenance at the time of divorce proceedings.} By explicitly empowering courts to recognize women’s contributions to the family and ensuring greater access to and flexibility with respect to claims for maintenance, states are taking an appropriate step in fulfilling their obligation to recognize the right of individuals to an adequate standard of living and non-discrimination on the basis of sex and marital status.

### Article 18. Best interests of the child

(1) A court shall not grant a decree of divorce until it is satisfied that the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the child in the circumstances.

(2) In determining the best interests of the child, a court may not discriminate against a parent on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age, mental or physical disability, or health status.\footnote{Sections 1 and 2 are derived from s. 6 of South Africa, \textit{Divorce Act of 1979}.}
(3) Whether a minor or dependent child is born inside or outside the marriage of the parents shall have no bearing upon determinations of custody, guardianship, access or maintenance.

(4) For the purposes of Articles 19 and 20 of this Act, the court may appoint an independent legal practitioner to represent a minor or dependent child at the proceedings and may order the spouses or either spouse to pay the costs of the representation.\(^\text{120}\)

**Article 19. Child custody and access**

(1) Notwithstanding any customary or religious laws or practices, a court granting a decree of divorce may make any order it deems to be in the best interests of any affected minor or dependent child with respect to the custody of that minor or dependant child, giving particular regard to:

(a) the wishes of the child, where practicable;
(b) the child’s physical, emotional and educational needs, and the capabilities of each parent to meet the child’s needs; and
(c) the desirability of giving custody of the child to the parent who has been the child’s primary caretaker prior to the divorce application, to ensure continuity of care.\(^\text{121}\)

(2) Notwithstanding Section (1), custody shall not be awarded to a parent if there is *prima facie* evidence that that parent has engaged in domestic violence, as defined in the [relevant domestic violence legislation], towards the other spouse, any child of the marriage or any other family member, unless the court is satisfied that this will be in the best interests of the child.

(3) A primary caretaker is the person who carries out most of the following activities in respect of the child:

(a) preparing and planning of meals;
(b) bathing, grooming and dressing;
(c) purchasing, cleaning and care of clothes;
(d) medical care, including nursing and trips to physicians;
(e) arranging for or monitoring social interaction among peers after school;
(f) arranging alternative care;
(g) putting the child to bed at night, attending to the child during the night, and waking the child in the morning;
(h) disciplining the child;

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\(^\text{120}\) Section 4 is drawn from s. 6 of South Africa, *Divorce Act of 1979*.

(i) educating the child in the religious, cultural and social spheres;
(j) teaching the child elementary skills; and
(k) any other caretaking activity.122

(4) A court granting a decree of divorce may make an order granting or denying access to an affected minor or dependent child by the non-custodial parent.

(5) In a case involving a request for access by a non-custodial parent where there is *prima facie* evidence that the parent requesting access has engaged in physical violence towards the other spouse, any affected child or any other family member, the court shall impose special measures to protect the safety of the child or children and the custodial parent, including, but not limited to, supervised access, access only at specified venues, or transfer of the child from one parent to the other only at specified venues.123

**Commentary: Articles 18 and 19**

Where divorce regimes discriminate against women in terms of child custody, the risk of losing access to their children may hinder some women’s ability to end their marriage.124 Therefore, child custody should not depend on the individual preferences of judges, and courts should discount discriminatory custodial preferences based on customary or religious practices (such as bride price, which in some communities confers upon the husband an automatic right to custody of the children upon marriage dissolution).125

Article 19 stipulates that custody of the child is guided by the child’s wishes, preferences and needs, each parent’s capabilities, which parent is the child’s primary caretaker and the need to protect the child against domestic violence.126 As one writer contends, “[a]  

122 This article is derived from art. 10 of the *Draft Divorce Act* in LAC, *Proposals* (supra).
123 Sections (4) and (5) are derived from art. 12 of the *Draft Divorce Act* in LAC, *Proposals* (supra).
124 See, for example, s. 104 of Tanzania, Local Customary Law, which states, “Children belong to the father, and he shall have the right to insist that they reside with him or with his relatives.”
125 CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Third and Fourth Periodic Report of States Parties: Zambia,” CEDAW/C/ZAM/3-4, 12 August 1999, p. 66. See also, T. Ezer et al, “Divorce reform” (supra), p. 903, which discusses the legal environment in Swaziland and provides, “Under customary law, children are assumed to belong to the father and his family, and under civil law, courts have come to adopt the best interests standard … with no legislative guidance, judges generally fall back on stereotypes — awarding physical custody to the mother and legal custody to the father.” See also, s. 204 of Tanzania, Local Customary Law, which stipulates that children “belong to the father, and he shall have the right to insist that they reside with him or with his relatives” after divorce; Unit for Gender Research in Law (UNISA), *Women & the Law in South Africa*, (Kenwyn: The Rustica Press, 1998), p. 22, which describes how in “KwaZulu-Natal the Code of Zulu Law provides that the children fall under the guardianship of the husband” upon the termination of a customary marriage.
126 See, for example, L. Clark, “Wife battery and determinations of custody and access: a comparison of U.S. and Canadian findings,” *Ottawa Law Review* 22 (1990): 691–724, who provides, “Both explicitly and implicitly, [Canadian] courts have recognized that it is beneficial to children to continue to be cared for by the parent who has been primarily responsible for this in the past and who has already demonstrated the ability to provide the care and support needed.” Art. 12 of the *Convention on the Rights of the Child*, 12
primary caretaker presumption would make it easier for women to leave an abusive relationship secure in the knowledge that they would continue to have custody of their children.\textsuperscript{127} Giving custodial preference to the primary caretaker also provides reasonable guidance to judicial discretion without unfairly disadvantaging either parent, reduces uncertainty and focuses on facts that are clearly related to the child’s best interests.\textsuperscript{128} To better ensure the wishes of the child, Article 18(4) authorizes the court to appoint an independent legal practitioner to protect the interests of the children of divorcing parents so that, for example, he or she may conduct enquiries into the arrangements being made for children when a divorce is pending.\textsuperscript{129}

The CEDAW Committee has noted that “in practice, some countries do not observe the principle of granting the parents of children equal status, particularly when they are not married.”\textsuperscript{130} Therefore, Article 16 of CEDAW obligates states parties to ensure, on a basis of equality of men and women the “same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.” Similarly, Article 7 of the Protocol on the Rights of Women in Africa stipulates that “in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children.” Common to both treaties is the stipulation that interests of the children be “paramount.”\textsuperscript{131}

The “best interests of the child” principal is recognized in the \textit{African Charter on the Rights and Welfare of the Child}, which provides that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration,” and further stipulates that in “all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views … opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.”\textsuperscript{132} A number of countries around the world have similarly acknowledged the best

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\textsuperscript{127} L. Clark, “Wife battery” (supra), para. 45.

\textsuperscript{128} In Clark’s view, this approach has “the additional benefit of discouraging litigation and providing certainty with respect to outcome”: L. Clark, “Wife battery” (supra), para. 44. See also pp. 174–179 of LAC, \textit{Proposals} (supra).

\textsuperscript{129} UNISA, \textit{Women & the Law in South Africa} (supra), p. 81.

\textsuperscript{130} CEDAW Committee, “General Recommendation No. 21” (supra), para. 19.

\textsuperscript{131} Art. 16 of CEDAW provides that “in all cases the interests of the children shall be paramount,” while art. 7 of the Protocol on the Rights of Women in Africa provides that “the interests of the children shall be given paramount importance.”

interests of the child as the foremost consideration and provide for explicit use of the best
interests of the child principle in custody determinations. While it is beyond the scope
of this project to include an exhaustive analysis of “the best interests of the child,” a
number of countries have codified the various factors comprising this principle.

### Article 20. Child maintenance

(1) A court granting a decree of divorce may make any order it deems to be in the best
interests of any affected minor or dependent child with respect to his or her
maintenance, based on the needs of the child, including:

- the financial, educational and developmental needs of the child, including but not
  limited to, housing, water, electricity, food, clothing, transport, toiletries, child
care services, education (including pre-school education) and medical services;
- the age of the child;
- the manner in which the child is being, and in which his or her parents reasonably
  expect him or her to be, educated or trained; and
- any special needs of the child, including but not limited to needs arising from a
disability or other special condition

and the respective financial means of the parents, and taking into account the extra
financial burden which normally falls on the custodial parent.

### Commentary: Article 20

Article 20 authorizes courts to order child maintenance to compensate the custodial
parent for the extra financial responsibilities undertaken. This serves to provide a child
of divorce with a standard of living appropriate for the child’s needs and the parents’
means, to the greatest extent possible, and mitigates the risk of poverty for the custodial
parent and his or her children.

According to the CEDAW Committee, the “best interests of the child” principle requires
granting the parents of children equal status, despite the reality that, “where the mothers
are divorced or living apart, many fathers fail to share the responsibility of care,

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133 T. Ezer et al, “Divorce reform” (supra), p. 906. The countries include South Africa, Nigeria, Australia
and Zimbabwe.

134 See, for example, s. 4 of Namibia, Matrimonial Affairs Ordinance 35 of 1955. For a fuller discussion of
the content of the “best interests of the child” principle, see T. Ezer et al, “Divorce reform” (supra), p. 907.
A list of factors in a “best interests” analysis is provided on pp. 913 and 966–969.

135 These provisions are derived from s. 16 of Namibia, Maintenance Act of 2003 and s. 66J of Australia,
protection and maintenance of their children.”136 [emphasis added] The African Charter on the Rights and Welfare of the Child stipulates, “No child shall be deprived of maintenance by reference to the parents’ marital status.”137 Further, both the African Charter on the Rights and Welfare of the Child and the ICCPR provide that “[i]n the case of dissolution, provision shall be made for the necessary protection of the child/any children.”138 In terms of the amount of maintenance to be awarded, the Convention on the Rights of the Child (CRC) and the ICESCR recognize the right of children to an adequate standard of living.139 The CRC further stipulates that children’s standard of living should be adequate for his or her “physical, mental, spiritual, moral and social development.”140

**Article 21. Interim orders**

(1) Where an application is made under Article 17, the court may, on application by either spouse, order temporary maintenance for the support of the other spouse, taking into account the factors enumerated in Article 17 and pending the determination of the application under Article 17.141

(2) Where an application is made under Articles 19 and 20 regarding the custody, access and/or maintenance of an affected minor or dependent child, the court may, on application by either or both spouses, order temporary custody, access and/or maintenance of that child based on the factors enumerated in Articles 19 and 20 and pending the determination of the application under Articles 19 and 20.

**Commentary: Article 21**

Article 21 allows for interim orders for maintenance in order to ensure neither spouse is rendered financially vulnerable while a divorce proceeding is pending. Because divorce proceedings can be protracted, courts should also be empowered to order temporary custody, access or maintenance of children to provide stability and clarity with respect to the child or children’s arrangements prior to a final order being made.

**Article 22. Rescission, suspension or variation of maintenance and custody orders**

(1) A spousal or child maintenance order or an order in respect of custody or access may at any time be rescinded or varied or, in the case of a spousal or child maintenance

136 See CEDAW Committee, “General Recommendation No. 21” (supra), para. 19.
137 See art. 18(3) of the African Charter on the Rights and Welfare of the Child.
138 See art. 18(2) of the African Charter on the Rights and Welfare of the Child, and art. 23(4) of the ICCPR.
139 See art. 27(1) of the CRC and art. 11(1) of the ICESCR.
140 See art. 29(1) of the CRC.
141 This provision is partly derived from s. 15.2 of Canada, Divorce Act of 1985.
order or an order with regard to access to a minor or dependent child, be suspended by a court if the court finds that there is sufficient reason, based on the factors enumerated in Articles 17 to 20 of this Act, to do so.\(^{142}\)

**Article 23. Enforcement**

(1) A spouse who knowingly violates the terms of an order made under Articles 17 or 20 shall be guilty of an offence and liable to a fine not exceeding [monetary amount].

(2) A court may authorize payment of spousal or child maintenance by an employer on behalf of an employee within one month of the employee’s default, which may be made from the employee’s salary, wages, remuneration or allowance.\(^{143}\)

(3) A court may seize any property, including pensions and annuities, to cover spousal or child maintenance payments.\(^{144}\)

(Optional additional clause):

(4) The [relevant state ministry] shall appoint enforcement officers for the purpose of enforcing spousal maintenance orders and child maintenance orders determined under Articles 17 and 20.

**Commentary: Articles 22 and 23**

Reviews of international literature with respect to child maintenance awards reveal they are often erratically, or never, paid.\(^{145}\) A system of maintenance in which defaulting on payment is the norm deeply constrains women’s choices to leave oppressive and abusive relationships.\(^{146}\) Therefore, a system of enforcement should accompany a spousal maintenance scheme to ensure maintenance orders are carried out. Depending on the infrastructure and resources of each country, possible means to respond to non-compliance of maintenance orders could include fines for late payment or non-payment,

\(^{142}\) See s. 8 of South Africa, *Divorce Act of 1979*.

\(^{143}\) Sections (2) and (3) are derived from s. 34 of proposed *Matrimonial Causes Act of 2007* featured in T. Ezer et al, “Divorce reform” (supra), pp. 982–983, which is in turn derived from s. 77 of Uganda, *Children’s Act*.

\(^{144}\) See, for example, *Gerber v. Gerber and Another* (12166/07; 12691/07) [2007] ZAWCHC 65 (9 November 2007) (South Africa, High Court), in which the Court ordered the attachment of the assets of the respondent to enable him to pay child support and to protect the best interests of his daughter. The Court held that it should intervene to protect the interests of the child even though the respondent would generally have the right to determine how he spends his own assets.


\(^{146}\) R. Langer, “Post marital support discourse” (supra), paras. 34 and 40.
criminal prosecution, court orders for the sale or seizure of property, or deductions from earnings in order to fulfill maintenance obligations. These options are provided in Article 23. Article 23’s optional additional section allows for the appointment of enforcement officers trained and dedicated to handling maintenance claims, which may facilitate enforcement in jurisdictions where there are few other means to ensure payment.

The CRC explicitly makes the connection between the right to an adequate standard of living and a state-sponsored maintenance system by requiring states parties to “take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.”147 A dysfunctional maintenance system violates children’s and, in many cases, women’s right to an adequate standard of living by preventing them from obtaining the financial support necessary for food, shelter and basic necessities.148

147 See art. 27(4) of the CRC.
148 See art. 11(1) of the ICESCR.
# Module 5: Inheritance

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Prefatory Note

Women, inheritance and HIV/AIDS

Many inheritance laws and practices continue to discriminate against, disadvantage or exclude women. Some statutory and customary laws overtly discriminate against women in terms of the allocation of a deceased’s property after he or she dies, the type of interest a women receives in property she inherits (for example, a life interest as opposed to full ownership) or the processes involved in administering the estate. Moreover, even where women’s equal inheritance rights are entrenched in national law, discriminatory customs and practices may nonetheless be applied to deny women their property and inheritance rights.

The CEDAW Committee has noted this continuing discrimination in their concluding observations to various countries, including, for example: Kenya (CEDAW/C/KEN/CO/6, 10 August 2007, paras. 11 and 42); Malawi (CEDAW/C/MWI/CO/5, 3 February 2006, paras. 13–14); Nigeria (CEDAW/C/NGA/CO/6, 18 July 2008, para. 17); Sierra Leone (CEDAW/C/SLE/CO/5, 11 June 2007, paras. 10–12, 36–38); Tanzania (CEDAW/C/TZA/CO/6, 18 July 2008, paras. 16, 44 and 45); and Uganda (U.N. Doc. A/57/38 (2002), paras. 151–154).

See, for example, Uganda, Succession Act of 1906, s. 2. Interpretation of “legal heir” provides a male shall be preferred to a female where more than one person fits the definition of heir. Kenya, Law of Succession of 1981, s. 35 (1) provides that if the surviving spouse is a widow, her interest shall terminate upon her re-marriage to any person, but there is no equivalent provisions terminating the interest of a widower upon remarriage. Liberia, Equal Rights of the Customary Marriage Law of 1998, s. 33 provides that after the death of her husband, a widow can remain on the premises of her late husband to administer the estate, but if she remarries she must vacate the premises and the property shall be given to the late husband’s heirs. There is no equivalent provision for widowers who remarry. Botswana, Administration of Estates Act of 1974, s. 28(5) allows for letters of administration to be issued to a woman, but requires the written consent of her husband if she is married in community of property, or is married out of community of property when the marital power of the husband is not excluded. No equivalent consent is required for men to receive letters of administration. Tanzania, Local Customary Law (Declaration) Order, Government Notice No. 436 of 1963, Second Schedule, Laws on Inheritance in Judicial and Application of Laws Act, s.2 [translated from Swahili into English], provides that 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, any other male relative chosen with the help of the clan council. If there is no male relative, the deceased’s sister is the administrator.

For example, relatives of the deceased may be granted the letters of administration ahead of a surviving spouse, irrespective of the surviving spouse’s rights under the laws on administration of estates. Under statute in Ghana, for example, the spouse is considered first in line to obtain a grant of letters of administration for the estate. However, courts often regard the heir of the deceased as most competent to take control of the property and will not grant letters of administration to a widow without an affidavit from the family supporting her application: J. Fenrich and T. Higgins, “Promise unfulfilled: law, culture, and women’s inheritance rights in Ghana,” Fordham International Law Journal 25 (2001–2002): 259–341, at 323. Similarly, a report on Namibia, Communal Land Reform Act of 2002 notes that there is no doubt that the revision of customary laws for communities in the north of the country played a major role in making land rights of widows more secure, but that reports of transgressions by family members continue, mostly because widows are fearful of seeking redress for illegal evictions by reporting the transgressions to the
Inequalities in inheritance laws and practices are not new issues, but protecting women’s rights in this area has taken on new urgency in the context of the HIV epidemic. One profound effect of the HIV epidemic is the exponential growth in the number of young women who are widowed or left without the support of parents. According to UNAIDS and the World Health Organization (WHO), in sub-Saharan Africa 1.6 million people died of AIDS in 2007, 22.5 million people are living with HIV, and the disease is the primary cause of premature death in the region. More women are becoming heads of households or widows, often in the context of family resources having been depleted because of illness. These women often lack independent property rights or livelihoods of their own. The right to inherit upon the death of a parent or spouse is therefore particularly important for the independence, equality and well-being of African women today.

The HIV epidemic has also amplified pre-existing discrimination against women and added new dimensions to human rights abuses against women. For example, misunderstanding of HIV/AIDS and discrimination against women merge, resulting in distrust and mistreatment of widows whose husbands have died of AIDS-related causes. A widow may be blamed for her husband’s HIV infection and death, and subsequently driven from her home by her in-laws. If a widow is showing signs of illness, her family may refuse to take her in. Her relatives and community may assume that she will soon die herself and use this as a justification to usurp her rightful property and withdraw social support from her. Moreover, as a result of stigma against people living with HIV, a woman who is believed to be infected with HIV may face eviction from her home or may find it difficult to find housing or land to buy or rent.


