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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

Module 6: Implementation Provisions

Canadian HIV/AIDS Legal Network
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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.

Canadian HIV/AIDS Legal Network
1240 Bay Street, Suite 600
Toronto, Ontario, Canada M6R 2A7
Telephone: +1 416 595-1666
Fax: +1 416 595-0094
E-mail: info@aidslaw.ca
Website: www.aidslaw.ca

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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**](mailto:womensrights@aidslaw.ca)

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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.¹ 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.² 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.³

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.⁴ 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

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.⁸ Similarly, where constitutional and statutory law defer to customary law, it may be difficult or impossible for women to inherit or divorce.⁹

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.¹⁰ 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.¹¹ For women who are living with HIV, in particular, fighting a

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.¹² 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.¹³

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.

and Women's Land Rights in Southern and Eastern Africa: Studies in Women's Law No. 57, Institute of Women's Law, University of Oslo, June 2005, p. xv.

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

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].

¹⁵ L. Mbatha, "Reforming the Customary Law of Succession," *South African Journal on Human Rights* 18 (2002): 259-286, at 260, referring to South Africa in particular.

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.¹⁷ 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.¹⁸

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.”¹⁹ 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.²⁰ 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.²¹

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.

¹⁹ CEDAW Committee, “Concluding Observations: Malawi,” U.N. Doc. CEDAW/C/MWI/CO/5, 2006, para. 31.

²⁰ Human Rights Watch, *Just Die Quietly: Domestic Violence and Women’s Vulnerability to HIV in Uganda*, Vol. 15, No. 15(A), 2003, pp. 34–35, online via: www.hrw.org.

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.²² 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.²³ In some cases, prohibitions may also be a requirement of international law — for example, in the case of forced marriage.²⁴

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.²⁵ 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.²⁶ This may involve, for example, empowering customary courts to

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."

²⁴ Numerous international conventions require the free and full consent of both parties to marriage, including the *Universal Declaration on Human Rights*, G.A. Resolution 217A (III), UN Doc A/810 (1948) 71 [UDHR]; the *Convention on the Elimination of all Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [CEDAW]; the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March, 1976) [ICCPR]; the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR]; and the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November, 1962, 521 U.N.T.S. 231, (entered into force 9 December 1964) [Marriage Convention].

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.

²⁶ For example, the Community Counselling Programme at the AIDS Care and Prevention Department of Chikankata Hospital in Zambia worked with traditional leaders to develop community-based strategies for HIV prevention and to discuss alternatives to sexual cleansing, which resulted in the enactment of a law abolishing ritual cleansing by sexual intercourse, a move which was followed by other traditional leaders in the country: J. Collins and B. Rau, *AIDS in the Context of Development, Paper No. 4*, UNRISD Programme on Social Policy and Development, 2000, p. 28. See, also, I. Yngstrom, "Women, wives and land rights in Africa: situating gender beyond the household in the debate over land policy and changing tenure systems," *Oxford Development Studies* 30(1) (2002): 21–40; G. Mutangadura, "Women and land tenure rights in southern Africa: a human rights-based approach," paper presented at a conference on "Land in Africa: Market Asset, or Secure Livelihood?", 2004, London, U.K.; R. Strickland, *To Have and To Hold: Women's*

preside over issues formerly limited to civil courts, or requiring customary leaders to oversee the fulfillment of minimum statutory protections for women²⁷

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.²⁸

Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa, International Center for Research on Women (ICRW), Working Paper, 2004, p. 53.

²⁷As 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, *Project 90, Discussion Paper 74* (supra), p. 36.

²⁸For 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.²⁹

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.³⁰

Despite these challenges, laws 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.

women are allowed to use their husband's land": COHRE, *Bringing Equality Home* (supra), p. 93. In Tanzania and Transkei (South Africa), despite the integration of all forms of marriage under one law, customary law continues to be regularly applied by traditional authorities and governs people's everyday lives: South African Law Commission, *Project 90, Discussion Paper 74* (supra), p. 33.

²⁹ 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, *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, *Combined Third and Fourth CEDAW Report*, CEDAW/C/ZAM/3-4, 1999, p. 65.

³⁰ See, for example, the approach to women, land and housing of the Huairou Commission, online: www.huairou.org/campaigns/land/index.html.

Module 6: Implementation Provisions

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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.

