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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 5: Inheritance

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 — Module 5: Inheritance**

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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

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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. Ikdaahl 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 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.¹ 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 woman receives in property she inherits (for example, a life interest as opposed to full ownership) or the processes involved in administering the estate.² 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.³

¹ 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).

² 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 *Judicature 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.

³ 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.⁴ 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.⁵ 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.⁶ If a widow is showing signs of illness, her family may refuse to take her in.⁷ 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.⁸ 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.

customary leaders: W. Werner, *Protection for Women in Namibia's Communal Land Reform Act: Is It Working?*, Legal Assistance Centre, Namibia (LAC), 2008, p. 25.

⁴ UNAIDS and WHO, *2007 AIDS Epidemic Update*, December 2007, p. 41.

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.

⁶ See T. Ezer, "Inheritance law in Tanzania: the impoverishment of widows and daughters," *Georgetown Journal of Gender and the Law* 7(Special Issue) (2006): 599–662, at 627; K. Izumi (ed), *The Land and Property Rights of Women and Orphans in the Context of HIV and AIDS: Case Studies from Zimbabwe* (Cape Town: HSRC Press, 2006), p. v; Human Rights Watch (HRW), *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, 2003, p. 38.

⁷ B. Scholz, "Linkage between HIV/AIDS and human rights to housing, land and inheritance for women within urban and rural contexts," presented at the Technical Consultation on Gender, Property Rights and Livelihoods in the Era of AIDS, U.N. Food and Agriculture Organization (FAO), 2007, Rome, Italy.

⁸ See 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), p. 4.

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

⁹ See, for example, HRW, *Double Standards: Women's Property Rights Violations in Kenya*, 2003, pp. 16–23; K. Izumi, *Case Studies from Zimbabwe* (supra), pp. 30–34; W. Werner, *Protection for Women* (supra).

¹⁰ W. Werner, *Protection for Women* (supra), pp. 7–8.

¹¹ *Ibid.*, p. 8.

¹² HRW, *Double Standards* (supra), p. 16.

¹³ *Ibid.*, p. 10.

¹⁴ HRW, *Hidden in the Mealie Meal: Gender-Based Abuses and Women's HIV Treatment in Zambia*, 2007, pp. 34–35.

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

¹⁶ Centre on Housing Rights and Evictions (COHRE), *Sources 5: Women and Housing Rights*, 2nd Edition, 2008, p. 17.

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 unremunerated and invisible."

¹⁸ K. Izumi, *Case Studies from Zimbabwe* (supra), p. 4.

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."

²⁰ UNAIDS and The Global Coalition on Women and AIDS, *Keeping the Promise: An Agenda for Action on Women and AIDS*, undated, p. 12.

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 combating 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

²¹ Para. 58. Online: www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html.

²² UNAIDS, *2008 Report on Global AIDS Epidemic*, p. 64; Office of the High Commissioner for 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 Resolution 2005/25, 51st meeting, 15 April 2005, (adopted without a vote. See c. X, E/CN.4/2005/L.10/Add.10).

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.

²⁶ *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.

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....”²⁷

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.²⁸

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.”²⁹ 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.³⁰

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.³¹

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.

²⁸ CEDAW Committee, “General Recommendation No. 21: Equality in Marriage and Family Relations, U.N. GAOR 1994, U.N. Doc No. A/47/38 1994, para. 35.

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

³³ C. Sweetman, *How Title Deeds Make Sex Safer: Women's Property Rights in an Era of HIV*, From Poverty to Power Background Papers, Oxfam International, 2008, p. 1.

³⁴ HRW, *Double Standards* (supra), p. 24.

³⁵ Ibid., pp. 1, 3.

³⁶ M. Kimani, "Women struggle to secure land rights: hard fight for access and decision making power," *Africa Renewal* 22(1) (2008): 13.

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.³⁸ 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.³⁹ 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.

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(I)(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.

⁴² A. Kuenyehia, “Brigitte M. Bodenheimer Lecture: Women, marriage, and intestate succession in the context of legal pluralism in Africa,” *University of California Davis Law Review* 40(2) (2006): 385–406, at 387.