5 R. Strickland, *To Have and To Hold: Women’s Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa*, International Center for Research on Women (ICRW) Working Paper, 2004. According to the ICRW, women who own property or otherwise control assets are better positioned to improve their lives and cope should they experience crisis. Relatively little data exists on the magnitude of gender gaps in ownership of assets within and across countries, but the gaps are thought to be substantial: ICRW, *Property Ownership for Women Enriches, Empowers and Protects: Toward Achieving the Third Millennium Development Goal To Promote Gender Equality and Empower Women*, 2005.


One specific and disturbing manifestation of women’s inequality with respect to inheritance in the context of HIV is the phenomena referred to as property dispossession (or as disinheritance, illegal property seizure or property grabbing), whereby property a person should own or have rightfully inherited is taken from them. While no comprehensive studies exist to quantify the prevalence of property dispossession, cases have been reported in many countries and qualitative studies confirm that the practice is widespread.9 One study, for example, found that female-headed households had lower average crop production than male-headed households, in part because they lacked ploughs, draught animals and other implements.10 This was attributed, in part, to the fact that “it is fairly common for a deceased husband’s family to take livestock and farming equipment away from the widow’s homestead,” especially in households affected by HIV/AIDS.11 Similarly, in another study, rural widows told researchers that their in-laws took their property, including their land, homes, vehicles, livestock, furniture and household items, when their husbands died. Many were subsistence farmers who lost their basis of survival when they lost their land. According to this report, rural widows, more so than urban widows, were expected to undergo wife inheritance or cleansing rituals and most of those who carried out the rituals were permitted to keep their property. Those who refused lost not only their property but were also ostracized.12

Property dispossession exacerbates the already devastating consequences of HIV/AIDS on families in sub-Saharan Africa. As noted in one study of women’s property rights violations, “Women with AIDS in Kenya, virtually all of whom were infected by husbands or regular male partners, are essentially condemned to an early death when the women’s homes, lands and other property are taken. They not only lose assets they could use for medical care, but also the shelter they need to endure this debilitating disease.”13 In another study, women living with HIV reported that because their in-laws unlawfully appropriated their property following their husbands’ deaths, they no longer had land to produce food or start small businesses. Left in poverty, they lacked the money needed to pay for transport to get to clinic appointments.14 Moreover, widows reported that the intense poverty caused by property grabbing prompted them to enter into new relationships for economic security, in some cases with abusive partners.15

Legal and social limitations to women’s ability to inherit, own, transfer and dispose of property put women in precarious positions of vulnerability and poverty. As noted by one international human rights organization, “One of the greatest obstacles HIV/AIDS

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11 Ibid., p. 8.

12 HRW, *Double Standards* (supra), p. 16.

13 Ibid., p. 10.


15 Ibid., p. 35.
infected women confront is their inability to secure property. Women’s inability to possess and manage property may result in their impoverishment, particularly in cultures which have a propensity to humiliate or shun HIV/AIDS infected women and girls.\(^{16}\)

Enabling women to have real access to property is essential to their personal autonomy and equality as well as to the economic development of their families, communities and countries.\(^{17}\) Legislative reform alongside comprehensive initiatives for implementation and public education are imperative. As noted by a leading expert,

> Given that the suddenness with which the HIV and AIDS phenomenon appeared and the prolific rate at which it has grown, institutional and policy responses have continually lagged behind the situation…. If society is going to contain the HIV and AIDS scourge, widespread institutional transformation will be needed. An integral part of this transformation will necessarily be in institutions responsible for access to property and inheritance, issues of marriage, and the land and property rights of widows…. [P]re-existing structures cannot, in their old format and ideology, provide the institutional responses required by the new social conditions inflicted upon communities ravaged by the disease.\(^{18}\) [citations omitted]

Inequalities and inadequacies in women’s property and inheritance rights are increasingly being identified as a critical area requiring concerted attention. Notably, the U.N. Secretary-General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa has identified property and inheritance rights as one of the areas in which action is most urgently needed and new strategies have a realistic prospect of reducing gender inequality, thereby halting the spread of HIV.\(^{19}\) Similarly, the Global Coalition on Women and AIDS has recommended protecting women’s property and inheritance rights through the establishment, reform and enforcement of laws, and the harmonization of statutory and customary laws.\(^{20}\) Moreover, the Declaration of Commitment on HIV/AIDS, issued by heads of state and government representatives at the U.N. General Assembly Special Session on HIV/AIDS in 2001, committed nations to enact, strengthen

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17 Ibid., p. 20, noting, “If women are unable to legally own, control and inherit property, they have little economic and personal autonomy because they fundamentally lack access to wealth. Women’s economic contribution to their families, which is essential, remains unrenumerated and invisible.”


19 UNAIDS, *Facing the Future Together: Report of the United Nations Secretary-General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa*, 2004, online: http://hivaidsclearinghouse.unesco.org/search/resources/SGs_report__final.pdf. The report further provides at p. 22, “In the context of HIV/AIDS, the rights of women and girls to own and inherit property, regardless of marital status, have become a matter of real urgency. Denial of these rights is a violation of CEDAW, which has been ratified by every Southern African country with the exception of Swaziland. It is therefore critically important for countries in the sub-region to enact laws protecting women’s rights to property, and to protect women who seek to assert those rights through the legal system.”

or enforce legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights by, people living with HIV and members of vulnerable groups including, in particular, their access to inheritance.\(^{21}\) UNAIDS and the U.N. Commission on Human Rights have also emphasized that women’s property rights should be prioritized by national governments and international donors in fighting the HIV/AIDS pandemic.\(^{22}\)

**Women, inheritance and human rights**

Under international law, women’s equal rights to property and inheritance are protected both under non-discrimination and equality provisions, and under rights to housing, property and inheritance. The rights to non-discrimination and equality are fundamental principles of international human rights law and included in most human rights treaties. The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) guarantee equality between men and women and the right to non-discrimination.\(^{23}\) The ICCPR also protects the family and equality of spouses within marriage and at the dissolution of marriage.\(^{24}\) The ICESCR provides that “the widest possible protection and assistance should be accorded to the family,” and recognizes the right of everyone to an adequate standard of living (including adequate food, clothing and housing).\(^{25}\)

In addition, under the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW), states parties have specific obligations with respect to combatting discrimination against women. The Convention outlines specific measures that states parties must take to combat discrimination against women, including embodying the principles of equality in national constitutions, adopting appropriate legislation, and taking measures to modify or abolish laws, customs and practices that constitute discrimination against women.\(^{26}\) Moreover, it requires that states parties take all appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all

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23 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art. 2(1) and 3; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR], art. 2(2) and 3.

24 ICCPR, art. 23 and 26.

25 ICESCR, art. 10 and 11.

other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women….”

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has stated,

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

Regional human rights norms also recognize women’s rights to equality and non-discrimination. The Protocol to the African Charter on Human Rights and People’s Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa) specifically protects the right to “equal access to housing and to acceptable living conditions” and requires states to “grant to women, whatever their marital status, access to adequate housing.” The article on the right to inheritance provides:

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents’ properties.

Moreover, the Protocol on the Rights of Women in Africa commits states parties to promote women’s access to, and control over, productive resources such as land, and to guarantee their right to property, as well as to undertake special measures to protect elderly women, women with disabilities and women in distress.

When a woman is denied the right to inherit, she is often denied the means to ensure a livelihood, to live with dignity in a safe and secure home free from violence, and to obtain food, water and sanitation necessary for survival. Women’s inheritance rights, therefore, are necessary for the full realization of gender equality and women’s human

27 CEDAW, art. 5.
29 Art. 16.
30 Art. 21.
31 Art. 19(c), 22, 23 and 24.
rights — including the right to life, the right to dignity, the right to the highest attainable standard of health, the right to an adequate standard of living and the right to be free from violence.

A. Protections Against Discrimination

NOTE:
Discrimination remains widespread with respect to property and inheritance. The following provisions prohibit discrimination with respect to property transactions, ownership and inheritance.

Article 1. Prevention of discrimination in property transactions

(1) No person shall unfairly discriminate against any person or class of persons on the grounds of real or perceived race, ethnic, national or social origin, colour, gender, sex, pregnancy, marital status, sexual orientation, age, disability, religion, political or other opinion, culture, language, tribe, birth or health status (including HIV status) in respect of the sale, lease, inheritance or other disposal of any property.

(2) Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to the acquisition, administration, control, use and transfer of land.32

Article 2. Prevention of discrimination within classes of beneficiaries

(1) When a testator leaves a gift to a class of persons, each person shall receive an equal share without regard to real or perceived race, ethnic, national or social origin, colour, gender, sex, pregnancy, marital status, sexual orientation, age, disability, religion, political or other opinion, culture, language, tribe, birth, health status (including HIV status) or other status.

(2) Within each class of heirs amongst whom an estate is being distributed, each person shall receive an equal share without regard to real or perceived race, ethnic, national or other social origin, colour, gender, sex, pregnancy, marital status, sexual orientation, age, disability, religion, political or other opinion, culture, language, tribe, birth, health status (including HIV status) or other status.

32 Article 1(2) is derived from the Constitution of the Federal Democratic Republic of Ethiopia, art. 35(7).
Commentary: Articles 1 and 2

Gender disaggregated statistics on property ownership and transactions are not readily available. Therefore, it is difficult to determine precisely the extent of the discrimination that women continue to experience with respect to the enjoyment of their property rights. However, it is clear that discrimination is widespread. In 1995, at the time of the Fourth World Conference on Women, the U.N. reported that women owned less than one percent of the world’s property. Little or no progress has been made since that time.33

Even though many countries protect against discrimination on the basis of race, sex, religion and other grounds in their constitutions or other laws, such protection is often weak in practice. Widespread accounts throughout the developing world confirm that many women are unable to register land in their own names, to obtain credit in order to purchase property, to collect and keep rent, to make contracts, and to access their rightful inheritances — just to name a few examples. Women and girls may also be unfairly discriminated against in the interpretation of a will or the distribution of an intestate estate, often based on cultural or familial expectations that they will get married and be supported by their husbands. In Kenya, for example, it is reported that it is uncommon for women, particularly married women, to inherit property on an equal basis with their brothers.34 Denying women’s property rights renders them totally dependent on marriage and other relationships with men in order to access shelter and the means of a livelihood which, in turn, renders them vulnerable to abuse and exploitation.35

According to one commentator,

What women need … is for their basic rights to be entrenched in constitutions and for equal rights of property ownership to be clearly stipulated in the law. Where this has already been done, it is necessary to bring all inheritance and land laws into harmony with the constitution, so that they say the same thing. In addition, legal institutions responsible for implementing the land laws need to operate equitably, be friendly to women and operate not only in the cities.36

This recommendation has been echoed by numerous other agencies and women’s rights advocates.37

35 Ibid., pp. 1, 3.
37 For example, the FAO explicitly calls for the principle of non-discrimination to be incorporated into both constitutions and legislation in order to overcome discrimination entrenched in socio-economic life: FAO, FAO Legislative Study — 76, Gender and Law: Women’s Rights in Agriculture, 2002, pp. 155–158. See also, UNAIDS, Facing the Future Together (supra); UN-HABITAT, Policy Makers Guide to Women’s Land, Property and Housing Rights Across the World, 2007.
Denial of women’s equal rights with respect to property and inheritance violates their human rights in two ways: 1) it denies women equal rights with men, representing discrimination on the basis of sex (and possibly other grounds); and 2) it denies women the benefits of property, including the means for achieving and maintaining an adequate standard of living. Explicit legislative protection of women’s rights with respect to property and inheritance may help reduce discrimination against women with respect to property by ensuring a legal basis to remedy discrimination. Some countries have incorporated such provisions into their constitutions or into other statutes. What is needed are not only broad provisions prohibiting discrimination and guaranteeing equality, but also specific provisions within the full range of statutes that impact on property transactions, including legislation pertaining to banking, securities, landlord and tenant relations, land reform and land use, among other areas. Enacting such protections is a requirement of international law. For example, Articles 2(b) and 2(e) of CEDAW require states to adopt appropriate legislative and other measures to prohibit discrimination against women.

Articles 2(1) and 2(2) explicitly prohibit discrimination on the basis of sex or marital status amongst a class of persons or a class of heirs, respectively. This means, for example, that if a testator states that an estate or part of an estate shall be distributed to “my children” or “my siblings,” sons and daughters or sisters and brothers would inherit equal shares.

### B. Administration of Estates

**NOTE:**

In some countries, several different sets of inheritance rules apply. The following provision establishes a uniform inheritance law for application throughout the country.

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**Note:**

38 For example, Tanzania has incorporated such provisions in its legislation to overcome customary laws which restrict women’s rights to use, transfer and own land: *Tanzania Land Act of 1999*, s.142(l)(d)(ii). Ethiopia recognizes women’s equal rights to acquire, administer, control, use and transfer property, as well as their right to equal treatment in the inheritance of property: *Constitution of the Federal Democratic Republic of Ethiopia of 1994*, art. 35(7). Uganda’s constitution protects the rights of “every person” to own property: *The Constitution of the Republic of Uganda of 1995*, art. 26.

39 The interdependence of various factors related to women and property has been recognized at the international level. See, for example, U.N. Commission on Human Rights, “Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing,” Human Rights Res 2005/25. This resolution includes the recognition that “laws, policies, customs, traditions and practices that act to restrict women’s equal access to credit and land also prevent women from owning and inheriting land, property and housing and exclude women from participating fully in development processes, are discriminatory and contribute to increasing the poverty of women and girls.”
Article 3. Application

(1) This Act shall apply to the estates of all persons dying in [country] after the commencement of this Act, irrespective of sex, marital status, religion or ethnic origin.40

Commentary: Article 3

Currently, in many African countries, several different legal systems apply to inheritance. For example, statutory law may apply to some estates, religious laws to others and customary laws to others still. Where people live, the type of marriage they have contracted, their religious or ethnic affiliation, and even their lifestyle can be determinative of which law will apply to their situation.41 As a result, the law of inheritance in many African countries has been described as “fraught with uncertainty and inequality.”42

In addition to the uncertainty that results from multiple, parallel legal systems, some of the resulting rules that apply to inheritance cases are discriminatory against women and are outdated.43 Many of the safeguards that were built into customary laws to protect women’s access to land have been eroded by the introduction of the market economy, private ownership and individual titling, rural to urban migration and the commercialization of agriculture.44 Article 3 can help to overcome some of this

40 Derived from Guyana, Civil Law of 1917, art. 5(1) and Sierra Leone, The Devolution of Estates Act of 2007. A provision of similar effect in Kenya, Law of Succession Act of 1981, ss. 2(1), states, “Except as otherwise expressly provided in this Act or other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of the estate of those persons.” However, land in certain areas and persons of Muslim faith are exempt from the Act (ss. 2(3) and 32). In Namibia, the Estates and Succession Amendment Act of 2005, s. 3(1), provides that the administration of the liquidation and distribution of all deceased’s estates, whether testate or intestate, of persons who died on or after the date of commencement of the Act, are now governed by the Administration of Estates Act of 1965.

41 For example, Kenya, Law of Succession Act of 1978, s. 2(3), provides, “Subject to subsection (4), the provisions of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.” In Botswana, the lifestyle of a person is a determining factor with respect to whether statutory or customary law will apply. If the person was living a modern or non-traditional lifestyle and has modern or non-traditional assets (for example, stocks and bonds) then customary law will not apply: personal communication with the Legal Officer, Botswana Network on Ethics, Law and HIV/AIDS (BONELA), January 2008.


43 For a more complete discussion of customary law and women’s rights issues, see the introduction to this volume.

44 See, for example, South African Law Reform Commission (SALRC), Discussion Paper 93, Project 90, Customary Law, 2000, p. xvi. South Africa, Reform of Customary Law of Succession and Regulation of Related Matters Act of 2009 emanates from the investigation and report of the SALRC and abolishes the
discrimination and assist in updating the applicable laws by supplanting them with the new, egalitarian laws in this new or reformed legislation.

Applying a uniform succession law to all estates throughout the country is one means to address both issues of uncertainty and inequality resulting from having two or more legal systems in operation.\textsuperscript{45} As the U.N. Human Rights Committee has noted, the right to religious and cultural freedom does “not authorize any State, group or person to violate the right to the equal enjoyment by women of any [International Covenant on Civil and Political] rights.”\textsuperscript{46}

\textbf{NOTE:}

Because courts or national offices are geographically and economically inaccessible to many people, having district-level offices and officials may be an effective means to provide information, register documents and oversee the administration of estates in accordance with the law. The following provision obliges a government to establish such an accessible system for administering estates, an option that may address the problem of inaccessibility in many countries.

\textbf{Optional: Article 4. Duties of Minister to create and maintain estate administration infrastructure}

(1) The [relevant state ministry] shall appoint a central Administrator-General.

(2) The Administrator-General shall:

\begin{itemize}
  \item[(a)] establish and make public the information and supporting documentation necessary to administer an estate;
  \item[(b)] sub-divide the country into administrative districts to ensure that estate administration can be carried out locally; and
  \item[(c)] appoint a district administrator for each district.
\end{itemize}

customary rule of primogeniture. The preamble to this Act notes that “social circumstances have so changed that the customary law of succession no longer provides adequately for the welfare of family members.”

\textsuperscript{45} Many countries now have harmonized at least some of the laws with respect to the administration of estates across customary, religious and other divisions. See, for example, Kenya, Namibia, South Africa and Guyana. Commentators have also recommended this approach. In recommending a reformed law of succession for Uganda, for example, Bennett asserts that uniform application of one law is necessary to eliminate the pervasive discrimination and hardship imposed on women and girls by customary and religious practices: V. Bennett et al, “Inheritance law in Uganda: the plight of widows and children,” \textit{Georgetown Journal of Gender and the Law} 7(Special Issue) (2006): 451–530, at 479–80.

NOTE:
An official death notice initiates the legal process of winding up the estate of the deceased.

Article 5. Death notices

(1) Whenever a person dies in [country], a spouse, adult child, next of kin, or person who immediately after the death has control of the premises where the deceased was living at the time of death, shall report the death to the [relevant authority] within [number] days of the death.47

(2) The notice of death shall include:

(a) the name, residential address and date of death of the deceased; and
(b) a list of all next of kin of the deceased, including all surviving spouses and children of the deceased, and their residential addresses.

NOTE:
A person named in a will to administer an estate is typically referred to as the executor, while a person who administers the estate of a person who dies intestate (i.e., without a will) is referred to as an administrator. Letters of administration or letters of executorship are legal documents entrusting an individual with the administration of the estate of a deceased person.