¹ A. Outwater, N. Abrahams and J.C. Campbell, “Women in South Africa — intentional violence and HIV/AIDS: intersections and prevention,” *Journal of Black Studies* 35(4) (2005): 135–154, at 138.

² K. Izumi (ed), *Reclaiming our Lives: HIV and AIDS, Women’s Land and Property Rights and Livelihoods in Southern and East Africa: Narratives and Responses* (Cape Town: HSRC Press, 2006), p. 2.

³ Office of the United Nations High Commissioner for Human Rights (OHCHR) and UNAIDS, *Handbook on HIV and Human Rights for National Human Rights Institutions*, 2007, p. 17 (referring specifically to women’s property rights). See also, S. Drimie and S. Mbaya, *Land Reform and Poverty Alleviation in Southern Africa: Towards Greater Impact. Conference Report and Analysis*, 2001, p. 7, noting that there is often a gap between intended policy objectives and implementation, and arguing that greater attention must be paid to the details of implementation, with a focus on what is practically feasible in the context of a given country.

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.⁴ 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.⁵

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

⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [CEDAW], art. 2.

⁵ See, for example, United Nations Division for the Advancement of Women and United Nations Office on Drugs and Crime, *Good Practices in Legislation on Violence Against Women: Report of the Expert Group Meeting*, May 2008, online via: www.un.org/womenwatch/daw/.

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.⁶ 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.⁷ 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."⁸ In the context of law

⁶ See, for example, Human Rights Watch (HRW), *Double Standards: Women's Property Rights Violations in Kenya*, March 2003, pp. 38–39, which states, "Lawyers and individual women complain that Kenya's courts are biased against women, slow, corrupt, and often staffed with ill-trained or incompetent judges and magistrates." In Uganda, "[l]ocal authorities, officers of the Administrator General's office, and low-level courts are often prejudiced by an attitude that women are to be treated as inferior to men.... Their tendency is to disregard women's evidence": V. Bennett et al, "Inheritance law in Uganda: the plight of widows and children," *The Georgetown Journal of Gender and the Law* 7 (2006): 451–530, at 488. In Zimbabwe, "the Supreme Court of Zimbabwe has traditionally adopted a rigid and discriminatory interpretation of customary law" which has worked to the detriment of women: Food and Agriculture Organization of the United Nations (FAO), *Gender and Law: Women's Rights in Agriculture*, 2002, p. 136. In South Africa, O'Sullivan describes how women experience gender bias during divorce proceedings: M. O'Sullivan, "Stereotyping and male identification: 'keeping women in their place,'" *Acta Juridica* (1994): 185–201. See also, Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*, 2004, p. 48.

⁷ The *International Covenant on Civil and Political Rights* stipulates, "All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law": *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art.14. Similarly, CEDAW mandates states to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination": art. 2(c). Women's right to a trial by "competent judicial, administrative or legislative authorities" is also provided for in 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], art. 25.

⁸ Committee on the Elimination of Discrimination Against Women (CEDAW Committee), "Concluding Comments: Niger," 38th session, CEDAW/C/NER/CO/2, 11 June 2007, para. 14. See also, similar language in CEDAW Committee, "Concluding Comments: Burundi," 40th session, CEDAW/C/BDI/CO/4, 8 April 2008, para. 16; CEDAW Committee, "Concluding Comments: Malawi," 35th session, CEDAW/C/MWI/CO/5, 3 February 2006, para. 10; CEDAW Committee, "Concluding Comments:

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,

Eritrea,” 34th session, CEDAW/C/ERI/CO/3, 3 February 2006, para. 9; CEDAW Committee, “Concluding Comments: Angola,” A/59/38(SUPP), 18 August 2004, para. 141.

⁹ CEDAW Committee, “Concluding Observations: Zambia,” 27th session, CEDAW/A/57/38 part II, 4 June 2002, para. 251.

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.

¹¹ CEDAW Committee, “Concluding Comments: Kenya,” 28th session, CEDAW/A/58/38 part I, 20 March 2003, para. 208.

entrusted with protecting women from eviction and property grabbing, were unaware of their obligations under Ghana’s *Intestate Succession Law*.¹² 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.¹³ 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.¹⁴ 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.¹⁵

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.”¹⁶

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];

¹² COHRE, *Bringing Equality Home* (supra), pp. 62 and 69.

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.

¹⁴ COHRE, *Bringing Equality Home* (supra), p. 24.