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.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.”⁴⁶

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.

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:

- (a) establish and make public the information and supporting documentation necessary to administer an estate;
- (b) sub-divide the country into administrative districts to ensure that estate administration can be carried out locally; and
- (c) appoint a district administrator for each district.

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.”

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,” *Georgetown Journal of Gender and the Law* 7(Special Issue) (2006): 451–530, at 479–80.

⁴⁶ 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. 32.

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.

- (2) 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
- (3) 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.⁵¹ 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.⁵² [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.⁵³ 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.⁵⁴

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.⁵⁵

28(5) Letters of administration may be issued to a woman, but shall not, without the consent in writing of her husband, be granted to a woman married in community of property, or to a woman out of community of property when the marital power of the husband is not excluded.

⁵¹ 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).

⁵² Tanzania Law Reform Commission (TLRC), *Report on the Law of Succession*, 2002, p. 55.

⁵³ J. Fenrich and T. Higgins, "Promise unfulfilled" (supra), p. 323.

⁵⁴ See COHRE, *Sources 5* (supra), citing H. Swaminathan, N. Bharla and S. Chakraborty, *Women's Property Rights as an AIDS Response, Emerging Efforts in South Asia*, ICRW, 2007.

⁵⁵ 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.”⁵⁶

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.

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].⁵⁷

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.

⁵⁷ Based on proposed provision for notice of application in a report prepared for the British Columbia [Canada] Law Institute by members of the Succession Law Report Project, *Wills, Estates and Succession: A Modern Legal Framework*, BCLI Report No. 45, 2006, pp. 218–219.

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

⁵⁸ Derived from Zambia, *Intestate Succession Act of 1989*, s. 19.

⁵⁹ Based on proposed provision in Succession Law Report Project, *Wills, Estates and Succession* (supra), p. 240.

⁶⁰ T. Ezer, "Inheritance law in Tanzania" (supra), p. 620.

⁶¹ SALRC, *Discussion Paper 95* (supra), p. 20; TLRC, *Report on the Law of Succession* (supra), p. 57.

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.⁶² 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.⁶³

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.⁶⁴ 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.

⁶⁴ TLRC, *Report on the Law of Succession* (supra), pp. 59 and 69.

- (3) Every such preliminary inventory shall be attested by two witnesses, being persons of good credit and repute who are not beneficiaries of the estate.
- (4) 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

- (1) 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.
 - (2) 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.

- (3) Every such final inventory shall be signed by the maker thereof or the administrator causing it to be made.
- (4) Every such final inventory shall be attested by two witnesses, being persons of good credit and repute who are not beneficiaries of the estate.
- (5) Every such final inventory shall be transmitted to the [relevant authority] within [number] days of the granting of letters of administration.
- (6) 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.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.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.⁶⁷

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 *Legislating for Women's Rights in the Context of the HIV/AIDS Pandemic*, consultation meeting, 16–18 January 2008, Johannesburg, South Africa.

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: *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, *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: *The Succession Act of 1906*, s. 278.

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, *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

makes a false inventory shall be guilty of an offence and liable to a fine not exceeding [monetary amount].⁶⁸

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.⁶⁹

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.

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

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.⁷³ This deference to custom has proven harmful to women in some settings, resulting in women being denied a fair portion of the estate.⁷⁴ 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.⁷⁵
- (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.⁷⁶

⁷³ Ibid.

⁷⁴ COHRE, *Sources 5* (supra), p. 76. On customary law, see the introduction to this volume.

⁷⁵ See Kenya, *Law of Succession Act of 1981*, s. 5(1); South Africa, *Wills Act of 1953*, s. 4.

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,⁷⁷ to ameliorate unfavourable consequences of the application of customary law,⁷⁸ 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.⁷⁹ 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).⁸⁰ 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.⁸¹ 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.

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.

⁷⁸ See LAC, *Customary Law on Inheritance in Namibia: Issues and Questions for Consideration in Developing New Legislation*, 2005, para. 6.19.