Article 6. Ability to administer an estate

(1) Every person who is over the age of [number] years may act as administrator or executor, as the case may be, to an estate unless the person is mentally incapable of appreciating the nature and effect of the act.48

(2) A woman or a man, whether married or unmarried, has the same capacity to administer an estate, notwithstanding any customary or religious rules to the contrary.

Article 7. Letters of administration

(1) The estates of all persons shall be administered and distributed according to law under letters of administration granted by the [relevant authority].

47 The time period for reporting the death is set at 14 days in South Africa, Zimbabwe and Botswana: South Africa, Administration of Estates Act of 1965, s. 7(1); Zimbabwe, Administration of Estates Act of 1907, s. 5(1); Botswana, Administration of Estates Act of 1974, s. 12(1). Factors to consider in determining an appropriate time period include mourning rituals, accessibility to the district administrator, master or relevant authority, and concerns for expediency and fairness.

48 In Zambia, the age is set at 21 years: The Wills and Administration of Testate Estates Act of 2002, s. 25. The age of majority will usually be appropriate as the minimum age to act as an administrator.
Letters of administration shall be granted to the executor(s) and/or administrator(s), as the case may be, of the deceased person. The letters of administration authorize the executor(s) and/or administrator(s) to administer the estate.49

No person shall liquidate or distribute the estate of any deceased person, except under letters of administration granted under this Act. Any distribution executed without letters of administration or otherwise contrary to the provisions of this Act shall be null and void.

Article 8. Spousal entitlement to administer estate

(1) The right to administer the estate automatically vests in the deceased’s spouse by operation of law, without the need to apply for letters of administration in accordance with the procedure set out in Article 9.

(2) The [relevant authority] shall deliver letters of administration to the spouse within [number] days of receiving notification of the death.

(Optional additional section where polygamy is not prohibited:)

(3) If the deceased is survived by more than one spouse, each surviving spouse’s right to administer the estate vests as follows:

(a) Each spouse has the right to administer the separate matrimonial home, as defined in the [relevant marital property legislation], including household property therein and the surrounding residential land, that he or she shared with the deceased.

(b) All surviving spouses have the right to administer jointly all property of the deceased other than property referred to in the above Subsection (a) or to agree to delegate administration to a selected administrator.

(c) If the surviving spouses are unable to agree on administration pursuant to the above Subsection (b), one or all of the surviving spouses may petition the [relevant authority] to designate an administrator in accordance with the principles of Article 10 of this Act.

Commentary: Articles 6–8

In many countries, the manner in which estates are administered — both in law and in practice — continues to deprive women of procedural rights and exclude women from participating in the administration of estates, which in practice often means that they can not claim their rightful inheritances. Some statutory laws continue to include explicit limitations on women’s ability to administer an estate.50 Some customary

49 For the purposes of this volume, the terms “letters of administration” and “administering the estate” shall be used to refer to both the estates of those who die with a will in place and those who die intestate.

50 In Botswana, for example, the Administration of Estates Act of 1974 includes the following provision:
laws also exclude women from the role of administrator, often because the customary successor (usually a man) is the first choice for the role of administrator, or because traditional practices exclude women in mourning from applying for letters of administration.\(^5\) As noted by the Tanzanian Law Reform Commission,

> Administration of deceased’s estate is as important as having a good law of succession. Even if the Law is good, bad administration may cause a lot of injustices. Undue delay in the administration of deceased’s estate may cause property grabbing. Choice of a fit and competent administrator with the welfare of the deceased family at heart is as an important task as choosing which law or legal system to be applied in the distribution of the deceased’s estate.\(^2\) [sic]

Relatives of the deceased are often granted the letters of administration ahead of a surviving spouse, irrespective of the surviving spouse’s rights or interests. In Ghana, for example, a hierarchy among persons with a beneficial interest in the estate is established, with the spouse considered first in line to obtain a grant of letters of administration for the estate. Notwithstanding this priority list, courts often regard the biological relatives of the deceased as most competent to take control of the property and will not grant letters of administration to a widow without an affidavit from the family supporting her application.\(^5\) When families are involved in property disputes, they may rush to apply for letters of administration or obstruct the estate’s administration in an attempt to exclude the widow from inheritance, even hoping that an HIV-infected widow or other beneficiary will die before the case is resolved.\(^5\)

Therefore, granting an automatic or preferential entitlement to letters of administration to the surviving spouse (or spouses) has been recommended by commentators and implemented in several countries as a means to protect the property rights of widows.\(^5\)

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\(^5\) Under the customary laws of Tanzania, for example, a woman can only become an administrator if the deceased has absolutely no male relatives who could assume the role. The statutory law mandates male administrators for small estates; for larger estates, it provides that the administrator can be anyone who is entitled to a portion of the deceased’s estate, with a preference for those with larger interests, who are seldom women. Under Islamic law, the administrator is normally chosen during the mourning period, which excludes women because the widow is confined to her home and does not participate in public activities during this period: T. Ezer, “Inheritance law in Tanzania” (supra), pp. 617–618. See also COHRE, *Bringing Equality Home* (supra), p. 64 (referring to Ghana).


\(^5\) See, for example, V. Bennett et al, “Inheritance law in Uganda” (supra), pp. 524–525; T. Ezer, “Inheritance law in Tanzania” (supra), p. 647. See also, Liberia, *An Act to Govern the Devolution of Estates and Establish the Right of Inheritance for Spouses of Both Statutory and Customary Marriages of*
As the Kenya High Court has observed, for example, “A widow is the most suitable person to obtain representation to her deceased husband’s estate. In the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children.”

**NOTE:**
The following provisions establish the application and selection process for administrators as well as the powers and duties of administrators.

### Article 9. Applications for letters of administration

(1) Applications for letters of administration shall be made to the office of the [relevant authority].

(2) Applications for letters of administration must be signed by the applicant and must contain:

   (a) the name, residential address and date of death of the deceased;
   (b) the name and residential address of the applicant;
   (c) the relationship of the applicant to the deceased;
   (d) a list of all next of kin of the deceased, including all surviving spouses and children of the deceased and their residential addresses; and
   (e) the amount of assets that are likely to comprise the estate.

(3) An application under Section (1) must be accompanied by a copy of the will, if any.

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2003, s. 3.5, which provides that the widow or multiple widows collectively, children or collateral heirs, shall have the unrestricted right to petition the Probate Court in their jurisdiction for Letters of Administration to administer the property of the deceased. Any denial of this right shall entitle the aggrieved party to appeal to the Supreme Court of Liberia. Similarly, in Zimbabwe, the surviving spouse is to be preferred for the role of executor where more than one person is competing for that role: Zimbabwe, Administration of Estates Act of 1907, s. 26.

56 Re Kibiego, (6 March 1972) Probate Cause 15 of 1972 (High Court of Kenya). Similarly, in the case of Ndossi v. Ndossi, the deceased’s brother was appointed as administrator of the estate. The widow successfully challenged that appointment in the appellate district court. On appeal, the judge held that the widow was entitled to administer the estate on behalf of her children under the Constitution of Tanzania, which provides that “every person is entitled to own property and has a right to the protection of that property held in accordance with the law.” Citing CEDAW, art. 2(b) and (f), and the Convention on the Rights of the Child, art. 3, the judge stated that these provisions protect widows and children from “uncouth relatives prying and/or attempting to alienate the estate of the deceased fathers and mothers under the shield of custom”: Ndossi v. Ndossi, Civil Appeal No. 13 of 2001, High Court of Tanzania at Dar Es Salaam, 13 February 2002. Further emphasizing the equality dimension of this issue, in a 2004 case, the sister of a deceased man filed a suit to object to the appointment of the deceased’s wife as the administrator of the estate and the custodian of the child. The High Court rejected the claim, holding that the argument that the wife had no right to serve as administrator because she was not chosen to do so by her husband’s clan was contrary to the equality provisions of art. 13, 19 and 26 of the Tanzanian Constitution, and art. 2 and 16 of CEDAW: Chilla v. Chilla, Civil Appeal No. 188 of 2000, High Court of Tanzania at Dar Es Salaam, 6 January 2004.
(4) At least [number] days before letters of administration are granted, notice of all applications must be given by the [relevant authority] or its official delegate to every person other than the applicant who is:

(a) a beneficiary entitled under the will;
(b) an intestate successor of the deceased according to [the relevant legislation];
(c) a spouse or child of the deceased; or
(d) a creditor of the deceased whose claim is in excess of [monetary amount].

**Article 10. Selection of administrator**

(1) Where an intestate deceased is not survived by a spouse or an application is made in accordance with Article 9 to grant letters of administration to someone other than the surviving spouse, the [relevant authority] may grant letters of administration to one or more of the following people, using the following order of priority as a general guide:

(a) a nominee of the spouse
(b) a child of the deceased
(c) a guardian of a child of the deceased
(d) a parent of the deceased
(e) a sibling of the deceased
(f) a close friend or business associate of the deceased
(g) a beneficiary of the estate
(h) a creditor

(2) Where no capable person applies for letters of administration, the [relevant authority] shall grant letters of administration to a designated agent of the [relevant authority].

(3) In deciding to whom letters of administration shall be issued, the [relevant authority] shall consider:

(a) the best interests of the dependents of the deceased, including in particular the surviving spouse and any minor or dependent children;
(b) the competence of the person to administer the estate fairly, efficiently and in accordance with the law; and
(c) the personal interest of the person in the estate.

(4) For further clarity, a person’s sex shall not be a relevant factor in selecting the administrator(s) of an estate.

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Article 11. The duties of the administrator

(1) The duties of the administrator shall be:

(a) to pay the debts and funeral expense of the deceased;
(b) to pay the estate duty, if payable;
(c) to effect distribution of the estate in accordance with the rights of the persons interested in the estate under the [relevant legislation], including the payment of maintenance payments; and
(d) to render to the [relevant authority] a full account of the administration of the estate.\(^58\)

Article 12. The powers of the administrator

(1) An administrator may exercise the powers conferred by this Article only insofar as a contrary intention does not appear from the will, if any.

(2) Subject to Section (1), the administrator has for the purposes of:

(a) administering and distributing the estate; and
(b) accounting to persons beneficially interested in the estate, creditors and the [relevant authority];

the same powers in relation to the assets of the estate as the deceased would have if alive.\(^59\)

Commentary: Articles 9–12

Delays in administering estates often work to the detriment of women, preventing them from having access to a home and means of support and allowing relatives to misappropriate property in the early stages after a man’s death.\(^60\) In many contexts, there is a presumption that whoever is designated as administrator has the right to appropriate all of the deceased’s property or to administer it as he or she personally sees fit.\(^61\) Such abuses of authority contribute to the precarious position many women, especially widows, find themselves in following the death of a spouse, other relative or benefactor. As discussed in the prefatory note above, such situations increase women’s vulnerability to poverty, violence and HIV infection.

Articles 9–12 aim to reduce the scope for conflicts and provide more certainty and fairness by setting out clear procedures, an order of priority for granting of letters of


\(^{60}\) T. Ezer, “Inheritance law in Tanzania” (supra), p. 620.

administration, and principles for choosing the appropriate administrator. While a surviving spouse has an automatic entitlement to letters of administration, Article 9 sets out the process by which other individuals may apply to administer an estate. In some cases, there may be no surviving spouse, a surviving spouse may not wish to administer an estate, or a surviving spouse may be incompetent to do so. Article 10, therefore, sets out guidelines for selection of an administrator. Processes that are clear, efficient, accessible and respected are essential to protect women’s rights, balancing the need for an efficient process with sufficient oversight and safeguards.

Articles 11 and 12 on the duties and power of the administrator help delineate and clarify the role of the administrator. In deciding upon administrators, therefore, it is best to select a person who is capable of efficiently performing these duties in accordance with the relevant law and who has an honest desire to preserve the deceased’s interests and protect the rights of the beneficiaries. These considerations are reflected in the factors outlined in Article 10(3).

NOTE:
The following provisions establish a requirement to record the items which are part of the estate following a death and before the estate is distributed. This inventory provides a starting point to ensure the estate is distributed fairly.

Optional: Article 13. Preliminary inventory of estate

(1) On the death of any person, a spouse, adult child, next of kin, or person who immediately after the death has control of the premises where the deceased was living at the time of death, shall make or cause to be made a preliminary inventory of all property known by the person making the inventory to have belonged to the deceased or to have been in his or her possession at the time of his or her death.

(2) Every such preliminary inventory shall be signed by the maker or person causing it to be made.

62 Note that some countries permit more than one administrator. See for example Zambia, *Intestate Succession Act of 1989*, ss. 15(2) and 16(1).

63 For example, the Law Reform Commission of South Africa noted in a discussion paper on the administration of estates under customary law that a system of estate administration that involves excessive control by the Master (who oversees the administration of estates) is not user-friendly or cost-effective, recommending that processes be simplified: SALRC, *Discussion Paper 95* (supra), pp. 35–36. On the other hand, a study on inheritance in Uganda revealed that although the administrator is supposed to see that property is distributed according to the Succession Act, once the right to administer is granted there is no mechanism in place to ensure that administrators actually perform their duties. As a result, administrators may draw on their broad powers to enter the family home, appropriate household items, or deny the widow and children access to the family home and land: V. Bennett et al, “Inheritance law in Uganda” (supra), p. 469.

Every such preliminary inventory shall be attested by two witnesses, being persons of good credit and repute who are not beneficiaries of the estate.

Every such preliminary inventory shall be transmitted to the [relevant authority] within [number] days of the date of death.

Article 14. Final inventory of estate

Every administrator shall make or cause to be made a final inventory in the prescribed form of all property known by the person making the inventory to have belonged to the deceased or to have been in the deceased’s possession at the time of his or her death.

In the preparation of the inventory in accordance with Section (1), the administrator may take the following steps, as appropriate:

(a) hold a personal meeting with the surviving spouse;
(b) hold a personal meeting with the child(ren) of the deceased;
(c) undertake consultations with any customary or religious leaders, employers, relatives and neighbours who could reasonably be expected to have knowledge of the deceased’s assets;
(d) search title deeds at the [land registry office]; and
(e) search accounts at banks and financial institutions located in the region.

(Optional additional step where preliminary inventory undertaken:)
and
(f) review the preliminary inventory.

Every such final inventory shall be signed by the maker thereof or the administrator causing it to be made.

Every such final inventory shall be attested by two witnesses, being persons of good credit and repute who are not beneficiaries of the estate.

Every such final inventory shall be transmitted to the [relevant authority] within [number] days of the granting of letters of administration.

A copy of every such final inventory shall be delivered to the surviving spouse of the deceased, if any, within [number] day of transmission of the same to the [relevant authority].

Commentary: Articles 13 and 14
An inventory is a commonly-used mechanism in the administration of estates. It is the starting point for the accounting to be done in relation to the estate. It also provides an essential mechanism for accountability and oversight with respect to the distribution of the deceased’s assets. The precise form and requirements of the inventory may vary from
jurisdiction to jurisdiction, but in general terms the inventory is a list of all of the property of the deceased, movable and immovable, containing a reasonably detailed description of the property along with its fair market value.

The provisions proposed here include both a preliminary inventory (optional) and a final inventory. The preliminary inventory is to be completed as soon as possible after a death by someone with a close association to the deceased. In light of the problematic possibility of property dispossession, it is desirable to produce a preliminary inventory quickly following the death, before property can be removed, concealed or otherwise misappropriated. In the period immediately following a death, relatives may take property that rightfully belongs to the surviving spouse(s) or children of the deceased, or begin distributing the estate in accordance with customary law rather than in accordance with statutory provisions.\(^\text{65}\) The final inventory follows at a later date, once the administrator has conducted a more thorough assessment of the assets and liabilities of the deceased.

The precise timeframe for these inventories in each jurisdiction must be determined in accordance with mourning practices and other local considerations.\(^\text{66}\) While an inventory cannot stop unscrupulous or uninformed relatives or community members from misappropriating or improperly distributing assets, it may provide a means of accountability and oversight that could assist in the efficient handling of an estate, could facilitate restitution where necessary, and could result in charges being laid against the perpetrators, where appropriate.

The inventory is not an end in itself, but rather a mechanism to contribute to the expedient and just administration of estates. The procedures should not be too cumbersome, unduly expensive or require legal representation. If the process is too onerous, people may try to avoid it and the possible benefits to be obtained from the process would be lost.\(^\text{67}\)

\(^{\text{65}}\) On property dispossession, see the prefatory note to this module, and Part E below. The specific risk of property grabbing in the period immediately following death was emphasized by the experts at \textit{Legislating for Women’s Rights in the Context of the HIV/AIDS Pandemic}, consultation meeting, 16–18 January 2008, Johannesburg, South Africa.

\(^{\text{66}}\) For example, in Botswana the law sets a timeframe of 14 days following death for the inventory to be made on the death of any person if that person was not married in community of property. According to the same Act, when one of two spouses who have been married in community of property dies the surviving spouse is to make an inventory within six weeks after the death: \textit{The Administration of Estates Act of 1974}, ss. 17(1) and 18(1). In Lesotho, the surviving spouse takes an inventory within six weeks of death (in the presence of all interested parties), and then forwards the inventory to the office of the Master or District Administrator: UN-HABITAT, \textit{Land Tenure, Housing Rights and Gender in Lesotho}, 2005, p. 46. In Uganda, the law requires that an executor or administrator produce an inventory within six months from the grant of letters of probate or letters of administration: \textit{The Succession Act of 1906}, s. 278.

\(^{\text{67}}\) For example, the Tanzania Law Reform Commission recommends streamlining cumbersome procedures associated with the administration of estates in order to avoid delays, unnecessary expenses and the loss of benefits to beneficiaries: TLRC, \textit{Report on the Law of Succession (supra)}, p. 69.
Optional: Article 15. District Administrator to produce inventory

(1) Where no final inventory has been transmitted to the [relevant authority] as required by Article 14(5), the [relevant authority] shall make or cause to be made such an inventory of all property known to have belonged to the deceased or to have been in his or her possession at the time of his or her death.

(2) In the preparation of the inventory in accordance with Section (1), the [relevant authority] or person appointed by the [relevant authority] to make the inventory may take the following steps, as appropriate:

(a) hold a personal meeting with the surviving spouse;
(b) hold a personal meeting with the child(ren) of the deceased;
(c) undertake consultations with any customary or religious leaders, employers, relatives and neighbours who could reasonably be expected to have knowledge of the deceased’s assets;
(d) search title deeds at the [land registry office]; and
(e) search accounts at banks and financial institutions located in the region.

(Optional additional source where preliminary inventory undertaken):
and
(f) review the preliminary inventory.

(3) Any reasonable charges associated with the preparation of the inventory in accordance with Section (1) shall be charged to the estate of the deceased.

(4) A copy of every such inventory shall be delivered to the surviving spouse of the deceased, if any, within [number] days of transmission of the same to the [relevant authority].