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*, 1999, pp. 10–11 and 24; South African Law Commission, *Project 90, Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders*, 2003, pp. 10–11. In Uganda, “Local 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 Peoples’ Rights*, 2006, p. 13; L.S. Khadiagalia, “The failure of popular justice in Uganda: local councils and women’s property rights,” *Development and Change* 32(1) (2001): 55–76, at 66. See also, 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 334, who observe that disputes in Ghana are most 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."¹⁹

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.²⁰
- (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.²¹

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.²² Reasons for this include high

¹⁹ 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. 22, online: www.ungei.org/resources/1612_1023.html.

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.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.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.²⁵ Access to legal aid may also be critical for people living with HIV to claim their legal entitlements.²⁶ In Kenya, for example, one study revealed that

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, *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, *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, *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," *Human Rights Quarterly* 28 (2006): 729–754.

²³ FAO, *Gender and Law* (supra), p. 155.

²⁴ *Ibid.*, p. 159. See also, M. Aliber et al, *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, *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.

²⁵ L.S. Khadiagalia, "The failure of popular justice in Uganda: local councils and women's property rights," *Development and Change* 32(1) (2001): 55–76.

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, *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, *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.

“the vast majority of Kenya’s people living with HIV and AIDS do not feel able to access the formal legal system.”²⁷ 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.²⁸

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.²⁹

Commentators have also recommended that governments ensure adequate payment of lawyers providing legal aid services.³⁰ 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.³¹

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.”³² 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

²⁷ K. Kalla and J. Cohen, *Ensuring Justice* (supra), p. 7.

²⁸ See S. Mukasa and A. Gathumbi, *Country Assessment* (supra), pp. 32–33; K. Kalla and J. Cohen, *Ensuring Justice* (supra), p. 8.

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.

³² *African [Banjul] Charter on Human and Peoples’ Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, (entered into force 21 October 1986) [African Charter], art. 7.

access to legal services, including legal aid.”³³ Similarly, the CEDAW Committee has recommended that states parties “remove the impediments that women may face in gaining access to justice”³⁴ 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.”³⁵

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.

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

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.

³⁷ For example, Ghana saw a decrease in polygamy in part because of its education initiatives. In Zambia, public education programs to combat the practice of bride price through the media, churches and other community-based institutions have seen early success: 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 Third, Fourth and Fifth Periodic Reports of States Parties: Ghana," 18 April 2005, CEDAW/C/GHA/3-5, para. 28; 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 Third, Fourth and Fifth Periodic Reports of States Parties: Zambia," 12 August 1999, CEDAW/C/ZAM/3-4, p. 65.

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.”³⁹ 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.”⁴⁰

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.”⁴¹ The Committee has also recommended the development and implementation of educational measures and awareness-raising campaigns on the provisions of relevant laws.⁴² 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.”⁴³ 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.⁴⁴

³⁹ Protocol on the Rights of Women in Africa, art. 5.

⁴⁰ Protocol on the Rights of Women in Africa, art. 8(c).

⁴¹ CEDAW Committee, “General Recommendation No. 15: Avoidance of Discrimination Against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS),” U.N. Doc. A/45/38, 9th session, 1990.

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).

⁴³ U.N. Human Rights Committee, “General Comment No. 28: Equality of Rights Between Men and Women (Article 3),” U.N. Doc. CCPR/C/21/Rev.1/Add.10, 68th session, 2000, para. 19.

⁴⁴ CEDAW Committee, “Concluding Comments: Burundi,” 40th Session, CEDAW/C/BDI/CO/4, 8 April 2008, para. 16.

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

⁴⁵ This article is partially derived from s. 45 of Philippines, *Anti-Violence Against Women and Their Children Act of 2004*.

⁴⁶ J. Shultz, *Promises To Keep: Using Public Budgets as a Tool To Advance Economic, Social and Cultural Rights*, 2002, p. 10, online via: www.internationalbudget.org/.

⁴⁷ UNIFEM, *Budgeting for Women’s Rights: Monitoring Government Budgets for Compliance with CEDAW. A Summary Guide for Policy Makers, Gender Equality and Human Rights Advocates*, 2008, p. 7, online via: www.unifem.org/resources/books_reports.php.

⁴⁸ Protocol on the Rights of Women in Africa, art. 26(2).

⁴⁹ *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(1).

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].⁵⁰
- (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.⁵¹
- (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).

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*.

⁵³ Commission on Legal Empowerment of the Poor and United Nations Development Programme (UNDP), *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor Vol. 1*, 2008, p. 82.