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

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.

death.⁸⁵ 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

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).

⁸⁷ Based on Manitoba Canada, *Wills Act of 2002*, s. 23.

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 witness⁹¹

(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.

⁸⁸ See Succession Law Report Project, *Wills, Estates and Succession* (supra), p. 20.

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;

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.

⁹³ Derived from South Africa, *Wills Act of 1953*, as amended by *Act 43 of 1992*, s. 7 and Zambia, *The Wills and Administration of Testate Estates Act of 1989*, s. 8(c).

⁹⁴ Derived from South Africa, *Wills Act of 1953*, s. 4A(2)(b).

- (b) a written declaration of the intention to revoke the will, made in accordance with the provisions governing the making of a written will; or
- (c) the burning, tearing or destruction of the written will by the testator, or by some other person in the testator's presence and by the testator's direction, with the intention of revoking it; or

(Optional additional subsection where oral wills are permitted:)

- (d) in the case of an oral will, an oral declaration of the intention to revoke the will, made in accordance with the provisions governing the making of an oral will.⁹⁵

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,

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].¹⁰²
- (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.¹⁰³
- (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].¹⁰⁴

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 immoveable property, including customarily acquired and inherited property, of the deceased in which the deceased had an ownership interest, to the extent of that interest.

¹⁰² Based on South Africa, *Administration of Estates Act of 1965*, s. 8(1).

¹⁰³ Ibid., s. 8(3).

¹⁰⁴ Based on Botswana, *The Administration of Estates Act of 1974*, s. 16.

(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.

¹⁰⁵ See similar provisions: Zambia, *The Intestate Succession Act of 1989*, s.4; Kenya, *Law of Succession Act of 1978*, s. 34; South Africa, *Intestate Succession Act of 1987*, s. 1(4)(b); Ghana, *Intestate Succession Law of 1985*, s. 2(1); Uganda, *The Succession Act of 1906*, s. 24.

¹⁰⁶ New South Wales Law Reform Commission, *Report 116, Uniform Succession Laws: Intestacy*, 2007.

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.¹⁰⁸ Some countries exclude family property from the estate.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.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.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.¹¹² Therefore, family land may need to be treated differently than other types of property, taking into account the various persons with legitimate interests.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.

¹⁰⁸ L. Mbatha, "Reforming the customary law of succession," *South African Journal on Human Rights* 18(2) (2002): 259–286, at 261–262.

¹⁰⁹ For example, in Ghana, see *Intestate Succession Act of 1985*, ss. 3–4; in Zambia, see *Intestate Succession Act of 1989*, s. 9; in Sierra Leone, see *Devolution of Estates Act of 2007*, s. 15.

¹¹⁰ LAC, *Customary Law* (supra), p. 162.

¹¹¹ L. Mbatha, "Reforming the customary law of succession" (supra), p. 267.

¹¹² Ibid., p. 272.

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.

¹¹⁴ See V. Bennett et al, "Inheritance law in Uganda" (supra), p. 476; L. Farha, *Women and Housing Rights*, COHRE, 2000, p. 13.

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.

¹¹⁶ V. Bennett et al, "Inheritance law in Uganda" (supra), p. 476.

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.¹¹⁷ 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 share¹¹⁸

- (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 than the amount that would otherwise devolve to the spouse under this Article.

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].¹¹⁹

(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.¹²⁰ 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.¹²¹ 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.¹²²

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.¹²³

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.

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. Sithole 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.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.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)*.

NOTE:

The following provision sets out the manner of distribution for the remainder of the estate of a person dying intestate.

¹²⁴ For example, in Kenya, a single surviving spouse with no children is entitled to the first ten thousand shills out of the residue of the net estate, or 20 percent of the net estate, whichever is greater: *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, *Wills, Estates and Succession* (supra), p. xvi. The preferential spousal share is a common feature in the inheritance legislation of Canadian provinces.

¹²⁵ For example, Ghana, *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, *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: *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: *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].¹²⁶
- (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:

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.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.¹³²

¹³¹ For example, Ghana, *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.