Article 16. No distribution of estate without inventory

(1) An estate shall not be liquidated or distributed until a final inventory has been transmitted to the [relevant authority].

Article 17. Penalty on omission of inventory

(1) A person who in the course of making an inventory knowingly omits to enter in such inventory any article of property of whatsoever kind, or who causes the destruction or deterioration of any property which should be included in the inventory, or otherwise
Commentary: Articles 15–17

As discussed in the prefatory note to this module, women’s inheritance rights are frequently not respected, whether because of discriminatory beliefs and practices, purposeful deception or a lack of knowledge about applicable laws. Inventories are one administrative mechanism that may help ensure women are able to retain their rightful inheritance. As such, Articles 15–17 aim to ensure that inventories are in fact produced and that they are accurate.

Where the surviving spouse, family or administrator have not produced an inventory for whatever reason, the agency responsible for administering estates could be empowered to do so. This provision advances the objective of obtaining a proper inventory of the estate, without seeking to punish someone who has not prepared the inventory for whatever reason. As it is likely that some expense would be incurred in having a designated official prepare the inventory, it has been suggested that a fair and efficient means to offset these costs would be to charge the fee back to the estate.

In order to protect the rights of beneficiaries and serve as a useful means of accounting and accountability, the inventory must necessarily be completed before distribution of the estate. For complete clarity on this point and to avoid abuse, Article 15 therefore prohibits distribution of the estate before the final inventory has been transmitted to the appropriate authority in the jurisdiction. Article 17 creates an offence for intentionally omitting property from an inventory. As little purpose would be served to punish unintentional omissions, Article 17 is concerned exclusively with intentional omissions that are attempts to defraud the beneficiaries of the estate or government authorities (for example, to avoid paying required estate duties or debts). Moreover, omitting property from an inventory may be a step in misappropriating that property, which (as noted) can result in great suffering on the part of the rightful beneficiaries.

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68 Zimbabwe, for example, mandates penalties in the form of fines and/or imprisonment for willfully making a false inventory: Zimbabwe, Administration of Estates Act of 1907, s. 19. Similarly, see South Africa, Administration of Estates Act of 1965, s. 102(1).

69 This solution was recommended by experts at Legislating for Women’s Rights in the Context of the HIV/AIDS Pandemic, consultation meeting, 16–18 January 2008, Johannesburg, South Africa.
C. Testate Succession

**NOTE:**
The following provision specifies which property a testator can bequeath in his or her will.\(^70\)

### Article 18. Property disposable by will

(1) A person may bequeath by will property, whether acquired before or after the making of the will, to which the person was entitled at the time of the person’s death by either law or custom.

(2) Notwithstanding Section (1), a married person may not bequeath the matrimonial home by will if he or she predeceases a spouse.\(^71\)

(3) For further clarity, a person who is married or separated may only bequeath by will his or her own share of any property commonly or jointly held with a spouse.

**(Optional additional section where family and traditional property requires distinct treatment:)**

(4) Notwithstanding Section (1), a person may not bequeath by will any property held in trust by the testator in terms of customary law for the benefit of other members of the testator’s kin group, if under customary law that property cannot be disposed of by will.\(^72\)

**Commentary: Article 18**

A will is a legal document containing a person’s instructions and wishes as to how his or her property and assets are to be distributed after their death. It may also include instructions on matters such as guardianship of the testator’s children. Legislation establishes various formalities which a person must comply with if his or her will is to be accepted by a court or governmental authority and put into effect after the person’s death. If a person dies without having made a valid will, then the person has died intestate and

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\(^70\) A testator is the person making a will, or a person who has died leaving a will. To bequeath is to give property through a will.

\(^71\) See the section on the matrimonial home in Module 3 “Property in Marriage.”

\(^72\) See also, Zambia, *Wills and Administration of Testate Estate Act of 1989*, s. 2:

This Act shall not apply to —

(a) land which at the death of the testator had been acquired and was held under customary law and which under that law could not be disposed of by will;

(b) property which at the death of the testator was institutionalised property of a chieftainship and had been acquired and was being held as part of the chieftainship property.
the distribution of his or her property is determined according to a set of legal rules. (On intestate succession, see Part D of this module.)

While testators have broad discretion with respect to the instructions they leave in their will, there are appropriate limitations as to what property a person can legally bequeath, in order to protect the legitimate interests of other people. Article 18(2) prohibits bequeathing the matrimonial home to anyone other than the surviving spouse. Rather than allowing a person to bequeath the matrimonial home as they can any other piece of property, particular rules apply (Article 36 in this module) to the disposition of the matrimonial home in order to protect the housing rights of the surviving spouse and any children. Article 18(3) provides further protection for a surviving spouse by establishing the requirement that a person can only bequeath his or her own interest in property. This is to avoid scenarios in which an individual bequeaths marital property which legally belongs to a surviving spouse.

Finally, Article 18(4) prohibits bequeathing certain properties held under customary law. Under customary land tenure systems, land can be used, held and allocated in different ways. In some countries, wills legislation does not apply to certain types of property which must descend by custom. This deference to custom has proven harmful to women in some settings, resulting in women being denied a fair portion of the estate. On the other hand, in other settings customary land systems can protect women’s land uses, and respect for culture and customary law favours respecting these different types of properties and land tenure systems. Article 18(4) is therefore an option for appropriate jurisdictions.

**NOTE:**
The following provision establishes the equal right to make a will.

**Article 19. Capacity to make a will**

(1) Every person who is over the age of [number] years may make a will unless at the time of making the will the person is mentally incapable of appreciating the nature and effect of the act.

(2) The burden of proof that a testator was mentally incapable of appreciating the nature and effect of the act lies on the person who alleges such incapacity.

(3) A woman or a man, whether married or unmarried, has the same capacity to make a will, notwithstanding any customary or religious rules to the contrary.

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73 Ibid.
74 COHRE, *Sources 5* (supra), p. 76. On customary law, see the introduction to this volume.
76 This section is derived from Kenya, *Law of Succession Act of 1981*, s. 5(2).
Commentary: Article 19
Upon a person’s death, family and friends may experience not only grief at the loss, but also a great deal of uncertainty with respect to financial and property issues, custody of children, and the legal, administrative and cultural procedures resulting from the death. In addition, as discussed in the prefatory note to this module, gender-based discrimination remains prevalent with respect to inheritance. Will-making is one mechanism that can help overcome some of these difficulties. Will-making has been recommended as a strategy to safeguard against confusion in intestate succession, to ameliorate unfavourable consequences of the application of customary law, and as a means for individuals to direct the administration of their estate according to their own wishes, particularly with respect to providing for their children and other family members.

The ability to make a will is normally restricted to adults who have the legal and mental capacity to own property and dictate the terms of its disposal. The minimum age for writing wills is usually set at 16 to 19 years, depending on the jurisdiction. Recommendations have been made to lower the minimum age to 16 years in some jurisdictions where it is higher, recognizing that young people may own valuable assets and that they may also have children or be married. Having the ability to make a will can help protect the interests of a person’s surviving spouse(s) and child(ren). In the context of the HIV epidemic in Africa, where increasing numbers of orphaned children are heading households, these considerations are particularly germane.

Some legal regimes and customary practices have limited the ability of women not only to inherit, but also to make a will and to pass on inheritance to others. Article 19(3), therefore, is an important provision in efforts to overcome gender discrimination.

NOTE:
The following provision sets aside wills which are not the true intention of the testator.

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77 See, for example, COHRE, Sources 5 (supra), p. 211; R. Strickland, To Have and To Hold (supra), p 55–6; UNAIDS and The Global Coalition on Women and AIDS, Keeping the Promise (supra), p. 11.


79 For example, the minimum age is as follows in these sub-Saharan African countries: Botswana, 16 (Wills Act of 1957, s. 5); Ghana, 18 (Wills Act of 1971, s. 1(1)); Zimbabwe, 16 (Wills Act of 1987, s. 4); South Africa, 16 (Wills Act of 1953, s. 4). In Zambia, “any person who is not a minor and is of sound mind may make a will”: Wills and Administration of Testate Estate Act of 1989, s. 4.

80 For example, the British Columbia [Canada] Law Institute recommended lowering the minimum age for writing wills in that province from 19 to 16 years for these reasons: Succession Law Report Project, Wills, Estates and Succession (supra), pp. 27–28.

81 See, for example, T. Ezer, “Inheritance law in Tanzania” (supra), p. 613. See also, Namibia, Native Administration Proclamation No. 15 of 1928, and the commentary in LAC, Customary Law (supra), p. 168.
Article 20. Wills made as a result of fraud or coercion

(1) Any will made as a result of fraud, coercion or a mistake, or whose making has been subject to any other undue influence or event which interferes with the free agency of the testator, is void.\(^{82}\)

**NOTE:**
A person can put their will into a written document or verbally express their wishes in an oral will. The following Articles establish the legal requirements for each form.

Optional: Article 21. Forms of wills

(1) A will may be made either orally or in writing.\(^{83}\)

Optional: Article 22. Oral wills

(1) An oral will must be made before two or more competent witnesses, as set out in Article 25 below.

(2) No oral will shall be valid if, and insofar as, it is contrary to any written will which the testator has made and which has not been revoked, regardless of whether the written will was made before or after the date of the oral will.

**Commentary: Articles 21 and 22**
Testators can express their wishes in either oral or written form. Given the added certainty and formality possible with written wills, written wills tend to be the preferred format. Yet in some situations, oral wills are common and are well-respected, and recognizing oral wills offers opportunities for people who otherwise might not make a will to do so. Oral wills also offer certain advantages to some testators. For example, for people who are illiterate or have low-level literacy skills, dictating an oral will before witnesses allows them to express their testamentary wishes. Similarly, where there are cultural taboos against writing wills, allowing oral wills may contribute to an increase in will-making.\(^{84}\) The requirement of at least two competent witnesses is intended to reduce the potential for misrepresentation.

While there are certain advantages to making oral wills an option for everyone, few countries have done so to date and little information is available in terms of evaluating such initiatives. It is more common for oral wills to be an option for limited groups of people, such as members of the military on active duty and people facing imminent death.

\(^{82}\) This language is derived from Kenya, *Law of Succession Act of 1981*, s. 7.

\(^{83}\) Ibid., s. 8.

\(^{84}\) For example, according to one commentator, many Ugandans refuse to write wills because they believe that will-writing is a precursor to death: V. Bennett et al, “Inheritance law in Uganda” (supra), p. 456.
Therefore, Articles 21 and 22 are optional and countries may choose to restrict oral wills to certain populations, in certain circumstances, or altogether.

**Article 23. Written wills**

(1) A testator, or some other person on behalf of the testator in the testator’s presence and under his or her direction, must sign or affix his or her mark to a written will.

(2) A written will must be attested by two or more competent witnesses, as set out in Article 25, each of whom must have seen the testator sign or affix his or her mark to the will, or have seen the other person sign the will in the presence and under the direction of the testator.

(3) Each of the witnesses must sign the will in the presence of the testator.86

**NOTE:**
The following provision allows a court to make exceptions to the required formalities for wills in appropriate circumstances.

**Article 24. Court may dispense with formal requirements**

(1) Where the court is satisfied that a document or any writing on a document embodies:

(a) the testamentary intentions of the deceased; or
(b) the intention of a deceased to revoke or alter his or her own will;

the court may, notwithstanding that the document or writing was not executed in compliance with all of the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been executed in compliance with all of the formalities imposed by this Act.87

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85 For example, see Zambia, *Wills and Administration of Testate Estate Act of 1989*, s. 6 (4), which allows oral wills (provided there are two witnesses) by members of the defense forces on active service, members of the security forces engaged in security operations and people who are terminally ill or injured with no hope of recovery and who eventually die due to that injury or illness. Kenya, *Law of Succession of 1981* permits oral wills when made before two or more witnesses if the person dies within three months of making the will, or if made by a member of the armed forces or merchant marine while on active duty, if they die during that same period of active service.

86 For wills to be considered valid, the formalities required commonly include that the will is written, it is signed at the end by the testator and it is attested by two witnesses in the testator’s presence. See, for example, South Africa, *Wills Act of 1953*, s.2; Zambia, *The Wills and Administration of Testate Estate Act of 1989*, s. 6; Botswana, *Wills Act of 1957*, s. 3(1)(a).

Commentary: Article 24
The prescribed formalities provide important protection against fraud and forgery.\(^88\) At the same time, invalidating a will because of inadvertent failures to follow the formalities precisely or the inability to fulfil all of the requirements can lead to injustices and intestacy in situations where the true testamentary intention could be fulfilled. A rigorous enforcement of formal requirements may defeat the intentions of the will-maker without serving a redeeming purpose. A power to dispense with these formal requirements allows a court to give effect to the intentions of the testator after considering the evidence of the particular circumstances. For this reason, Article 24 allows a court to give effect to testamentary intentions where the document is undoubtedly intended to be a will, but would otherwise be invalid for not complying with the formalities. In situations where testators do not have legal counsel to assist them in preparing their will, this power may be particularly important.\(^89\)

NOTE:
The following provisions set out parameters with respect to the witnessing of wills, whether written or oral.

Article 25. Competent witnesses

(1) Any person, male or female, who:

(a) is over the age of [number]; and
(b) is competent to give evidence in a court of law;

shall be competent to witness the signing of a written will (additional phrase where oral wills are permitted: and the making of an oral will).\(^90\)

Article 26. Gifts to attesting witness\(^91\)

(1) If a will is witnessed, or signed on behalf of a testator, by a person to whom a gift is made under the will, or to whose spouse a gift is made under the will, the gift is void so far only as it concerns the person so attesting or signing or the person’s spouse.

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\(^{89}\) A survey of cases in which similar provisions were applied in Canada found that they did not generate excessive amounts of litigation. Such provisions allowed for testamentary wishes to be given effect where the document was undoubtedly intended to be a will, but the courts tended to apply the provisions with restraint and they did not result in a laxity of practice or the enforcement of wills where there was doubt as to the authenticity of the document: Succession Law Report Project, *Wills, Estates and Succession* (supra), p. 24.

\(^{90}\) In South Africa, *Wills Act of 1953*, s. 1, the minimum age for a witness is set at 14. In Zimbabwe, the *Wills Act of 1987*, s. 7, sets the minimum at 16.

\(^{91}\) In this module, the term “gift” refers to a benefit received because of the will.
(2) If, upon application by a person seeking to uphold a gift under the will that is void under Section (1), the court determines that the testator knew and approved of the gift and the court is satisfied that the gift was not given as a result of fraud, coercion or undue influence, the court may declare that the gift is not void and takes effect accordingly.

(3) In this Article, the relevant time for determining whether one person is the spouse of another is the time of the making of the will.92

(4) A person or his or her spouse who witnessed a will should not be disqualified from receiving a benefit under the will if the will concerned has been witnessed by at least two other competent witnesses who will not receive any benefit from the will.93

(5) A person or his or her spouse who witnesses a will shall not be disqualified from receiving a gift under that will if in terms of the [relevant law relating to intestate succession] he or she would have been entitled to inherit from the testator if that testator had died intestate, provided that the value of the gift received does not exceed the value of the share to which that person or his or her spouse would have been entitled to if the testator had died intestate.94

NOTE:
A testator must be able to revoke or alter a previous will. In order to prevent errors or misrepresentations following the death of a testator as to whether or not a will (or portion of a will) was still intended to be in force, the following provisions provide some formality and clarity to the process of revocation and alteration of wills.

Article 27. Revocation of wills

(1) A will may be revoked by its maker at any time when he or she is competent to dispose of his or her property by will.

(2) A will may be revoked by:

(a) a later will or an addition or alteration made to a will duly executed and expressed to revoke the earlier will;

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92 Based on proposed subsections 41(2) through (5) in Succession Law Report Project, Wills, Estates and Succession (supra), p. 146. South African legislation contains a similar provision stating that a person or his or her spouse who witnesses a will or writes out the will is disqualified from receiving any benefit from that will, unless a court declares the person or his or her spouse competent to receive the benefit because they did not defraud or unduly influence the testator: Wills Act of 1953, ss. 4A (1) and (2). Botswana, Wills Act of 1957, also prohibits a witness from benefitting under a will: s. 6.


94 Derived from South Africa, Wills Act of 1953, s. 4A(2)(b).
Article 28. Alteration of wills

(1) A will may be altered by its maker at any time when he or she is competent to dispose of his or her property by will.

(2) A written will may be altered by a written declaration of the intention to alter the will, made in accordance with the provisions governing the making of a written will.

(3) If a written will is altered, it is sufficient compliance with the requirements for execution if the signatures of the witnesses to the alteration are made in the margin or on some other part of the will near the alteration.

(Optional additional section where oral wills are permitted:)

(4) An oral will may be altered by an oral declaration of the intention to alter the will, made in accordance with the provisions governing the making of an oral will.

NOTE:
Commencing or terminating a marriage fundamentally changes a person’s legal responsibilities. The following provisions outline what effect these changes of status have on existing wills.

Article 29. Effect of marriage on wills

(1) A will shall remain valid despite the marriage of the testator.

Article 30. Effect of termination of marriage on will

(1) If any person dies after her or his marriage was dissolved by a divorce, annulment or separation, and if that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if her or his previous spouse had died before the date of the dissolution concerned.

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95 Based on Zambia, The Wills and Administration of Testate Estates Act of 1989, s. 13(1).
unless it appears from the will that the testator intended to benefit her or his previous
spouse notwithstanding the dissolution of the marriage.96

Commentary: Articles 29 and 30
In many jurisdictions, a will is automatically revoked if the testator marries after the will
has been executed, unless the will expressly states that it was made in contemplation of
the marriage.97 The purpose of revocation of a will by marriage is to protect the interests
of the new spouse and any children of the testator. If this provision is not widely known
by the public, however, it can result in unintended intestacies or the undoing of carefully
planned arrangements to meet obligations of the testator, such as provisions in the
revoked will for dependant parents, children of previous marriages and others. This can
have unfortunate consequences for beneficiaries who have no legal right apart from the
will to a share of the estate.

Given the negative consequences the automatic revocation of a will upon marriage can
have on some beneficiaries, and given that the will is not the only means to protect the
interests of dependents, Article 29 establishes that a will not be automatically revoked by
a subsequent marriage. In the event that one of the spouses does not make a new will to
take account of their new marriage, resulting gaps in provision for the new family can be
at least partially rectified by means of other provisions. Matrimonial property legislation
should provide protection to the new spouse for example, and rules with respect to
maintenance should provide for dependents who may not be provided for in the will (see
Part E below).

Article 30 addresses the validity of a will made prior to the termination of a marriage. If
a testator’s marriage is terminated between the time that the testator makes the will and
his or her death, any gift under the will to the former spouse is revoked, unless a contrary
intention is evident in the will. Similarly, if the former spouse was designated as an
executor or trustee, this appointment will not take effect. The will takes effect as if the
spouse or partner had predeceased the testator. The policy rationale behind this Article is
to prevent a spouse from benefiting from the estate of the other spouse after the
relationship has broken down. In particular, it prevents an ex-spouse from being
“overcompensated,” by receiving their share of the property upon the division of assets at
the termination of the relationship, and then also receiving a benefit as if they were still
the spouse under a will that the ex-spouse had neglected to revoke.98

96 Derived from South Africa, Wills Act of 1953, s. 4. Note that the South African provision reads, “If any
person dies within three months after his marriage was dissolved by a divorce or annulment…."

97 See, for example, Zimbabwe, Wills Act of 1987, s. 16; Kenya, Law of Succession Act of 1981, s. 19;
Uganda, Succession Act of 1906, s. 56; Western Australia (Australia), Wills Act of 1970, s. 14(1); Manitoba
Canada, Wills Act of 2002, s. 17.

98 Succession Law Report Project, Wills, Estates and Succession (supra), p. 35.
NOTE:
In order for the instructions in a will to be implemented after the testator’s death, the will must be available to the appropriate people. The following provisions establish systems to ensure that wills are known, accessible and executed after the testator’s death.

Article 31. Registration of wills

(1) Any person may deposit, or have deposited on their behalf, any will executed by him or her with the [relevant authority], either open or enclosed under a sealed cover.

(2) The [relevant authority] shall keep a register of the names of the persons depositing with him or her every will, and the date on which it was so deposited.

(3) Every will shall be kept under the charge and custody of the [relevant authority] until the death of the maker thereof, unless re-delivery of the same is demanded by its maker. When any will is re-delivered, the maker of the will shall sign a receipt for the same.99

Article 32. Consequences of non-registration

(1) Failure to register a will does not affect the validity of that will.

Commentary: Articles 31 and 32

A system of registering wills may be helpful in order to ensure that the will’s existence is known upon the testator’s death and that the provisions of the will can be implemented.100 The registration system should be accessible to everyone; therefore, people must be able to register their wills locally at no cost and without legal or other representation.101

Although registration may be a helpful means to ensure that wills are properly executed following the death of testators, failure to register should not affect the validity of the will. Nor should other penalties be imposed for non-registration. Rendering unregistered wills void would deprive many testators (and their beneficiaries) of the benefits of having executed a will, as well as create undue hardship for individuals who do not know about the registration requirement or who are under pressure not to register their will. Widows and their children could be unfairly penalized in terms of not being able to access their rightful inheritance. Registration of wills, therefore, should be encouraged and should be

99 Derived from Zimbabwe, Administration of Estates Act of 1907, s.7.
100 An alternative mechanism included in Zambia, Wills and Administration of Testate Estates Act of 1989 provides that:

19. A will may be kept in any place but any person may, in his lifetime, deposit for safe custody in the High Court his own will, sealed up and sealed with the seal of the Court.
101 COHRE, Sources 5 (supra), p. 211.
an option available to all testators, but there should be no legal ramifications for failure to register.

NOTE:
The following provisions require that any unregistered wills be produced promptly upon the death of the testator.

**Article 33. Transmission of wills**

(1) Any person who has any document being or purporting to be a will in his or her possession at the time of, or any time after, the death of any person who executed such document, shall, as soon as the death comes to his or her knowledge, transmit or deliver such document to the [relevant authority].

(2) Any such document which has been received by the [relevant authority] shall be registered in a register of estates, and any such document which is sealed shall be opened for the purpose of such registration.

(3) When any person is believed on reasonable grounds to be in possession of or to have under his or her control any will, and after the death of the testator fails to deliver the same to the [relevant authority], the Court may issue an order that such person shall deliver that will to the [relevant authority].

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**D. Intestate Estates**

NOTE:
The following provision defines the intestate estate, to which the law regarding intestate estates will apply.

**Article 34. Intestate and partial intestate estates**

(1) The estate of a deceased person shall include any and all moveable and immovable property, including customarily acquired and inherited property, of the deceased in which the deceased had an ownership interest, to the extent of that interest.

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102 Based on South Africa, *Administration of Estates Act of 1965*, s. 8(1).
103 Ibid., s. 8(3).
(2) A person is deemed to die intestate in respect of all property in the estate which is not the subject of a valid will.\(^{105}\)

(3) For further clarity, only the deceased’s share of any marital property shall form part of the estate, to the extent of the deceased’s interest according to the [relevant marital property legislation] or any applicable agreement with respect to marital property.

(4) For further clarity, the matrimonial home devolves according to the provisions of Article 36 and does not devolve according to the provisions governing intestate succession.

(Optional additional section where family and traditional property requires distinct treatment:)

(5) For further clarity, family and/or traditional property held in trust in accordance with customary law devolves according to customary law and does not devolve according to the provisions governing intestate succession.

**Commentary: Article 34**

When a person dies leaving property or assets, decisions must be made as to what to do with that property. Where a person leaves a valid will, the property can be distributed in accordance with the deceased’s stated wishes. Where he or she has not left a will however, or the will does not address all of the deceased’s property, the rules of intestacy will govern how the property devolves. The general aims of intestacy rules are to carry out the presumed intentions of the deceased person, to provide simplicity, clarity and certainty with respect to the administration and distribution of the estate, and to meet the needs of family members.\(^ {106}\) The rules of intestacy are of critical importance from a human rights perspective, as they may determine the living conditions of survivors. Where rules of intestacy are discriminatory or do not correspond to current socio-economic conditions, great injustice and suffering can result.\(^ {107}\)

Articles 34(3) and (4) emphasize that the share of any marital property owned by the deceased’s spouse and the matrimonial home are not part of the estate, subject to the rules of intestacy. As discussed in the prefatory note above, discrimination against women with respect to property and inheritance remains a problem, and in some circumstances widows may find themselves without a home or any property following the death of their spouse. (See also Part F on property dispossession below.) These provisions, therefore, protect the legitimate rights of surviving spouses to marital property and the matrimonial home.

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\(^{107}\) See the prefatory note to this module on the injustices and harms that can result from discrimination with respect to inheritance laws.
Article 34(5) provides an optional provision with respect to property held under customary law. The customary legal systems in different countries, and of different tribal groups, have distinct rules and practices with respect to land and property. Common to many, however, are the ideas of family property, which belongs collectively to family members, and customarily held land, to which there are group rights attached. Such property is distinguished from personal property according to its function, the interests it serves (group or personal interests) and the family status of the person allocated the property.\textsuperscript{108} Some countries exclude family property from the estate.\textsuperscript{109} It has been argued that this approach respects the fact that property ownership under customary law is different than under legal systems imposed during colonial regimes.\textsuperscript{110} It has also been suggested that enforcing a law that gives family property to one person enriches the heir unfairly and encourages him or her to use the family property to serve his or her own interests, rather than to administer the property as a trustee in accordance with customary practices.\textsuperscript{111} Further, it is worth noting that family property can be protective of women’s rights. Women who return to their families after their marriages have broken down may have access to family property, and family members occupying family property due to need may use it indefinitely.\textsuperscript{112} Therefore, family land may need to be treated differently than other types of property, taking into account the various persons with legitimate interests.\textsuperscript{113}

NOTE:  
To protect the interests of the spouse of the deceased, the following provision gives the government authority which administers estates the duty to ensure that marital property is divided in accordance with the applicable marital property regime before the inheritance process begins.

Article 35. Division of marital property

(1) If the deceased was married or separated, the [relevant authority] shall not authorize the distribution of the estate until satisfied that all relevant property has been divided according to the applicable marital property regime or any applicable agreement with respect to marital property.


\textsuperscript{109} For example, in Ghana, see \textit{Intestate Succession Act of 1985}, ss. 3–4; in Zambia, see \textit{Intestate Succession Act of 1989}, s. 9; in Sierra Leone, see \textit{Devolution of Estates Act of 2007}, s. 15.

\textsuperscript{110} LAC, \textit{Customary Law} (supra), p. 162.

\textsuperscript{111} L. Mbatha, “Reforming the customary law of succession” (supra), p. 267.

\textsuperscript{112} Ibid., p. 272.

\textsuperscript{113} Ibid., p. 282.
NOTE:
The following provision establishes distinct treatment for the matrimonial home, apart from the rest of the estate.

Article 36. The matrimonial home

(1) Where the estate includes a matrimonial home, the surviving spouse and his or her child(ren) shall be entitled to a life interest in that matrimonial home.

(Optional additional section where polygamy is not prohibited:)

(2) Where there is more than one surviving spouse, each surviving spouse and his or her child(ren) shall be entitled to a life interest in the matrimonial home that they shared with the deceased immediately prior to his or her death.

Commentary: Article 36
The matrimonial home is central to family life and is often the primary asset of a couple. If a woman loses access to the matrimonial home, she may well become homeless and destitute, and lose custody of her children. Allowing women to be evicted from their homes (whether by an ex-spouse, his family or others) also subjects women to insecurity, vulnerability, poverty and sexual violence.114 Unfortunately, women continue to be dispossessed of their homes on the death of their husbands. (See Part F below on property dispossession.)

In many jurisdictions, the surviving spouse is legally entitled to remain in the matrimonial home on the death of his or her spouse.115 This is consistent with the idea that the primary function of inheritance rules is to minimize the disruptive effect of a death on the family. It allows the surviving spouse and children to continue living in the house where they lived before the death of their spouse and parent and, as far as possible, to continue living as they were accustomed. It also recognizes the contribution of the surviving spouse to the home and the family, and the surviving spouse’s resultant interest in the property.

If a similarly-situated husband would have full ownership rights of the home and be entitled to remain there after the death of his wife (and further, after his own remarriage) denial of the same rights to widows is sex-based discrimination. Allowing such discrimination to continue puts women at risk of abuse and insecurity and denies women equal protection of the law.116 For this reason, Article 36 protects women’s right to retain the matrimonial home.


115 See, for example, Zambia, Intestate Succession Act of 1989, s. 9; Ghana, Intestate Succession Act of 1985, ss. 4 and 16A; Zimbabwe, Deceased Estates Succession Act of 1929, s. 3A; Uganda, Succession Act of 1906, Second Schedule; Sierra Leone, The Devolution of Estates Act of 2007, s. 9.

The ICESCR definition of the right to adequate housing includes the right to live somewhere in “security, peace and dignity,” and also includes legal security of tenure. Forced evictions are *prima facie* incompatible with the international right to adequate housing. The provision above is one way to prevent forced evictions and protect the right to housing, including for widows and children. In addition, Article 21 of the Protocol on the Rights of Women in Africa provides for a right to inheritance, stating that a “widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.”

**Article 37. The estate**

*Two options for Article 37 are provided below — 37A and 37B. One or the other should be selected, but not both.*

**Option 1: Article 37A. Preferential spousal share**

(1) Where an intestate dies leaving a spouse, the spouse is entitled to a preferential share of the estate as provided in Sections (2) through (4).

(2) Where the intestate leaves one spouse and one or more children, the preferential share is [monetary amount].

(3) Where the intestate leaves one spouse and no children, the preferential share is [monetary amount].

(4) If the total value of the estate after the payment of debts and liabilities is less than the preferential share designated by this Article, the entire estate shall devolve upon the spouse.

(5) In the case of partial intestate, Sections (1) through (4) apply to the portion of the estate which does not devolve according to the will if the amount that devolves to the spouse according to the will is less that the amount that would otherwise devolve to the spouse under this Article.

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117 U.N. Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The Right to Adequate Housing (Article 11(1)),” Sixth session, 1991, U.N. Doc. A/43/8/Add.1, 13 December 1991, para. 7. Legal security of tenure, as described in General Comment No. 4, means that notwithstanding the type of tenure (for example, rental accommodation, owner occupation, emergency housing), all persons should possess a degree of security of possession of that housing that includes guarantees of legal protection against forced eviction, harassment and other threats: para. 8(a).

118 The preferential share is a set amount the spouse is entitled to, in preference to others, after the estate’s debts and liabilities have been paid. When the net value is less than the preferential share, the surviving spouse is entitled to receive the entire net estate. When the value of the estate is greater than the preferential share, the surviving spouse is entitled to the preferential share plus a certain percentage of the value of the estate (sometimes referred to as the distributive share).
(6) The [Minister of relevant ministry] may vary the amount fixed for the preferential spousal share by notice in the [Gazette or other relevant parliamentary publication for official notices].

(Optional additional section where polygamy is not prohibited:)

(7) Where the intestate leaves more than one spouse, a preferential share of [percentage] shall be given to each spouse with one or more children, and a preferential share of [percentage] shall be given to each spouse with no children.

Option 2: Article 37B. Small Estates

(1) Notwithstanding Article 38, where the total value of the estate does not exceed [monetary amount], the estate shall:

(a) devolve upon the surviving spouse and his or her child(ren); or
(b) where there is no surviving spouse or children, devolve upon the parents of the deceased; or
(c) where there is no surviving spouse or children or parents, devolve upon [category of beneficiary].

(2) The [Minister of relevant ministry] may vary the amount fixed in Section 1 by notice in the [Gazette or other relevant parliamentary publication for official notices].

(Optional additional section where polygamy is not prohibited:)

(3) Where the intestate leaves more than one spouse and the total value of the estate does not exceed [monetary amount], the estate shall devolve upon the surviving spouses and his or her child(ren) in equal shares.

Commentary: Article 37 (both options)

As discussed in the prefatory note to this module, all too often women do not inherit much from the estates of their deceased husbands, causing great suffering and injustice to them. However, increasingly this injustice is being recognized and efforts are mounting to address it. For example, the Preamble to South Africa’s recent Reform of Customary Law of Succession and Regulation of Related Matters Act of 2009 notes, among other things, that a widow in a customary marriage whose husband dies intestate does not enjoy adequate protection and benefit under the customary law of succession. As such, the Act introduces a system that prioritizes the surviving spouse in intestate inheritance.

119 Article 37B is derived from Zambia, Intestate Succession Act of 1989, ss. 11–12.

120 The Preamble further notes: the South African Constitution provides that everyone has the right to equal protection and benefit of the law; social circumstances have changed such that the customary law of succession no longer provides adequately for the welfare of family members; and the South African Constitutional Court has declared that the principle of male primogeniture, as applied in the customary law of succession, cannot be reconciled with current notions of equality and human dignity.
Moreover, case law from various African jurisdictions supports a move away from preserving discriminatory inheritance practices, towards protecting the rights of women and children to equality, housing, property and inheritance in situations of intestate succession. For example, in one case from Nigeria, the Court of Appeal overturned a longstanding custom in southeast Nigeria under which a widow was not entitled to inherit her husband’s property. The Court noted that it could not invoke a custom that is repugnant to natural justice, equity and good conscience. The Constitutional Court of South Africa has similarly held that the rule of male primogeniture as it applies in African customary law of succession and sections of statutory law were unconstitutional in the cases of *Bhe* and *Shibi*, and in a related class action.

Statutory regimes that give substantial inheritance rights to the surviving spouse and children provide stability, clear entitlements and consistency. They also counteract the widespread poverty, violence and vulnerability that widows and orphans have been subjected to because of intestate succession rules that give the bulk of the estate to heirs other than the surviving spouse and children, and are consistent with the requirements of human rights law. There is increasing support for reforms that allow the widow — who is seen to have the best interests of the children at heart and to have contributed to the amassing of property during the marriage — to control the property on the death of her husband.

The preferential spousal share outlined in Article 37A aims to put the rights of the surviving spouse front and centre in the distribution of the property of someone dying intestate. The preferential share is a set amount which the spouse inherits, after the estate’s debts and liabilities have been paid. When the net value of the estate is less than the preferential share, the surviving spouse is entitled to receive the entire net estate. If the value of the estate is large enough to cover the debts and liabilities, any maintenance needs of dependents and the preferential share, anything that remains is divided according to the manner of distribution for intestate succession as set out in the legislation and the surviving spouse would therefore also be entitled to a certain percentage of the value of the estate.

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121 On appeal, the Supreme Court held that the Court of Appeal had erred in holding the custom to be repugnant to natural justice, but did not overturn the result of the case, allowing the woman to keep the land: *Mojekwu v. Mojekwu* (Nigeria, 1997), as discussed in A. Kuenyehia, “Brigitte M. Bodenheimer Lecture” (supra), p. 394.

122 *Bhe and Others v. The Magistrate, Khayelitsha and Others*, Case CCT 49/03; *Shibi v. Sihole and Others*, Case CCT 69/03; and *South African Human Rights Commission and Another v. President of the Republic of South Africa and Another*, Case CCT 50/03. South Africa, *Reform of Customary Law of Succession and Regulation of Related Matters Act of 2009* abolishes the customary rule of primogeniture, giving legislative effect to the Constitutional Courts judgment in *Bhe* and *Shibi*.

123 See, for example, L. Mbatha, “Reforming the customary law of succession” (supra), p. 271, referring to research done in South Africa.
The amount of the preferential spousal share should be set in light of typical estate values and contemporary living standards in the jurisdiction.\textsuperscript{124} Note that different amounts may be set for the preferential share for situations where there are also children or for polygamous marriages. The preferential spousal share approach can be especially protective of women, particularly for estates where the value of the estate is not known, contested or not that large. Rather than dividing the estate into various shares, which may be extremely small, the spouse’s preferential share is taken off the top before any dividing begins.

The “small estate” approach outlined in Article 37B has a similar effect. Many jurisdictions have similar provisions with respect to “small estates,” to ensure that the dependents receive the bulk of the estate and that it is not fragmented into such tiny portions that no one receives anything of significant value.\textsuperscript{125} As with the preferential spousal share, the value below which an estate is considered a “small estate” needs to be set by government in light of typical estate values and contemporary living standards in the jurisdiction. (In addition, a different amount may be set for polygamous marriages than for monogamous ones, in recognition of the additional wife or wives.) One potential pitfall of the “small estate” approach is that if the value of the estate is even slightly more than the designated value, the surviving spouse only receives his or her percentage according to the manner of distribution for intestate succession as set out in the legislation which, depending on the legislative provisions, may be significantly less than the “small estate” value or a preferential spousal share. Each jurisdiction would need to specify appropriate persons to inherit (or mechanism to determine the persons to inherit) for Article 37B(1)(c).

\textbf{NOTE:}

The following provision sets out the manner of distribution for the remainder of the estate of a person dying intestate.

\textsuperscript{124} For example, in Kenya, a single surviving spouse with no children is entitled to the first ten thousand shillings out of the residue of the net estate, or 20 percent of the net estate, whichever is greater: \textit{Law of Succession Act of 1978}, s. 36(1). The British Columbia Law Institute recommended that the amount be set at CAN$300,000 in that Canadian province. See Succession Law Report Project, \textit{Wills, Estates and Succession} (supra), p. xvi. The preferential spousal share is a common feature in the inheritance legislation of Canadian provinces.