¹³² According to Ghana, *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-eighths 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,” *Journal of African Law* 29(2) (1985): 118–128. Zambia, *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, *Sources* 5 (supra), p. 147. Malawi, *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, adopted 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.¹³³

arranged in the matrilineal system, his wife, children and dependents acquire two-fifths of the estate, while the customary heirs are entitled to the remaining three-fifths: 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 *tsvimbo* 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. 68C. 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.

¹³⁴ Derived from T. Ezer, "Inheritance law in Tanzania" (supra), Appendix A, pp. 648–649.

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.¹³⁶ 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.”¹³⁷

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.¹³⁸

¹³⁶ T. Ezer, “Inheritance law in Tanzania” (supra), p. 638.

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.

¹³⁹ Based on Sierra Leone, *The Devolution of Estates Act of 2007*, s. 2.

- (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.
- (3) 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

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.

¹⁴¹ As recommended at *Legislating for Women's Rights in the Context of the HIV/AIDS Pandemic*, consultation meeting, 16–18 January 2008, Johannesburg, South Africa.

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.

legatees: LAC, *Customary Law* (supra), p. 145, citing *Glazer v. Glazer*, 1963 4 SA 694 (A) 706–707; *Hoffman v. Herden*, 1982 2 SA 274; *Ex parte Jacobs* 1982 2 SA 276 (O); *Lotz v. Boedel van der Merwe* 1958 (2) PHM16 (O); *Ritchken's Executors v. Ritchken* 1924 WLD 17; *In re Estate Visser* 1948 3 SA 1129 (C). Similarly, under South Africa, *Maintenance of Surviving Spouse Act*, a surviving spouse can claim maintenance from the estate of his or her deceased spouse's estate insofar as he or she is unable to provide for his or her own means: s. 2(1). Likewise, in Kenya, the law allows dependents to make a claim on the estate of the deceased if the amount granted by the will or the intestate succession is “not enough to make reasonable provision”: *Law of Succession Act of 1978*, s. 26. See also, Zambia, *Wills and Administration of Testate Estates Act of 1989*, s. 20; Uganda, *Succession Act of 1906*, ss. 37–38; Sierra Leone, *Devolution of Estates Act of 2007*, s. 22.

¹⁴⁴ LAC, *Customary Law* (supra), p. 147.

- (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.¹⁴⁵
- (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.¹⁴⁶

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.

¹⁴⁵ Sections (3) and (4) are derived from Namibia, *Maintenance Act of 2003*, ss. 16(3) and (4).

¹⁴⁶ Articles 46 and 47 are derived from Zambia, *Wills and Administration of Testate Estates Act of 1989*, ss. 20–21; Ghana, *Wills Act of 1971*, s. 13; Namibia, *Maintenance Act of 2003*, ss. 16–17; Succession Law Report Project, *Wills, Estates and Succession* (supra), pp. 191–192; and V. Bennett et al, “Inheritance law in Uganda” (supra).

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 disinheritance 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

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.¹⁴⁸ HIV and AIDS have exposed women, especially widows and orphans, to increasing threats of being dispossessed of their land and property rights.¹⁴⁹ At the same time, numerous studies report that property dispossession is often disregarded by the police and courts.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.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.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."¹⁵³

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, *Intestate Succession Law of 1985*, s. 17, as substituted by the *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, *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.

¹⁴⁸ See, for example, HRW, *Double Standards* (supra), pp. 16–23; K. Izumi, *Case Studies from Zimbabwe* (supra), pp. 30–34; W. Werner, *Protection for Women* (supra); K. Pradhan and R. Sundar, *Gender Impact of HIV and AIDS in India*, United Nations Development Programme, 2006.

¹⁴⁹ K. Izumi, *Case Studies from Zimbabwe* (supra), p. 2.

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.

¹⁵¹ R. Strickland, *To Have and To Hold* (supra), p. 14.

¹⁵² A criticism that has been levied against the prohibitions on "intermeddling of property" in Zambia, *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, *Customary Law* (supra), p. 131.

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 disinheritance of widows and children would satisfy this definition.