\textsuperscript{125} For example, Ghana, \textit{Intestate Succession Law of 1985} sets out a formula that divides the bulk of the estate amongst the surviving spouse, children, parents, and reserves one-eighth of the estate to be distributed in accordance with customary law. However, if the estate has a value of less than 10,000,000 cedis, the spouse and children of the deceased are entitled to all of it: s. 12(a). Zambia, \textit{Intestate Succession Act of 1989} likewise sets out a scheme with percentages of the estate devolving on surviving spouses, children, parents and dependents of the deceased, depending on what beneficiaries the deceased leaves. Notwithstanding these provisions, s. 11 provides that “where the total value of the estate does not exceed K30,000 the estate shall: (a) devolve upon the surviving spouse of child of the intestate or both; or (b) where there is no surviving spouse or children, devolve upon the surviving parent.” In South Africa, if an estate is valued at less than 120,000 rand, it automatically devolves to the surviving spouse: \textit{Intestate Succession Act of 1987}, s. 1(c)(i). The amount is fixed by the Minister of Justice by notice in the Gazette. In Sierra Leone, where the total value of the estate does not exceed 15,000,000 leones, it shall devolve to the surviving spouse or child, or both; if there is no surviving spouse or child, then to the surviving parent, brother or sister or next-of-kin: \textit{Devolution of Estates Act of 2007}, s. 18.
Article 38. Manner of distribution

[Two options for Article 38 are provided below — 38A and 38B. One or the other should be selected, but not both.]

Option 1: Article 38A. Equal shares

(1) Where a person dies intestate, the net value of any property of the estate remaining following any award of maintenance for dependents as required under Article 46 and any distribution required pursuant to Article 37 is the residue of the estate.

(2) The residue of the estate shall be distributed in equal amounts to the surviving spouse and children.

(3) If the deceased leaves no surviving spouse or children, the residue shall devolve upon [category of beneficiary].

Option 2: Article 38B. Varying shares

(1) Where a person dies intestate, the net value of any property of the estate remaining following any award of maintenance for dependents as required under Article 46 and any distribution required pursuant to Article 37 is the residue of the estate.

(2) Where the intestate is survived by a spouse and one or more children, the residue of the estate shall devolve in the following manner:

(a) [percentage] to [category of beneficiary];
(b) [percentage] to [category of beneficiary];
(c) [percentage] to [category of beneficiary]; and
(d) [percentage] to [category of beneficiary].

(4) Where the intestate is survived by one or more children but no spouse, the residue of the estate shall devolve in the following manner:

(a) [percentage] to [category of beneficiary];
(b) [percentage] to [category of beneficiary];
(c) [percentage] to [category of beneficiary]; and
(d) [percentage] to [category of beneficiary].

(5) Where the intestate is survived by neither any children nor a spouse, the residue of the estate shall devolve in the following manner:

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126 For example, in Zambia, 20 percent devolves to the surviving spouse; 50 percent to the children in proportions commensurate with each child’s age and educational needs; 20 percent to the parents of the deceased; and 10 percent to the dependents in equal shares: Intestate Succession Act of 1989, s. 5(1).
(a) [percentage] to [category of beneficiary];
(b) [percentage] to [category of beneficiary];
(c) [percentage] to [category of beneficiary]; and
(d) [percentage] to [category of beneficiary].

(Optional additional section where polygamy is not prohibited:)
(6) Where the intestate is survived by more than one spouse, such spouses shall inherit [percentage] of the residue of the estate in equal shares. The remainder shall devolve in the following manner:

(a) [percentage] to [category of beneficiary];
(b) [percentage] to [category of beneficiary];
(c) [percentage] to [category of beneficiary]; and
(d) [percentage] to [category of beneficiary].

Article 39. Discretion to vary

(1) Notwithstanding the provisions of Article 38, where there are multiple surviving spouses, children of multiple spouses or other relationships, and/or other dependant persons affected, the [relevant authority] is not required to distribute the residue of the estate pursuant to the fractions set forth above if equity and good conscience would dictate otherwise.127

Commentary: Articles 38 (both options) and 39

In devising the specific distribution scheme appropriate for each country, it is important to give proper consideration to contemporary needs and living circumstances within the jurisdiction, human rights principles and existing customary practices. Statutory regimes that grant substantial or complete inheritance rights to surviving spouses and children may be met with resistance from those who feel that customary law is being subjugated unnecessarily to statutory law.128 Such laws may also frustrate legitimate expectations of extended families. For example, elderly parents may not be adequately taken care of if they inherit nothing from the estate, or if the customary heir who might be expected to make provisions to care for the parents does not inherit.129 Finally, it has been noted that approaches which depart too radically from existing customary law are likely to be ignored.130 Where these realities are not specifically considered, courts may interpret the

127 Based on Sierra Leone, Devolution of Estates Act of 2007, s. 11. This is also a recommended addition to Ghana, Intestate Succession Act of 1985, in J. Fenrich and T. Higgins, “Promise unfulfilled” (supra).
128 Indeed, this was reportedly the reaction in South Africa after the Bhe case. See LAC, Customary Law (supra), para. 10.13. Similarly, the Indian Succession Act of Tanzania, a gender-neutral Act containing a fixed formula for the division of an estate to primarily benefit surviving spouses and children, is reportedly seldom applied except for those of European descent: T. Ezer, “Inheritance law in Tanzania” (supra), pp. 616–617.
129 See COHRE, Sources 5 (supra), p. 156.
130 LAC, Customary Law (supra), p. 140.
resulting law in a way that is discriminatory towards women and does not protect the rights of surviving spouses.\textsuperscript{131} Therefore, while prioritizing the rights of surviving spouses, children and legitimate dependents, the law should also take into consideration the rights and realities of other dependents, customary heirs, adopted children or step-children, and multiple wives (in situations where polygamy is permitted). The provisions enacted by parliament should all include specific instructions on how to appropriately handle the different situations that are relevant to the given country (for example, the possibility of multiple spouses, small estates, etc.), in accordance with human rights and constitutional non-discrimination and property rights protections.

According to the framework set out in Article 38, once maintenance claims have been determined and the preferential spousal share has been distributed, any property remaining will be distributed in accordance with a scheme for intestate estates. Two options have been provided: 1) distributing the estate in equal shares to the surviving spouses and children (often referred to as “child’s shares”); or 2) devising a scheme that designates certain fractions or percentages of the estate for different beneficiaries. Under Option 1, the legislation also needs to instruct on how the remaining property is to devolve if there is no surviving spouse or child. For example, the properties could be distributed to the parents, to siblings and even to the state if there are no dependents.

Option 2 is more complicated than Option 1, as it must be drafted to anticipate a range of possible situations and combinations of potential heirs. However, Option 2 may have the advantage of more closely resembling existing customary law and meeting the legitimate expectations of different categories of beneficiaries in a given jurisdiction. Option 2 is similar to the model currently used in many countries.\textsuperscript{132}

\textsuperscript{131} For example, Ghana, \textit{Intestate Succession Law of 1985} provides that the spouse and children of the intestate are entitled absolutely to one house and household chattels (where the estate includes a house or houses). In cases involving more than one wife, courts have required all surviving wives and children to share one house as tenants-in-common rather than awarding each spouse her matrimonial home. The wives are accordingly under-compensated for their contributions during the marriage. This causes tremendous problems for women and their children who may not even be aware of other wives or children. Where the house is sold and the proceeds distributed among the widows and children, they may be left with insufficient resources with which to live in dignity. This result is contrary to the intention of the law: J. Fenrich and T. Higgins, “Promise unfulfilled” (supra), pp. 295–298.

\textsuperscript{132} According to Ghana, \textit{Intestate Succession Law of 1985}, for example, the spouse and child receive the house of residence and its contents. Residual property is divided according to a complex fixed formula. If there are children, three-sixteenths devolve to the spouse, five-eights to the surviving children, one-eighth to the surviving parent and one-eighth to the customary law heir: J. Fenrich and T. Higgins, “Promise unfulfilled” (supra), p. 287; G.R. Woodman, “Ghana reforms the law of intestate succession,” \textit{Journal of African Law} 29(2) (1985): 118–128. Zambia, \textit{Intestate Succession Act of 1989} similarly provides a formula that takes into account customary law principles. It provides for 20 percent of the estate to go to the surviving spouse; if there is more than one widow, the 20 percent is shared between them in proportion to the duration of their marriages and other factors. Fifty percent goes to children, with proportions that are commensurate with a child’s age or educational needs, or both. Twenty percent goes to the parents of the deceased, and 10 percent to dependents in equal shares. The house devolves to the spouse and children as tenants in common. Where there is more than one widow, the home is shared as tenants in common: COHRE, \textit{Sources 5} (supra), p. 147. Malawi, \textit{Wills and Inheritance Act} provides that if the deceased man’s marriage was arranged in the patrilineal system, half of his estate share must be distributed amongst his wife, children and dependents. His heirs at customary law will acquire the other half. If the marriage was
Note that the model presented in Option 2 must be adapted to each particular jurisdiction. There may be more or less sections in the Article, and more or less than four subsections per section, depending on specific provisions drafted for the country. Some of the common categories of beneficiaries that may be included are surviving spouse(s), children (including biological, adapted and step-children), parents of the deceased, siblings of the deceased, customary heirs and next-of-kin.

**NOTE:**
The following provision protects the property rights of spouses who are separated from their spouses at the time of the death.

### Article 40. Effect of separation on distribution of the intestate estate

1. If the deceased dies before a formal division of property has been agreed upon in the form of divorce decree or separation agreement, a separated spouse shall inherit the same amount from the deceased as he or she would have inherited had the marriage continued.

2. If a formal division of property has been executed between a separated spouse and the deceased, then the estate shall devolve as if the surviving spouse had predeceased the deceased.

**NOTE:**
While the bulk of the estate is distributed to the deceased’s dependents, where it is consistent with customary law to do so, the customary heir can continue to inherit customary titles and traditional articles. This allows the position of customary heir to be preserved as a primarily symbolic position.

### Optional: Article 41. Inheritance of customary articles by heir

1. Upon the death of a person, his or her primary customary law heir shall inherit any titles and any traditional articles which, under customary law, pass to the heir on the person’s death.\(^\text{133}\)

\(^{133}\)Zimbabwe’s law has a similar provision, stating that the customary heir shall inherit the person’s name and *svimbo* or *intonga*, and any traditional articles which, under customary law, pass to the heir upon the person’s death: *Administration of Estates Act of 1907*, s. 16(2). See also, S. White, “Can rights lift the poor out of poverty? Intersecting the law, women’s property rights, and poverty in Malawi,” paper presented at the Workshop on Poverty, Legal Empowerment and Pro-Poor Governance organized by the Centre for Development and the Environment, 26–27 October 2007, University of Oslo, Norway.

133 Zimbabwe’s law has a similar provision, stating that the customary heir shall inherit the person’s name and *svimbo* or *intonga*, and any traditional articles which, under customary law, pass to the heir upon the person’s death: *Administration of Estates Act of 1907*, s. 16(2). Uganda, *Succession Act of 1906* provides that the customary heir will inherit one percent of the intestate estate: s. 27. Ghana, *Intestate Succession*
Commentary: Article 41
In many places, succession under customary law is not only concerned with the transfer of property, but also with the transmission of rights, duties and debts. Succession is also designed to maintain families, lineages and tribes. A customary heir is a person recognized by the rites and customs of the tribe or community of a deceased person as the person who will inherit from the deceased. He or she may or may not be a child of the deceased. Different kinship systems necessarily have different ways of defining heirs, and in different systems the heir will inherit different symbolic articles, assets and pieces of property. Article 41 as adapted to any given jurisdiction would need to take account of these differences.

A provision such as Article 41 preserves the tradition of the customary heir where this is appropriate, while the financial and land assets can devolve upon the dependents of the deceased according to the rules of intestate succession. This provision is one possible means to acknowledge and respect existing customary law systems while overcoming some of the problems associated with customary inheritance practices discussed in the introduction to this volume.

Note:
The following provision protects the property rights of surviving spouses in cases of remarriage.

Article 42. Effect of remarriage on inheritance

(1) Upon remarriage, a surviving spouse maintains full rights in any property she or he receives from a deceased’s estate. 134

Commentary: Article 42
It is a feature of inheritance laws in some sub-Saharan African countries that women lose any property that they inherited from their deceased spouses if they remarry. 135 Making women’s access to or ownership of property dependent on their remaining unmarried undermines their autonomy and reinforces the idea that women’s control of property is not independent, but rather mediated through their husbands.

Law of 1985 specifies that the law does not apply “to any stool, skin, or family property”: s. 1(2). LAC recommends that the customary law heir should be entitled to inherit the name and traditional articles that they would have become entitled to in terms of customary law as well as a portion of the estate: LAC, Customary Law (supra), p. 143.


135 For example, Zambia, Intestate Succession Act of 1989 provides that the surviving spouse or child, or both, are entitled to the house that is included in the estate, but that the surviving spouse’s life interest in that house terminates upon remarriage. Kenya, Law of Succession Act of 1981, s. 35(1), states, “Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the spouse shall be entitled to: (a) the person and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to another person.”
Generally, such provisions do not apply to widowers. Such provisions are clearly discriminatory on the basis of sex. In addition, such provisions are violations of the human rights to marry and to found a family by preventing a woman from marrying the person of her choice under threat of losing access to her matrimonial home, loss of her inheritance and even separation from her children. The Protocol on the Rights of Women in Africa directly addresses this issue and states, “A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.”

E. Maintenance

NOTE:
The following provision defines who the dependents of the deceased are for the purposes of determining appropriate maintenance payments.

Article 43. Definition of dependent

[Two options for Article 43 are provided below — 43A and 43B. One or the other should be selected, but not both.]

Option 1: Article 43A

(1) For the purposes of this Act, dependent means:

(a) the spouse of the deceased, whether or not maintained by the deceased immediately prior to his or her death;
(b) the children of the deceased, including biological, adopted, non-marital and step-children, whether or not maintained by the deceased immediately prior to his or her death; and
(c) the deceased’s parents, grandparents, grandchildren, brothers and sisters, and half-brothers and half-sisters, and any others who were being maintained by the deceased immediately prior to his or her death and were substantially dependant on the testator.

137 Art. 21(1). Further, it provides that “a widow shall have the right to remarry, and in that event, to marry the person of her choice”: art. 20(c).
138 Derived from Kenya, Law of Succession of 1978, s. 29. See also, Uganda, Succession Act of 1906, s. 2.
Option 2: Article 43B

(1) For the purposes of this Act, dependent includes a spouse, child, parent or any person who before the death of the deceased was by law required to be maintained by the deceased.139

Commentary: Article 43 (both options)
The appropriate definition of dependent varies by culture and recognizes different types of family structures and economic obligations. The two options provided here — Article 43A and 43B — provide different possibilities that capture relationships of dependence and financial need. Option 1 includes the spouse and all children of the deceased as dependents, as well as a list of other relatives (and others) who may be treated as dependents if they were being maintained by the deceased immediately prior to his or her death and were substantially dependant on the testator. This formulation allows for a broad spectrum of people to be considered as dependents. Option 2 includes the spouse, child and parents of the testator as dependents as well as any person who was required by law to be maintained by the testator. This formulation relies on existing law in the jurisdiction to define the dependents without including a broad spectrum of possibilities as in the first option. In some cases, Option 1 may more realistically reflect the different responsibilities a deceased had. However, this requires an interrogation of “substantial” dependence; Option 2 may provide for greater clarity, since dependents are explicitly defined pursuant to existing law.

NOTE:
Maintenance payments from an estate are critical to ensure that widows and other dependents are able to avoid economic destitution and to maintain an adequate standard of living, if there are sufficient assets in the estate. The following provisions set out the criteria for determining appropriate maintenance awards. If maintenance payments are required, they are to be determined before the estate is distributed according to the provisions of the will or the rules governing intestate liability succession, as appropriate.

Article 44. Provision for the maintenance of dependents to be made in every will

(1) Provision for the maintenance of dependents is to be made in every will.

Article 45. Maintenance of dependents

(1) The [relevant authority] shall not authorize the distribution of any estate until satisfied that the maintenance needs of all dependents have been satisfied in accordance with Article 46.

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139 Based on Sierra Leone, *The Devolution of Estates Act of 2007*, s. 2.
The [relevant authority] shall inform all dependents of their right to make an application to the court for a maintenance payment or payments to be made out of the estate of the deceased.

An application to the court for maintenance to be paid out of the estate must be made within [number] months of the death.140

**Commentary: Articles 44 and 45**

Articles 44 and 45 propose maintenance of dependents as the first charge on an estate in order to minimize the disruption caused by a death in the family and to protect against poverty.141 This is particularly important in the context of the HIV epidemic in Africa, where many people are dying young and leaving their families without their economic contribution (resulting in families becoming vulnerable to poverty and exploitation). Moreover, given the correlation between poverty and vulnerability to HIV infection, maintenance of dependents is also an important priority in order to contain the spread of HIV.

Making a will does not give a person absolute discretion to do anything at all with their assets. Moreover, while will-writing has been recognized as an important mechanism for people to ensure that their dependents are provided for after their death, the fact that someone makes a will does not necessarily mean that they have provided adequately for their spouse, children or other dependents. Some people simply restate customary norms in their wills for example, potentially leaving a surviving spouse with little access to the family’s property and assets. Research from Namibia has found that the majority of wills apply customary law rules on inheritance, thereby perpetuating the inequalities brought about by the application of intestate rules under common law.142 Finally, dependents may be left out of a will inadvertently, through a drafting error, or as a result of circumstances having changed significantly since the time that the will was drafted. In recognition all of these possible problems, Article 44 requires that provision for dependents be included in every will.

Many jurisdictions recognize the strong public policy arguments in favour of providing for the reasonable needs of one’s dependents over complete freedom of testation. Such provision can take the form of minimal spousal shares, special protections for the matrimonial home and related property, and allowing maintenance applications against the estate.143 It has also been argued that providing maintenance from a testate or

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140 Sierra Leone, *The Devolution of Estates Act of 2007*, s. 25(1), sets the time frame within which applications must be made at six months.


142 LAC, *Customary Law* (supra), p. 27.

143 According to case law in South Africa, for example, children can claim maintenance when left destitute as a result of not being provided for in the deceased’s will. The maintenance and education of a testator’s minor children constitute a claim against the testate estate where no provision has been made for a child in the will. This claim is subordinate to that of creditors, but has precedence above those of heirs and
intestate estate institutionalizes the duty of support which has been part of succession under customary law in some jurisdictions.144

**Article 46. Determination of maintenance**

(1) The court shall make an order of maintenance to any and all dependents of the deceased who, in the court’s determination, require maintenance in order to satisfy their needs, notwithstanding the provisions of the will, if any.

(2) The court shall determine the nature and amount of maintenance payable to a dependent under this Section having regard to:

   (a) the nature and quantity of the property representing the deceased’s estate;
   (b) the responsibilities and needs which each of the dependents of the deceased has and is likely to have in the foreseeable future;
   (c) the lifestyle, income, earning capacity, property and resources which each of the dependents of the deceased has and is likely to have in the foreseeable future; and
   (d) the deceased’s reasons, so far as ascertainable, for not making adequate provision for a dependent.

(3) Where the dependent is a child, in determining the nature and amount of maintenance the court must have particular regard to:

   (a) the financial, educational and developmental needs of the dependent, including but not limited to housing, water, electricity, food, clothing, transport, toiletries, child care services, education (including pre-school education) and medical services;
   (b) the age of the dependent;
   (c) the manner in which the dependent is being, and in which his or her parents reasonably expect him or her to be, educated or trained;
   (d) any special needs of the dependent, including but not limited to needs arising from a disability or other special condition; and
   (e) the direct and indirect costs incurred by the parent or guardian of the child in providing care for the dependent, including income and earning capacity forgone by the parent or guardian in providing that care.

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(4) Where the dependent has a disability or disabilities, in determining the nature and amount of maintenance the court must have particular regard to:

(a) the extent of the disability;
(b) the life expectancy of the disability;
(c) the period that the dependent would in all likelihood require maintenance; and
(d) the costs of medical and other care incurred by the dependent or their parent or guardian as a result of the disability.  

(5) Where the estate is insufficient to satisfy the maintenance needs of all dependents, the court shall make equitable maintenance orders in accordance with available assets and the factors in Sections (2), (3) and (4).

**Article 47. Maintenance payments**

(1) The provision for maintenance to be made by an order under Article 46 may include:

(a) payment of a lump sum;
(b) payment of periodic payments for life or any lesser period corresponding with the cessation of the dependence; or
(c) grant of an interest in immovable property for life or any lesser period corresponding with the cessation of the dependence.

(2) An order made under this section may be:

(a) an interim order, subject to review and variation after a period of [number] years;
or
(b) a final order.  

**Commentary: Articles 46 and 47**

Articles 46 and 47 establish a procedure that includes an appropriate contextual analysis of the actual financial needs of each dependent and is sufficiently flexible to respond to differing needs and circumstances. The key considerations are need and dependence. Article 46 lists specific criteria for determining whether maintenance should be ordered and, if so, in what amount, to ensure a minimum level of support for dependents in need and to dissuade arbitrary determinations of the amount of the order. Many estates will not be large enough to accommodate all claims for maintenance, but by prioritizing dependents with genuine need, vulnerability to poverty and HIV/AIDS may be tangibly reduced in some situations and the economic and social rights of the most vulnerable will be protected to the greatest degree possible.

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145 Sections (3) and (4) are derived from Namibia, *Maintenance Act of 2003*, ss. 16(3) and (4).

By explicitly empowering courts to make orders for maintenance based on a contextual analysis of needs and the relative situations of different dependents, states are taking an appropriate step in fulfilling their obligation to recognize the right of individuals to an adequate standard of living. In addition, they are taking an appropriate step in fulfilling their obligation to guarantee non-discrimination by basing maintenance awards on actual need rather than allowing discriminatory inheritance laws or practices to persist unchecked.

F. Property Offences

NOTE:
Property disinheription or dispossession (also known as “property grabbing”) is a practice whereby the property of a deceased person is taken from the surviving family members and heirs to whom it rightly belongs. The following provision creates a specific offence of property dispossession.

Article 48. Property dispossession

(1) No person shall, before the distribution of the deceased’s estate, eject a surviving spouse or child from the matrimonial home.

(2) Any person who, before the distribution of the deceased’s estate:

(a) ejects a surviving spouse or child from the matrimonial home;
(b) deprives an entitled person of the use of:
   (i) any part of the property of the entitled person; or
   (ii) any portion of the remainder which the entitled person stands to inherit under this law;
(c) removes, destroys or otherwise unlawfully interferes with the property of the deceased person; or
(d) removes any children from the care and control of the surviving parent, unless mandated by [relevant child protection services];

commits an illegal act and is punishable by a fine not exceeding [monetary amount] and/or a term of imprisonment not exceeding [number] years.

(3) Any person ejected from her or his matrimonial home, or who has her or his 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, for its value if it has been destroyed, and for damages.147

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147 Derived from T. Ezer, “Inheritance law in Tanzania” (supra), Appendix A, p. 650. See also, Zambia, Intestate Succession Act of 1989, s. 14, which makes property-grabbing a punishable offence; Ghana,
Commentary: Article 48
Cases of property dispossession have been widely documented, occurring in different ethnic groups, across social classes, in urban and rural settings, and in different regions.\textsuperscript{148} HIV and AIDS have exposed women, especially widows and orphans, to increasing threats of being dispossessed of their land and property rights.\textsuperscript{149} At the same time, numerous studies report that property dispossession is often disregarded by the police and courts.\textsuperscript{150}

Widows can lose their property in disputes with members of their deceased spouse’s extended family, even where their rights are protected by law. Multiple factors such as social norms and local customs affect women’s security of tenure, and many of these factors derive from, or contribute to, gender-based discrimination.\textsuperscript{151} Protecting women’s rights therefore requires more than establishing women’s right to inherit; it also requires enacting laws that explicitly prohibit property dispossession and provide that misappropriated property shall be returned to the rightful owner.\textsuperscript{152}

Under international human rights law, states are obligated to protect people from forced evictions, whether committed by state agents or others. The U.N. Committee on Economic, Social and Cultural Rights has called on governments to ensure that appropriate legislative measures are adopted and that “the law is enforced against its agents or third parties who carry out forced evictions.”\textsuperscript{153}

\textit{Intestate Succession Law of 1985}, s. 16A, which prohibits any person from ejecting a spouse or child from the matrimonial home, whether or not the person died testate or intestate, prior to the distribution of the estate. Ghana, \textit{Intestate Succession Law of 1985}, s. 17, as substituted by the \textit{Intestate Succession (Amendment) Law of 1991}, s. 2, establishes that this is an offence, punishable by fine or up to a year imprisonment. Sierra Leone, \textit{Devolution of Estates Act of 2007} also punishes intermeddling with a fine and/or imprisonment, and permits orders to restore the property to the entitled person or pay compensation. See ss. 32–34.


\textsuperscript{149} K. Izumi, \textit{Case Studies from Zimbabwe} (supra), p. 2.

\textsuperscript{150} See, for example, T. Ezer, “Inheritance law in Tanzania” (supra), p. 625, recounting that police often disregard inheritance disputes as family matters outside of their concern or jurisdiction, but also that there is support within the police for the criminalization of property-grabbing.

\textsuperscript{151} R. Strickland, \textit{To Have and To Hold} (supra), p. 14.

\textsuperscript{152} A criticism that has been levied against the prohibitions on “intermeddling of property” in Zambia, \textit{Intestate Succession Act of 1989}, for example, is that the absence of a requirement that the illegitimately begotten property be returned to its rightful owner has undermined the effectiveness of the provisions: LAC, \textit{Customary Law} (supra), p. 131

\textsuperscript{153} U.N. Committee on Economic, Social and Cultural Rights, “General Comment No. 4 (supra), para. 8. According to the Committee, “forced evictions” are “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”; para. 7. Most cases of property dispossession or disinherition of widows and children would satisfy this definition.

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Prefatory Note

In the field of women’s rights, the gap between the “law on paper” and the actual implementation of legal provisions is a commonly discussed challenge. No matter how progressive and rights-protecting legal provisions are, without adequate attention paid to implementation, those provisions will never lead to concrete improvements for the individuals and communities they are intended to serve. Indeed, policy and legal change (while important) are not useful “if the enabling environment at the community level for the implementation of the changes is not present.”¹ Implementation challenges are particularly pronounced with respect to women’s rights in the areas of family and property law. As explained by one commentator,

Although some progress has been made on institutional reform concerning marriage, inheritance and property rights laws, how to apply and enforce such legislation effectively is a key challenge in many countries. Even where progressive laws exist, the state often fails to enforce them. And, while legal reform aimed at protecting and strengthening women’s land and property rights should continue, there is also an urgent need to facilitate awareness and understanding of these laws, principally through improving the accessibility of the judicial system to women. At the same time, making new laws an acceptable, normative, and therefore enforceable aspect of communal life presents perhaps the biggest challenge yet.²

Some of the factors that diminish the effectiveness of legal solutions to women’s rights violations include “lack of law enforcement, the existence of contradictory customary law, an unwillingness on the part of the judiciary to apply the law, a reluctance to bring a complaint owing to the public nature of legal proceedings, or a lack of legal aid and other assistance to help women bring legal claims.”³ These impediments may be particularly pronounced with respect to family and property law issues in sub-Saharan Africa because of the multiple and diverse customary law regimes that apply, and the common belief that these issues are of a private nature — to be addressed within the home or community without state involvement.

To fulfill their legal obligations with respect to women’s human rights and to achieve the full potential of gender equality, states must go beyond adopting human rights-compliant legislation; they must translate those laws into reality for women through adherence to the rule of law, and meaningful implementation and enforcement initiatives. For example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obligates states to condemn discrimination against women in all of its forms and to pursue by all appropriate means and without delay the elimination of discrimination. This requires states to not only adopt appropriate legislation, but also establish legal protection of the rights of women through competent tribunals and other public institutions; and take all appropriate measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Moreover, states must provide gender-sensitive leadership and co-ordination amongst different entities and initiatives in order to create an enabling environment and address the “implementation gap.”

An important opportunity exists within the legislative drafting process to include implementation provisions within legislation. By giving forethought to what realistically will be required to put the legislative provisions into practice, specific provisions can be placed within the relevant acts to concretize implementation commitments, provide accountability for implementation and enforcement of the new law, and ensure that the law will remain relevant and effective in order to achieve the full potential of legislative reform for women’s rights in the context of HIV. The implementation gap and how to address it within legislation has been explored more thoroughly within the context of violence against women, but the need for implementation provisions is equally imperative in the areas of family law and property law.

Therefore, this module provides sample provisions that address training, provision of legal aid, public education, budgetary allocations, and monitoring and evaluation schemes. These provisions can be adapted to specific pieces of legislation and the particular implementation needs of a given country. For example, in legislation pertaining to marriage, the training provisions outlined in Articles 1–3 may be adapted to include specific references to training on the essential conditions of marriage and the penalties associated with the violation of such conditions. Similarly, the provisions on data collection and reporting in Article 7 could be applied to inheritance legislation, taking into account the country-specific infrastructure for processing inheritance claims, and the specific realities facing widows, such as the possibility of property dispossession, mourning rituals and immediate needs for resources to cover living expenses on the death of a spouse. In adapting these provisions, care should be exercised to avoid drafting that permits too much discretion. Further, clear obligations on governments to carry out

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timely implementation and review of legislation as well as accountability mechanisms within legislation can serve to increase effectiveness of new laws.

A. Training

NOTE:
Because lawyers, judges, the police and customary leaders are called on to enforce or interpret provisions of new legislation, training is crucial to ensure that laws serve their intended purpose. The following provisions oblige governments to implement and provide training for key actors in the judicial sector and in law enforcement, and for customary leaders.

Article 1. Training of judicial sector

(1) The [relevant state authority] shall develop and provide training sessions to individuals working in the judicial sector, including but not limited to paralegals, lawyers, magistrates and judges working on or presiding over proceedings related to the [relevant legislation], to ensure their competence concerning the provisions of the [relevant legislation]. These training sessions shall educate individuals working in the judicial sector on:

(a) the various provisions of the [relevant legislation];
(b) the importance of non-discrimination in interpreting and applying the provisions of the [relevant legislation];
(c) women’s human rights under national and international law; and
(d) the linkages between women’s human rights and HIV in the context of the [relevant legislation];

and shall train those working in the judicial sector to perform their duties under the [relevant legislation].

(2) Training sessions must be designed and carried out in consultation with national HIV/AIDS and gender commissions, relevant government bodies, and non-governmental organizations including those involved in the protection and promotion of the rights of women and the rights of people living with and vulnerable to HIV.
Commentary: Article 1

In a number of countries, courts have been alleged to be biased against women. This prejudice may discourage women from using courts to assert their rights. Measures should therefore be taken to enhance the judicial sector’s capacity to effectively interpret and apply legislation with reference to national and international human rights treaties that protect and promote women’s human rights. To promote the fair, gender-sensitive application of laws in the areas of family and property, therefore, Article 1 requires governments to train individuals working in the judicial sector and stipulates that training sessions be designed and carried out in collaboration with individuals and organizations working on women’s rights and the rights of people living with HIV.

Such training is imperative in order for states to fulfill their international obligations, which include rights to equality before the courts and to effective redress by competent tribunals. To promote the protection of women’s rights by competent judicial bodies, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has repeatedly called for the implementation of “training programmes for prosecutors, judges and lawyers that cover all relevant aspects of the [CEDAW] Convention and the Optional Protocol so as to firmly establish in the country a legal culture supportive of gender equality and non-discrimination.”

In the context of law
reform affecting customary law, the CEDAW Committee has specifically recommended the “introduction of programmes on legal education, gender sensitization and human rights for judges.”9 In the context of property, the U.N. Human Rights Commission has encouraged governments, specialized agencies and other organizations of the U.N. system, international agencies and non-governmental organizations (NGOs) to provide judges, lawyers, public officials, community leaders and other concerned persons with information and human rights education concerning women’s equal ownership of, access to, and control over, land and the equal rights to own property and to adequate housing.10 Moreover, recognizing the value of collaboration, the CEDAW Committee has recommended that relevant ministries work “with civil society, including non-governmental organizations, in order to create an enabling environment for legal reform, effective law enforcement and legal literacy.”11

Article 2. Police training

(1) The [relevant state authority] shall develop and provide training sessions to police officers at all levels to ensure their competence concerning the provisions of the [relevant legislation]. These training sessions shall educate police on:

(a) the new criminal provisions of the [relevant legislation];
(b) the importance of non-discrimination in carrying out the provisions of the [relevant legislation];
(c) gender sensitivity in the performance of duties; and
(d) the linkages between women’s human rights and HIV in the context of the [relevant legislation];

and shall train police to perform their duties under the [relevant legislation].

(2) Training sessions must be designed and carried out in consultation with national HIV/AIDS and gender commissions, relevant government bodies and non-governmental organizations, including those involved in the protection and promotion of the rights of women and the rights of people living with, and vulnerable to, HIV.

Commentary: Article 2

Even where laws protect women’s human rights, inadequate enforcement can effectively render them obsolete. For example, one study found that police forces in Ghana,

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10 U.N. Human Rights Commission, “Women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing,” Resolution 2000/13, para. 7.
entrusted with protecting women from eviction and property grabbing, were unaware of their obligations under Ghana’s *Intestate Succession Law*. In some instances, women have also been reported to avoid the police in the context of property disputes because they believe the police will turn them away, dismissing their complaints as family or clan disputes. Similarly, relatives have been reported to abuse widows with impunity during disputes over rights to inheritance, land and property ownership, because police and other authorities see these activities as “family matters” and, therefore, are reluctant to intervene. Even where innovative or specialized police services exist to assist with the implementation and enforcement of laws to protect women from abuse, police need ongoing training and support.

These examples underline not only the need for good laws, but also for training, gender-sensitization programs and support to police officers in order that they understand their obligations to intervene, as well as to investigate crimes, as required. To ensure the police are aware of new legislation protecting women, their obligations under those laws, and the rationale for those provisions, Article 2 requires the state to develop and implement training sessions for all police officers on relevant legislation. This is in compliance with the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (Protocol on the Rights of Women in Africa), which obligates states parties to ensure “that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights.”

**Article 3. Training of customary leaders**

(1) The [relevant state authority] shall provide training sessions to customary leaders, including but not limited to those presiding over proceedings related to the [relevant legislation], to ensure their competence concerning the provisions of the [relevant legislation]. These training sessions shall educate customary leaders on:

(a) the provisions of the [relevant legislation];
(b) the importance of non-discrimination in interpreting the provisions of the [relevant legislation];

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13 HRW, *Double Standards* (supra), p. 36. See also, COHRE, *Bringing Equality Home* (supra), pp. 21, 96 and 148, describing the situation in Rwanda and Zambia. Similarly, reports indicate that law enforcement authorities in Uganda frequently refuse to interfere with issues perceived to be domestic affairs, including property issues and violence against women: V. Bennett et al, “Inheritance law in Uganda” (supra), pp. 486–487.


15 For example, in Zambia, a Victim Support Unit (VSU) within the police department is tasked with providing legal protection for women and girls subjected to sexual violence and other abuses including property dispossession. However, the effectiveness of the unit has been undermined by a lack of training, as well as a shortage of resources and equipment: HRW, *Suffering in Silence: The Links Between Human Rights Abuses and HIV Transmission to Girls in Zambia*, 2002, pp. 68–70.

16 Protocol on the Rights of Women in Africa, art. 8(d).
(c) women’s human rights under national and international law; and
(d) the linkages between women’s human rights and HIV in the context of the
[relevant legislation];

and shall train customary leaders to perform their duties under the [relevant
legislation].

(2) Training sessions must be designed and carried out in consultation with national
HIV/AIDS and gender commissions, relevant government bodies and non-
governmental organizations, including those involved in the protection and
promotion of the rights of women and the rights of people living with and vulnerable
to HIV, and judicial institutions.

Commentary: Article 3
Like civil courts, some customary courts have been alleged to be unaccountable,
undemocratic and biased against women.17 This may be due, in part, to the fact that those
who preside over customary courts are unaware of the existence of a law, or are
unfamiliar with its provisions.18 Where new legislation has an impact on customary laws
or practices, involving customary leaders by educating them on the provisions of the laws
in question, the rationale for reform, and their obligations under the laws may be one
means of ensuring the new laws are respected and applied. Customary leaders are
consequently armed with the knowledge to comply with the mandatory provisions of new
legislation and to promote gender equality within their communities.

Customary leaders continue to constitute an important force with respect to family law
and property issues throughout Africa. It is therefore critical that they be included in a
meaningful way in law reform processes as well as in the implementation of laws that
protect women’s rights with respect to marriage, divorce and inheritance. As UNAIDS
has said, “Progress on sensitive issues … will depend on traditional leaders becoming full

17 See South African Law Commission, Project 90, Discussion Paper 82, The Harmonization of the
Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders,
Council Courts” (LCCs) — which are staffed by lay judges and apply principles of customary law — have
been reported to engage in corruption, and women and youth find the courts more biased against them than
do men. However, the LCCs have jurisdiction over disputes concerning marriage, separation and divorce
and are the most accessible of dispute resolution fora in Uganda: Uganda Association of Women Lawyers,
Shadow Report of Uganda’s First Periodic State Report to the African Commission on Human and
and T. Higgins, “Promise unfulfilled: law, culture, and women’s inheritance rights in Ghana,” Fordham
often settled by traditional authorities who do not resolve the cases in a manner consistent with women’s
rights as stipulated in legislation. For these reasons, at least one country has excluded customary law courts
from having jurisdiction over matters such as spousal or child maintenance, custody or guardianship of
minor children, dissolution of marriage and the interpretation of the validity and effect of wills: Zimbabwe,
Customary Law and Local Courts Act of 1990, ss. 16 (1) (c), (d), (e) and (f).

18 V. Bennett et al, “Inheritance law in Uganda” (supra), pp. 457.
partners in the struggle against HIV/AIDS. As keepers of the traditions and laws of African cultures, these authorities have a critical role to play in mediating disputes within their communities and supporting women.… Traditional leaders are ideally placed to ensure that the protective features of customary law are used to complement common law and protect women’s rights.”

B. Legal Aid

NOTE:
The following provision obliges the government to implement and fund legal aid services to enable women to seek redress for violations of their rights.

Article 4. Legal aid services

(1) The [relevant state ministry] shall provide legal aid services for proceedings related to the [relevant legislation] by any method that it considers appropriate — having regard to the needs of women, individuals from rural communities and disadvantaged communities — including:

(a) the authorization of lawyers and paralegals, by means of certificates, to provide legal services to individuals, groups of individuals and civil society organizations;
(b) the funding of legal clinics and legal aid offices to provide legal services to individuals, groups of individuals and civil society organizations;
(c) the funding of non-governmental organizations to provide public legal education; and
(d) the provision of assistance to individuals representing themselves in court proceedings, including the provision of legal advice, assistance in preparing documents, and the development and distribution of information packages or self-help kits.

(2) Where an individual, group of individuals or civil society organization benefits from legal aid as set forth in Section (1), this benefit should continue through all levels of proceedings, including appeal.

Commentary: Article 4
The inaccessibility of legal services has been cited as a key reason why women do not assert their rights in terms of family and property law. Reasons for this include high

20 This article is derived in part from s. 14 of Ontario, Canada, Legal Aid Services Act of 1998, c. 26.
21 This section is derived from art. 7 of Mali, Loi sur l’assistance judiciaire de 1961.
court fees, long and inefficient court processes, inaccessible court locations and language barriers.\textsuperscript{23} Women’s lack of economic resources and their accompanying lack of knowledge about their legal rights are major hindrances to women’s ability to enforce those rights.\textsuperscript{24}

Legal aid comprises a variety of legal services, provided at no cost to people who would otherwise be unable to afford them. Providing comprehensive legal aid services is one means to facilitate legal protection and redress for women and women’s organizations that otherwise might not be able to access the legal system, or that would only be able to do so without the benefit of professional legal advice. For example, legal aid has been identified as crucial in enabling women to have their disputes adjudicated by civil courts rather than customary courts which, in some settings, are perceived to interpret laws to women’s disadvantage.\textsuperscript{25} Access to legal aid may also be critical for people living with HIV to claim their legal entitlements.\textsuperscript{26} In Kenya, for example, one study revealed that

\footnotesize{\textsuperscript{22} For example, an investigation into women’s property rights violations in Kenya revealed that the most serious obstacles to women asserting their property rights were “women’s lack of awareness about their legal rights, the time and expense of pursuing property claims, violence, social stigma, poverty, and harassment of NGOs working on women’s property rights”: HRW,\textit{ Double Standards} (supra), p. 31. An FAO study noted, “Even where [women] do know about their rights, they often lack the resources necessary to bring claims (which involve paying lawyers and court fees)”: FAO,\textit{ Gender and Law} (supra), pp. 159–161. In Rwanda, “[w]omen are generally reluctant to approach the formal court system: the road to the courts is long and costly. Once in the court system, cases demand an even greater investment, often taking years to be decided and costing considerable sums of money, which most widows, in particular, do not have”: COHRE,\textit{ Bringing Equality Home} (supra), p. 96. Amiens also notes that limited legal aid makes it very difficult for individuals married under Muslim law to undertake legal proceedings to enforce a marriage contract or to challenge legislation that denies a person the benefits of the marriage: W. Amiens, “Overcoming the conflict between the right to freedom of religion and women’s rights to equality: a South African case study of Muslim marriages,”\textit{ Human Rights Quarterly} 28 (2006): 729–754.}\textsuperscript{23}

\footnotesize{\textsuperscript{24} Ibid., p. 159. See also, M. Aliber et al, \textit{The Impact of HIV/AIDS on Land Rights: Case Studies from Kenya}, Integrated Rural and Regional Development Research Programme, Human Sciences Research Council and FAO, 2004, which cites at p. 51 a high transfer fee in the context of inheritance as “a real obstacle to formalising the transfer of ownership of land to widows after the death of their husbands.” See also, R. Strickland, \textit{To Have and To Hold: Women’s Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa}, International Center for Research on Women (ICRW), 2004, p. 55.}\textsuperscript{24}


\footnotesize{\textsuperscript{26} Some commentators have indicated that the rights of HIV-positive people have been more subject to abuse, particularly for women: E. Minde, “Law reform and land rights in Tanzania,” presentation at the XVI International AIDS Conference, 16 August 2006, Toronto, Canada. See also, S. Mukasa and A. Gathumbi, \textit{HIV/AIDS, Human Rights and Legal Services in Uganda: A Country Assessment}, Open Society Initiative for East Africa, 2008, who state at p. 26, “Legal aid service providers interviewed … said that they had handled a number of cases of women who were subjected to violence or denied child custody or maintenance upon disclosing their positive HIV status to their spouses”; and, at p. 36, “It is clear from the level of HIV-related human rights abuse in Uganda that there is a tremendous need for HIV-related legal services.” According to Kalla and Cohen, Kenyans living with HIV who sought redress for human rights abuses were limited in their ability to do so by the cost of legal services and related costs such as transportation to court: K. Kalla and J. Cohen, \textit{Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-Related Legal Services}, Open Society Initiative for East Africa, 2007, p. 22.}\textsuperscript{26}
“the vast majority of Kenya’s people living with HIV and AIDS do not feel able to access the formal legal system.”

To facilitate the access of people living with HIV to legal aid services, one approach may be to integrate legal aid services into existing services for people living with HIV.

In order for women to claim their legal entitlements, and to facilitate access, the legal aid application process should be straightforward, particularly for women who have little experience navigating the legal system. As well, legal aid services should cover areas of law of particular relevance to women, including family law and inheritance. Commentators have also recommended that governments ensure adequate payment of lawyers providing legal aid services. Implementing a broad number of approaches to providing legal aid also promotes greater accessibility of services. For example, in addition to authorizing private lawyers and legal clinics to provide legal services, authorizing paralegals to do so in appropriate circumstances may provide an important source of legal assistance in developing countries.

The right to a legal remedy for human rights violations is protected by the African [Banjul] Charter on Human and Peoples’ Rights, which provides, “Every individual shall have the right to have his cause heard,” a right which comprises the “right to an appeal to competent national organs against acts of [sic] violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.”

Recognizing the need for women to be able to claim their rights, the Protocol on the Rights of Women in Africa commits states to take measures to ensure “effective access by women to judicial and legal services, including legal aid,” and recommends that they support “local, national, regional and continental initiatives directed at providing women

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29 For example, one study found that women need legal aid primarily in civil matters, and particularly in proceedings related to family law: A. Brewin and L. Stephens, Legal Aid Denied: Women and the Cuts to Legal Services in B.C., Canadian Centre for Policy Alternatives, 2004, p. 7. Yet a study revealed that where legal aid is provided, it “focuses on criminal matters, neglecting other areas where women’s rights issues are likely to arise, such as family, succession and land law”: FAO, Gender and Law (supra), p. 160.
30 L. Addario, Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice, National Association of Women and the Law, 1998; K. Kalla and J. Cohen, Ensuring Justice (supra), p. 28, citing D. McQuoid-Mason, The Supply Side: The Role of Private Lawyers and Salaried Lawyers in the Provision of Legal Aid — Some Lessons from South Africa, Association of University Legal Aid Institutions (AULAI) Trust, undated, who contends that in South Africa, “it is axiomatic that legal aid lawyers should be paid for their services, and that in democratic countries the duty to pay for such services rests with the State.”
31 Kenya, for example, “is home to several paralegal networks, which have received some legal training and work for free in many communities. The role of paralegals in Kenya is typically to spread awareness of human rights and make referrals to appropriate services”; K. Kalla and J. Cohen, Ensuring Justice (supra), p. 29. Some grassroots women’s networks, such as the Huairou Commission, provide training for paralegals on issues including property and inheritance: www.huairou.org.
access to legal services, including legal aid.” Similiarly, the CEDAW Committee has
recommended that states parties “remove the impediments that women may face in
gaining access to justice” and implement “measures to ensure women’s access to the
civil courts, including raising awareness on available legal remedies and the provision of
legal aid.”

C. Public Education

NOTE:
The following provision requires governments to develop public education initiatives to
raise awareness of rights contained in relevant laws and to underscore the linkages
between new legislation, HIV and AIDS, and gender equality.

Article 5. Education programs

(1) The government shall conduct public education on the [relevant law] throughout the
country, in both rural and urban areas. Public education measures may include, but
are not limited to, the following:

(a) distributing copies of the [relevant law] to all courts, legal clinics, customary
leaders and organizations working on the rights of women and the rights of
people living with HIV in the country, in official and local languages;
(b) using diverse media including radio, television, posters, pamphlets and other
means to publicize the provisions of the [relevant law] in official and local
languages;
(c) mandating that information on the [relevant law] is made part of education
curricula at the appropriate levels; and
(d) coordinating public education efforts with non-governmental organizations and
other community organizations working with women in order to raise women’s
awareness about their rights under this law.

(2) Public education campaigns must be designed and carried out in consultation with
national HIV/AIDS and gender commissions, relevant government bodies, and non-
governmental organizations including those involved in the protection and promotion
of the rights of women and the rights of people living with and vulnerable to HIV.

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33 Protocol on the Rights of Women in Africa, art. 8(a) and 8(b).
34 CEDAW Committee, “Concluding Comments: Burundi,” 40th Session, CEDAW/C/BDI/CO/4, 8 April
2008, para. 16.
35 CEDAW Committee, “Concluding Comments: Equatorial Guinea,” 31st Session, CEDAW/A/59/38
(SUPP), 18 August 2004, para. 192.
Commentary: Article 5

Ignorance of the law, biased attitudes towards women and misunderstandings of the rationale for law reform can undermine the effectiveness of legislation that is aimed towards promoting equality in family and property law. Education programs and awareness campaigns can help create and sustain a positive environment supporting women’s rights, and help to transform public understanding and acceptance of women’s entitlements in the areas of family and property law. Public education campaigns take on particular importance with respect to family law and property issues because of the intersection of customary and statutory laws. It has been noted, for example, that Kenya’s pluralistic legal system is complex and confusing even for those with high levels of education and access to information. Women who are not in that privileged position seldom know their legal rights.36

In countries where public education campaigns have been instituted, there has been demonstrable acceptance of new laws which promote the rights of women.37 For example, popular educational campaigns that have taught people the value of making wills have successfully promoted this practice. Will-writing has increased where education campaigns have been undertaken and support services have been provided.38

While many of these campaigns have been undertaken by NGOs and other community groups, governments have a legal responsibility to implement public education programs. Governments can work with and provide support to NGOs as well as undertake

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36 HRW, Double Standards (supra), p. 41. Many women interviewed by Human Rights Watch had not heard of laws relating to property or knew very little about their content. Some women knew that they had legal rights, but did not know how to claim them.


38 K. Izumi (ed), Case Studies from Zimbabwe (supra), pp. 36 and 39. In South Africa, another component of an education campaign on wills has been “will writing days,” which are events where people are invited to come to a specific venue to write their will with the support of voluntary paralegals and lawyers: Legal Assistance Centre, Namibia, Customary Law on Inheritance in Namibia: Issues and Questions for Consideration in Developing New Legislation, 2005, p. 169. Some NGOs have produced accessible booklets explaining inheritance and will-writing, and some have conducted training seminars to educate community members about wills. See, for example, The Uganda Association of Women Lawyers (FIDA-Uganda), Booklet on The Law of Inheritance, undated. According to R. Strickland, To Have and To Hold (supra), p. 49, Women’s Voice, a Malawi-based organization, has trained community-based paralegals and conducted popular education and advocacy work in communities to advocate for fair dispensation of property and teach people how to write valid wills and observe their provisions. Similarly, the Rwanda Women’s Network (RWN) trained facilitators and peer educators to provide community members with legal education and support in preparing wills. They developed templates for different types of wills and a training manual to inform clients about each type of will: C. Johnson et al, Women’s Property Rights as an AIDS Response: Lessons from Community Interventions in Africa, ICRW, 2007.
independent public education activities with respect to laws that protect the rights of women.

Numerous international instruments and bodies support the implementation of public awareness and education initiatives. For example, the Protocol on the Rights of Women in Africa requires states parties to “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards” by creating “public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes.”

Further, the Protocol on the Rights of Women in Africa calls for “the establishment of adequate educational and other appropriate structures with particular attention to women … to sensitise everyone to the rights of women.”

Public education has also been called for by the CEDAW Committee, which has recommended that states parties “intensify efforts in disseminating information to increase public awareness of the risk of HIV infection and AIDS, especially in women and children, and of its effects on them.” The Committee has also recommended the development and implementation of educational measures and awareness-raising campaigns on the provisions of relevant laws. Similarly, in the context of marriage, the U.N. Human Rights Committee has urged states to “provide information on laws or practices that prevent women from being treated or from functioning as full legal persons and the measures taken to eradicate laws or practices that allow such treatment.”

Moreover, the CEDAW Committee has recommended that awareness-raising and information campaigns target women and NGOs working on women’s issues and human rights, to encourage them to make use of the available procedures and remedies to address the violations of women’s rights.

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39 Protocol on the Rights of Women in Africa, art. 5.
40 Protocol on the Rights of Women in Africa, art. 8(c).
42 See, for example, the CEDAW Committee’s concluding comments to Benin (U.N. Doc. A/6038, para. 118), Malawi (U.N. Doc. CEDAW/C/MWI/CO/5, para. 14) and Ethiopia (U.N. Doc. A/59/38 part I, para. 254).
D. Budget Allocations

NOTE:
The following provision ensures governments allocate the necessary resources for the effective implementation of new and existing laws.

Article 6. Budgetary allocations

(1) The amount necessary to implement the provisions of the [relevant legislation], including but not limited to resources for the training, legal aid, public education, and monitoring and evaluation activities included in this Act, shall be included in the [applicable local, regional and national budget acts] each fiscal year.45

Commentary: Article 6

It is stating the obvious to say that without the adequate allocation of financial resources, legislation cannot be fully implemented. Enforcement, related services, and training and education activities essential for legislation to be effective all require some sustained financial commitment. Budgets are important instruments with respect to human rights. In order to fulfill their human rights obligations, states must allocate public resources in addition to adopting appropriate legislation. As one commentator has explained, “Public budgets are more than a collection of numbers, they are a declaration of a community’s or nation’s priorities. From a human rights perspective, budgets are the concrete means by which governments either fulfill or violate human rights requirements.”46 Moreover, failure to allocate appropriate funds to programs that address the barriers that women and girls face can amount to discrimination.47

There is support for budgetary allocation provisions in international law. For example, the Protocol on the Rights of Women in Africa requires states parties to undertake to adopt all necessary measures and, in particular, “provide budgetary and other resources for the full and effective implementation of the rights herein recognised.”48 Furthermore, under the International Covenant on Economic, Social and Cultural Rights, governments are required to make full use of their “maximum available resources” to fulfill human rights.49

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45 This article is partially derived from s. 45 of Philippines, Anti-Violence Against Women and Their Children Act of 2004.


E. Monitoring and Evaluation

**NOTE:**
The following provision requires the government to monitor and evaluate the implementation and effectiveness of legislation, to ensure it is serving the purpose it is intended to, and to allow for reform if necessary.

**Article 7. Data Collection and Reporting**

(1) The [relevant state ministry] shall create an oversight committee to evaluate the implementation and effectiveness of the [relevant legislation], which shall report this initial evaluation back to the [relevant state ministry / legislature] two years after the implementation of the [relevant legislation].

(2) The oversight committee shall be responsible for ongoing surveillance of the implementation and effectiveness of the [relevant legislation], announcing the results of such surveillance every [number] years to the [relevant state ministry / legislature] and utilizing those results as fundamental materials to establish policies to promote the effective implementation of the [relevant legislation] or to reform the [relevant legislation] if necessary.

(3) The evaluation and surveillance conducted by the oversight committee pursuant to Sections (1) and (2) shall include analysis of the following, as appropriate:

   a. reporting and conviction rates under criminal provisions in the [relevant legislation];
   b. processing times for claims through court or tribunals;
   c. outcomes of cases;
   d. cost and budgetary analysis;
   e. demographic data on those affected by the legislation; and
   f. any other issue the oversight committee deems relevant.

(4) The oversight committee shall collect appropriately segregated data, including but not limited to information on sex, ethnic group and geographical region, in carrying out its work pursuant to Sections (1), (2) and (3).

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50 For another example of a reporting provision, see art. 66.2.5(b) of South Africa, *Criminal Law (Sexual Offences and Other Related Matters) Amendment Act of 2007*.

51 This section was partially derived from art. 4-2 of Korea, *Act on the Prevention of Domestic Violence and the Protection, Etc. of Victims Thereof* of 2006.
Commentary: Article 7

Many governments have created monitoring and oversight committees to evaluate the effectiveness of laws.52 Monitoring should assess both the steps taken and the results achieved towards the objectives of the legislation. As the U.N. has argued, monitoring is important to ensure that implementation takes place and that the laws deliver the intended outcomes, and also so that legal reforms can be adjusted as need be for the given context.53

Including an explicit provision within legislation which requires governments to create a monitoring and oversight body may help ensure that meaningful monitoring and evaluation takes place. Requiring the committee to report two years after the implementation of a new law, and periodically afterwards, provides clear guidance on timelines for reporting. Monitoring and evaluation also allow for appropriate changes to be made so that the law remains relevant and its effectiveness is maximized. These are all critical elements of government accountability.

52 See, for example, art. 66.2.5(b) of South Africa, Criminal Law (Sexual Offences and Other Related Matters) Amendment Act of 2007; art. 31(5) of South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; Art. 4-2 of Korea, Act on the Prevention of Domestic Violence and the Protection, etc. of Victims Thereof of 2006; art. 16 of Georgia, Elimination of Domestic Violence, Protection and Support of its Victims of 2006.